

Aboriginal and Torres Strait Islander Social Justice Commissioner, Fourth Report 1996

1 July 1995 to 30 June 1996

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About the position of Aboriginal and Torres Strait Islander Social Justice Commissioner

The establishment of the **Aboriginal and Torres Strait Islander Social Justice Commissioner** was stimulated by the *Royal Commission into Aboriginal Deaths in Custody* and the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence*.

The major functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner are:

- to monitor the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples and to report annually to the Attorney-General on the findings;
- to promote discussion and awareness of the human rights of Aboriginal and Torres Strait Islander peoples and to promote respect for and enjoyment of those rights through research, education and other programs; and,
- to examine enactments and proposed enactments to see whether they recognise and protect the human rights of Aboriginal and Torres Strait Islander peoples and to report to the Attorney-General the results of such examination.

The objectives of this report to the Attorney-General are:

- to monitor the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples;
- to reflect Aboriginal and Torres Strait Islander aspirations for social justice and self-determination; and,

- to evaluate Australia's human rights performance regarding Aboriginal and Torres Strait Islander peoples in terms of the relevant international human rights standards and instruments.

Chapter 1: Perspective

Social justice which is based on the day by day enjoyment of human rights by Aboriginal and Torres Strait Islander peoples offers an enrichment of all our lives. Human rights derive from the inherent dignity of all human beings. The achievement of social justice for Indigenous Australians is an affirmation of the dignity of all Australians. In this perspective, our cause, as the Indigenous peoples of this country, is everyone's cause.

These words drawn from my First Report 1993, expressed my belief at that time. It remains my belief.

...whatever or whoever diminishes any of us diminishes our nation and us all.

These words were spoken in 1996 by Sir William Deane, Governor-General of the Commonwealth of Australia.

The words are confluent. They assert the common good and shared interests of every Australian in vigorously upholding respect for human rights. But they reflect different potentials. One looks to the substance, the other to the shadow. Enrichment is contrasted to diminishment.

In 1993, I wrote with optimism and expressed an aspiration which I thought was attainable. The Governor-General's words are couched as a warning in a different environment where, "to undermine...mutual respect or to defy or deny...tolerance within our land" presents another potential.

I make no bones about the fact: I attribute a large degree of responsibility for this climatic shift to the Coalition Government and the leadership of the Hon., the Prime Minister, John Howard. What I mean by this should not be misconstrued.

If you are a child of a mixed race, particularly, if you will Asian-Caucasian or Aboriginal-white, you are a mongrel and that's what happens when you cross dogs or whatever. I'm not a racist, I don't believe I'm superior to a person of another culture, but I do recognize that cultures are different.¹

These are the wretched views of an individual. They are long standing and were not brought into existence by the Coalition Government.

They have been expressly condemned by the Prime Minister and members of his Government. Indeed, no person with any claim to public or personal credibility, or simple decency, could find such views anything but repulsive.

I have no doubt that the Prime Minister, his Minister for Aboriginal and Torres Strait Island Affairs, Senator Herron, and other members of his Government care about the devastating, chronic levels of disadvantage suffered by Aboriginal people and Torres Strait Islanders. It is explicit policy to target the areas of health, housing, education and employment.

¹ Statement by Mr Peter Davis, Mayor of Port Lincoln reported in *The Australian*, 23 October 1996, p. 6.

*By the year 2000 when the Olympic Games are on I will defy anybody to say we've got Third World conditions in any Aboriginal community in Australia.*²

There is a commitment to convene a National Summit to review the dismally ineffectual responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody.

I do not believe the Prime Minister considers Aboriginal people, Torres Strait Islanders or Asian people to be lesser human beings because of their race. He has stated clearly that "*the Liberal and National parties will yield to nobody, no political force in this country, in our commitment for racial equality and racial tolerance*".³

There is no doubt in my mind that the Prime Minister refers himself and his Government's policies to the benchmarks of what he considers 'reasonable', 'fairminded' and 'decent'. There is certainly no doubt in his mind that any criticism of the Government's handling of Indigenous affairs is warranted:

*We are not going to cop a situation that just because we do things differently every time we announce a change in policy that gives a rhetorical licence to those on the other side of this parliament and others in the community to brand us as insensitive or racist. The days of that kind of smearing are over.*⁴

As a 'politically correct' member of the 'thought police' entrenched in the 'Aboriginal industry', with a 'black armband' view of history, I sometimes wonder whether a very old Australian rhetorical licence in Aboriginal affairs has not been confirmed and re-issued by the Government.

The paradox is, while the Prime Minister and changes of policy do not rest on racism, how can it be that within nine months of the Coalition's election to government, it became necessary for the House of Representatives to pass a Joint Resolution affirming the fact that equality and not racial intolerance characterises this country?

At one level the answer is simple. It comes as no revelation to Aboriginal and Torres Strait Islanders to learn that racism is still alive and abroad in this country. The National Inquiry into Racist Violence in 1991, the Royal Commission into Aboriginal Deaths in Custody in 1991, documented and described its manifestations. But the language and behaviour of overtly racist attitudes have been largely confined to the immediate places of their expression: in cells, in bars, in playgrounds. They have always been known intimately, personally, by the people they are directed towards. But they were not generally heard. Certainly talkback radio hosts have never been constrained from "*robust debate*" based on racial stereotypes, but the currency of overt racism has not been common in the mainstream of public debate in Australia for some decades.

The Coalition Government is not responsible for the language of a disendorsed Liberal Party candidate. But despite the repudiation of the Member for Oxley, as an appropriate representative, there has been a sustained degeneration into political discourse centred on race.

It has been suggested that the fracturing of debate along the lines of race is an expression of a deeper anxiety about the pace of change in Australia, and the world generally. Apprehensions, particularly amongst lower socio-economic groups about unemployment, the shift of labour markets both geographically and in the skills valued by the market-place, threatens individuals and communities

2 Statement by Senator the Hon. John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, reported in *Message Stick*, Newsletter of the Queensland Federated Land Councils, September 1996.

3 House of Representatives, Question Time, Hansard, 8 October 1996.

4 *Ibid.*

with long-term unemployment and uncertainty about the future. The composition of Australian society has in visible, and apparently novel, ways shifted to embrace people of many other races, cultures and religions: most recently from the countries of South East Asia.

The very success of Asian economies and the corresponding increase in Australia's trade ties with this region, intensifies fears that familiar horizons of expectation are dissolving. The spectacle of nation states splitting into ethnic enclaves deepens a pervasive feeling of malaise and disquiet, that the world is out of joint. Senses of insecurity and displacement, mixed with nostalgia, compound to produce a crude xenophobia and intolerance of difference. Race and culture become clubs to knock down people of other races and cultures.

...most Australians are Anglo-Celtic and those that aren't, want to be. This country is not diverse, its not a nation of tribes.⁵

The concept of multiculturalism is based on all cultures being of equal value which is bullshit.⁶

There is significance in an economic and contextual explanation of why race is a resurgent issue. But one thing should be clearly understood.

Irrespective of its sources, racism is racism. Ignorance is no excuse. Insecurity no justification. Without dismissing or belittling the anxieties which may underpin the scapegoating of people of uncongenial races, racism in all its forms should be uncompromisingly condemned.

I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe we are being swamped by Asians...they have their own culture and religion, form ghettos and do not assimilate.

Anyone with a criminal record can, and does, hold a position with ATSIC.⁷

She is entitled to express her view, and I defend her right to say what her views are.⁸

She is just plain wrong, and wrong in ways that can lead to great evil.⁹

The problem is, of course, there are no racists in Australia. Or at least none that recognize themselves as such. Even the Mayor of Port Lincoln who speaks of “*mongrel*” children asserts in the same breath “*I'm not a racist*” and advances a dictionary definition in his defence. In the same manner pejorative references to race are frequently accompanied by references to cultural differences and disparate historical achievements, usually technological, to establish some kind of objective truth to camouflage the racial value judgment. This is particularly so where Indigenous laws and cultures are concerned.

5 Statement by Mr Graeme Campbell, MP, reported by Graham, D. in 'Campbell says he is a message to parties', *The Age*, 4 March 1996, p. 7.

6 Statement by Mr G Campbell, MP reported by Franklin, M and Stark, D. in 'No Place for thought police: Crooke', *Courier Mail*, 14 March 1996, p. 1.

7 The Member for Oxley, House of Representatives, Hansard, 10 September 1996, p. 3802ff.

8 The Prime Minister, the Hon. John Howard, MP, reported in *The Sydney Morning Herald*, 2 October 1996.

9 The Hon. M. Fraser, quoted by the Hon. G Evans, QC, MP, Deputy Leader of the Opposition, House of Representatives, Hansard, 30 October 1996.

Similarly, economic stresses and economic arguments are used to excuse or give credence to statements which identify people of a particular race or culture as a problem. In effect an economic issue slides, blurs and merges into a racial or cultural issue, as though one necessarily entails the other. In Aboriginal affairs it is frequently suggested that ‘economic development’ and respect for our cultural values are antithetical. More broadly, Indigenous laws and cultures are regarded as relics, of no inherent value, without meaning or significance in contemporary Australia, other than their decorative value for tourists.

In many contexts there is no need to even refer to Indigenous people or our cultural beliefs. The more subtle disregard or implicit denigration of our values is carried forward by assertions that all Australians should be treated in just the same manner. The ‘mainstream’ simply expands to engulf us all.

The overt, intemperate language of attack on Aboriginal, Torres Strait Islander and Asian Australians is damaging. It is acutely hurtful. But, in my view, it is not the deeper, more pernicious problem. I agree with the Prime Minister when he says “*the ratbags and bigots ...deserve to be treated...with contempt*”.¹⁰

That is clear. It is straightforward, an easy mark. I would also agree with the Prime Minister that undue attention has been given to “*the form rather than the substance of the debate*”.¹¹ However, the discrepancy between the form and substance he refers to, and what I am concerned about, are very different.

The Prime Minister was essentially referring to whether or not he properly should have made a direct response to the maiden speech of the Member for Oxley. I am concerned with a wider issue of Mr. Howard’s own concentration on form rather than substance. He speaks of the language employed and the manner in which the debate ought to be conducted. The Prime Minister says that discussion involving race ought to be conducted in “*a sensitive and caring fashion*”.¹²

Words are weapons, they can hurt. It is right to insist on a civil tongue in the expression of views. However, by placing emphasis at this formal level the real damage and denigration implicit in the concepts which now have currency are simply not addressed. The most dangerous racial prejudice excited against Indigenous Australians lies at a level below words of abuse.

In my view this is the core issue and the deeper source of the malaise which has arisen in this country since the Coalition Government came to power.

It is useful to reconsider the views of the Member for Oxley in this light. I believe there are distinct parallels with the Government’s views, the rationale and thrust of policy in Indigenous affairs. Once again, I make it clear that I do not suggest the Prime Minister or his Government share her radical expression, her factual inaccuracies or her plain denigration of people of a different race or culture. But the failure to expressly address and dismiss her views reflects not only an ‘understanding’ of the tensions lying behind them. I believe it flows from an acceptance of her core premise. It concerns ‘equality’ and its meaning.

The Member for Oxley generally characterises her public role as “*my call for equality for all Australians*”.¹³ Measures taken to assist Indigenous Australians rest on “*a type of reverse racism ...*

10 The Prime Minister, the Hon. J. Howard, MP, *The John Laws Show*, Radio 2UE, 24 October 1996, transcript.

11 The Prime Minister, the Hon. J. Howard, MP, House of Representatives, Hansard, 30 October 1996.

12 The Prime Minister, the Hon. J. Howard, MP, House of Representatives, Hansard, 8 October 1996.

13 The Member for Oxley, House of Representatives, Hansard, 10 September 1996, p. 3802.

*encouraging separatism in Australia by providing opportunities, land, moneys and facilities available only to Aboriginals”.*¹⁴ This has lead to “...the inequalities that are ... paid for by the taxpayer.

We now have a situation where a type of reverse racism is applied to mainstream Australians by those who promote political correctness and those who control the various taxpayer funded ‘industries’ that flourish in our society servicing Aboriginals, multiculturalists and a host of other minority groups.

*I draw the line when told I must pay and continue paying for something that happened over 200 years ago.*¹⁵

Leaving aside the references to criminals, ghettos and the repudiation of all United Nations treaties, we then arrive at the obligatory statement that:

I do not consider those people from ethnic backgrounds currently living in Australia anything but first-class citizens...provided of course they give this country their full, undivided loyalty.

In my view, it is extremely difficult for the Prime Minister to distance himself from these views. The rub is that the Prime Minister, the Minister for Aboriginal and Torres Strait Islander Affairs and the body of his Government, in essence, share these views. Most often they are more sensitively and caringly expressed. Sometimes they are not.

The use of the pejorative expression the “*Aboriginal industry*” by the Prime Minister of Australia feeds into and legitimates perceptions that Australians, Indigenous and non-Indigenous, who work with energy and devotion to build a decent life for our peoples are, in some imprecise way, leeches on the public purse. There is waste, there are inefficiencies, there are some rip-offs. I and other Indigenous Australians have criticised them, particularly the disproportions between expenditure and outcomes.¹⁶ It is true that no one has “*a monopoly on concern and compassion*”¹⁷ or a monopoly on the desire to see efficient administration.

From my perspective it is not only the taxpayer who is cheated by any dishonesty or waste: it is Aboriginal and Torres Strait Islander people who suffer most immediately. Proper accountability is not at issue, but the foundation of the rights of Aboriginal and Torres Strait Islander people is very much at issue. It turns on the concept of equality.

In my view there has been an insidious, sometimes even unconscious, process of appeal to a notion of equality which denies any rights which attach to cultural differences and, particularly, the identity of Aboriginal and Torres Strait Islander peoples as the Indigenous peoples of this country. The claim to human rights which attach to such identity are regarded, ironically, as racist and discriminatory. Hence we arrive at a situation where ‘equality’ and ‘non-discrimination’ are converted into instruments to strip Aboriginal and Torres Strait Islander peoples of appropriate recognition and

14 *Ibid.*

15 *Ibid.*

16 For a detailed examination of the administration of Commonwealth funding in the area of health, I refer you to my *Second Report 1994*, chapter 3.

17 The Prime Minister, the Hon. J. Howard, *op. cit.*, 8 October 1996.

protection of our rights. In the process grossly racist attitudes find apparent shelter. Perceptions of “*extraordinarily favourable treatment*”¹⁸ are not condoned, but they are ‘understood’.

Prejudice is moved forward, fanned and excited by suggestions that the recognition of cultural difference is offensive where it gives rise to distinct rights. Such prejudice, in turn, is used to gain support for the denial of such ‘special’ rights on the grounds of ‘non-discrimination’. Without explicitly denying respect for Indigenous laws and culture or cultural diversity, the appeal is towards the rights of ‘the mainstream’ and ‘ordinary Australians’. Public opinion rather than human rights become the arbiter of right and wrong. The argument is circular and tumbles on, building public opinion and racial division and using such opinion and division to support the argument.

The progress of the argument is seen most clearly in the context of native title.

When the *Native Title Act 1993* was being debated, in December of that year, Senator, the Hon. Nick Minchin criticised the High Court for its judgment on the grounds that it was out of step with public opinion and was “*bad law*”. Native title was “*inherently racist...because only people of a particular race can now claim this new title*”.¹⁹

Given charge of formulating amendments to the *Native Title Act 1993*, based on the High Court’s decision, Senator Minchin is now more circumspect in his language. However, the underlying thrust is the same. Reference to “*special rights*” and “*special privileges*” promotes the notion of unfair advantage being given to “*people of a particular race*”. It may be open to argue, as it is argued, that native title does not include the right to negotiate over interference with native title land. But to advance the argument along the lines that “*where Aborigines have these special rights that other Australians don’t have, that’s how you get the potential backlash*”,²⁰ feeds into a line of public opinion where race is maintained as a dividing line. In contemplating such a “*backlash*” there is a subtle affirmation that “*other Australians*” have a right to feel aggrieved.

While the Prime Minister acknowledges the Aboriginal and Torres Strait Islander peoples as “*the original Australians and first inhabitants of this continent of ours, however one would wish to describe it*”,²¹ he is profoundly reluctant to recognize rights flowing from this status.

Within the lifetimes of Aboriginal and Torres Strait Islander people who experienced the deliberate endeavour to obliterate our unique identity and cultures, our struggle to gain recognition and effective legal protection for our laws and cultures is regarded by the Coalition Government with deep apprehension. It is seen as separatist and divisive, as though 1.6 per cent of the population scattered throughout the country could realistically shatter the collective. In speaking of multiculturalism, the claim to ‘distinctive identity’ is ruled out of court and run together with the fracturing of the body politic. “*To some people it means the preservation of distinctive identity and almost, sort of, a federation of cultures.*”²²

While cast in the context of the immigration debate, the cast of thought is characteristic of the Government’s approach to Indigenous Affairs, “*this is an absolute, you know, indivisible, immutable*

18 Senator, the Hon. John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, reported in *The Sydney Morning Herald*, 12 March 1996, p. 6.

19 Senator, the Hon. N. Minchin, reported in *The Sydney Morning Herald*, 1 June 1996, p. 34.

20 *Ibid.*

21 The Prime Minister, the Hon. J. Howard, MP, *op. cit.*, 30 October 1996.

22 The Prime Minister, the Hon. J. Howard, MP, *The John Laws Show, op. cit.*

*principle – once someone has come to this country, that person is entitled to every respect and protection and every decency that is available to the rest of us”.*²³

The present thrust of Aboriginal and Torres Strait Islander policy, its fundamental direction, is towards assimilation. The assertion that Government policy is assimilationist is reacted to almost as vehemently as any allegation of racism. Given the history of that policy in Australia, and the means employed to put it into effect, that is hardly surprising. It is a policy that will not speak its name. But when you recall the definition agreed between the Commonwealth, States and Territories in 1961, its resonance with the current Government’s values is transparent.

*The policy of assimilation means that all Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, as other Australians.*²⁴

*...united behind a common commitment to the values, beliefs and institutions of the Australian community.*²⁵

*I was not aware of anyone’s having labelled the Howard Government’s policy approach as a “racist pursuit”. The Prime Minister’s use of that dangerous phrase was an attempt to foreclose criticism of the Government’s more assimilationist approach, which favours dealing with Aborigines as disadvantaged citizens in need of temporary welfare assistance, rather than as indigenous people with a right of self-determination within the life of the nation.*²⁶

With the recognition of native title in Australia, let alone the guarantee of cultural rights in international instruments such as the *Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*, it is simply not an option for any Australian Government to declare outright that respect for cultural rights is in any way diminished. The Coalition’s Aboriginal and Torres Strait Islander Affairs Policy, for example, expressly recognizes the “*special relationship between Indigenous people and the land which is at the core of Indigenous culture*”.²⁷

However, beneath the surface, and in the detailed working out of the practical implications of such an acknowledgement, the reality unfolds.

Once again, amendments to the *Native Title Act 1993*, clearly demonstrate an approach which negates real effect being given to the acceptable surface rhetoric. Under current law, where there is an application for the expedited grant of a mining interest over native title land, its direct interference with community life must be taken into account in determining whether to make the grant. In *Ward v Western Australia*²⁸ the Federal Court held that the impact on the community’s “*spiritual attachment*” to the land is a necessary aspect of the interference to be considered. The Government proposes to overturn the current law and confine consideration to purely physical interference with

23 *Ibid.*

24 Native Welfare Conference, Commonwealth and State Authorities: Proceedings and Decision, January 1961. Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol. 5, para 36.3.11, p. 31.

25 The Prime Minister, The Hon. J. Howard, MP, *op. cit.*, 30 October 1996.

26 Brennan, F., 'Howard must build on politics of trust', *The Canberra Times*, 12 October 1996.

27 *Aboriginal and Torres Strait Islander Affairs Policy*, February 1996, p. 8.

28 1996 133ALR557.

the land. Physical interference with land conforms with the Government's 'commonsense' notion of what real damage is. In the 'ordinary' sense, of course.

So much for spiritual attachment, which is the essence of the "*special relationship between Indigenous people and the land which is at the core of Indigenous culture*".

This precise example of disregard for the legitimate, practical recognition of our spiritual beliefs flows from a general attitude which discounts our values and consistently prefers the values of "*mainstream Australia*". The proposed amendments to the *Native Title Act 1993* provide serial examples of this tendency, to homogenize values and interests, so that 'equality' of treatment becomes effective discrimination against our values and interests. They fall outside the pale. The proposed amendments concerning pastoral leases are more straightforward. They are just patently in breach of the *Race Discrimination Act 1975*.²⁹

The negative is always presented as a positive.

*I think Australians are a generous people. I think they want to help the disadvantaged, they hate waste, they hate humbug, they hated the Hindmarsh Bridge exercise because to them that was just absolute nonsense.*³⁰

The repeated use of the term "*hate*" in the heat of the race debate is clearly unhelpful, but the central point I wish to draw from this statement is the Coalition Government's concentration on the issue of "*disadvantage*".

The unequivocal acceptance of the appalling disadvantage of the Aboriginal and Torres Strait Islander peoples of Australia and the Government's commitment to mount a concerted effort to address the chronic, impoverished circumstances in which too many of our people live is unequivocally welcomed. However, the agenda of Indigenous Affairs in Australia has been radically reduced to these issues alone. In effect, Indigenous Affairs has been collapsed to the provision of plain citizenship entitlements.

Health, housing, education and employment are vital issues.

In each of my reports to Government, including this one, I consider such issues in detail. The achievement of tangible, measurable shifts in these areas is a complex task. Adequate resources are clearly a necessary condition, but an insufficient condition, to make progress. I have spent most of my adult life endeavouring to understand how these apparently intractable problems are most effectively tackled: to achieve social justice for our people, to reduce the number of funerals I attend, to see our children grow up in a society that offers them an equal start, a fair go and gives them pride and support in their struggle. It will continue to be a struggle for years to come.

My broad structural conclusions were expressed in my *First Report 1993* where I grappled with the notion of what 'social justice' actually means and what are the foundations to achieve it.

If the concept of social justice is to hold a content of crisp meaning it must be based on the recognition of rights.

29 Refer to *Native Title Report 1996* for a detailed review of the proposed amendments.

30 The Prime Minister, The Hon. J. Howard, MP, *The John Laws Show*, *op. cit.*.

A decent standard of health and a life expectancy equivalent to others is an entitlement. Social justice is not primarily a matter of the relief of suffering. It is a matter of the fulfilment of a responsibility.

To draw this distinction is not to deny that the facts by themselves speak out for a remedy. Nor is it to deny that compassion is a proper response. But compassion is an insufficient foundation for the delivery of rights.

*Government policies which are based on feelings or particular value judgments are subject to the vagaries of political movements. Social **justice** should provide a constant basis for social **policy** rather than be a creature of such policy.*

An understanding of social justice which is explicitly based on rights to equality and rights to fairness, and rights to resources to achieve these³¹ objectives, places social justice for Indigenous Australians on its correct foundation.

I find it an incalculable loss to Indigenous Australians and to the broader Australian community that we have regressed to considering the condition of our people as being primarily a matter of welfare.

I mean, I think Australians are generous about the underprivileged.³²

Most Australians accept that as a nation we have a special obligation to enhance the welfare and lift the hopes of Australia's Indigenous people.³³

...the relief of suffering of less fortunate people in this world.³⁴

The Prime Minister has characterized his Government's approach to Aboriginal and Torres Strait Islander Affairs and the achievement of social justice as being cleansed of the "*politically correct agenda*". I take this stigmatization as a reference to any approach to social justice which rests on the recognition of Indigenous rights rather than a welfare model designed to relieve suffering and underprivilege.

It is unnecessary to say that I disagree with the Prime Minister's ideological position which underpins the model he politically prefers. However, it is necessary to say why I believe this approach is, not only unpalatable, but also impractical.

It is impossible to adequately address the issues of health, housing, education and employment without placing them in the context of peoples lives, their individual and community histories. I refer once again to my First Report 1993, and go back to the elementary social, cultural and psychological building blocks of our peoples' renaissance. The dynamics of community development are described in a chapter entitled 'Self Determination: A Decisive Voice'.

Health cannot be driven into a community on the back of a truck. The Army may provide technical and engineering support but the process of designing, building and maintaining a healthy living environment is fundamentally dependent on our choices, our practices and the control of our lives. Support, advice, resources, encouragement and assistance from governments and the broader

31 Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, pp. 5-7.

32 The Prime Minister, The Hon. J. Howard, MP, *The John Laws Show*, op. cit..

33 The Hon. J. Howard, MP, reported in *The Sunday Telegraph*, 17 January 1993.

34 The Prime Minister, the Hon. J. Howard, op. cit., expressing confidence in his Minister for Aboriginal and Torres Strait Islander Affairs, 8 October 1996.

community is required and welcome. But ultimately it is down to us, if the hard yards are to be sustained over time. The right to self determination is the foundation stone. It is justified in both principle and practicality.

Despite the rhetoric of Senator Herron about “*genuine self-empowerment*”, “*genuine self-sufficiency and self-empowerment*” and “*real economic and social self-sufficiency*”,³⁵ in precise terms there is nothing new in the Coalition Government approach, save Army involvement. His recent policy statement is a road-train of cliches.³⁶ The suggestion that there is anything fresh about attaining “*financial independence*” is an insult to the thousands of hard-working men and women who have battled against the odds for years to give their children a future and pride in themselves.

A policy “*to promote and encourage Indigenous progress away from handouts and welfare, towards genuine self-empowerment*” is not only an irritating statement of the obvious, it is difficult to hear from a Government with the attitudes and biases it has demonstrated. The overarching framework of approach is one of welfare redolent of the 1960s.

There is one perfectly true element in Senator Herron’s policy statement: “*nothing will be achieved without partnership and trust between Indigenous and non-Indigenous Australians*”.³⁷ And it is precisely this fragile and immeasurably valuable element which has been substantially eroded in the short period since the Coalition came to power.

Senator Herron’s denunciation of the Bill which became the *Native Title Act 1993* was prefaced with a curious qualification for a Minister for Aboriginal and Torres Strait Islander Affairs:

I speak as an average Australian, a member of the community, who – like nearly everybody else – has had nothing to do with the Aboriginal community.

He then went on to report his observations drawn from a quick course of familiarization:

*I have seen blue-eyed flaxen-haired white Aboriginals in some communities that had been infiltrated once the Aboriginal community had been accepted by the local community. These are facts that are apparent to all of those who have had direct involvement. It is a very great problem.*³⁸

Once in office, one of the first Coalition Cabinet decisions was to appoint, illegally as it transpired,³⁹ a Special Auditor to investigate the administration of ATSIC funds. Senator Herron was censured by the Senate concerning the conduct of the special audit which had to be suspended so as not to delay CDEP (work for the dole) payments, amendments to the *Aboriginal and Torres Strait Islander Commission Act 1989* were devised to ensure greater Executive Government control over the composition of its board, \$400m was cut from ATSIC’s budget, special legislation was contemplated to clear the way for the Century Zinc mine in the Gulf of Carpentaria, amendments which exceed in volume the substance of the *Native Title Act 1993* are proposed to the detriment of Indigenous rights, special legislation has been introduced as though it were necessary for the construction of the Hindmarsh Island bridge: these are some of the highlights of some nine months of precipitate action

35 Senator, the Hon. J. Herron, Minister for Aboriginal and Torres Strait Islander Affairs, 9th Annual Joe and Enid Lyons Memorial Lecture.

36 *Ibid.*

37 *Ibid.*

38 Senator, the Hon. J. Herron, Minister for Aboriginal and Torres Strait Islander, Hansard, 15 December 1993.

39 *ALS Ltd v Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs*, 18 September 1996, Federal Court (NSW) No: NG528 of 1996.

which has substantially damaged the one asset essential to the well being and achievement of social justice of Aboriginal and Torres Strait Islander people and the one asset the Government seems incapable of nurturing: trust.

*I have a completely sensitive understanding of the feelings of the Aboriginal community on this...*⁴⁰

*I profoundly reject ...the black armband view of Australian history. I believe the balance sheet of Australian history is a very generous and benign one.*⁴¹

There is no other single issue which shows such an insistent insensitivity, lack of imaginative depth, or simple heart, as the Prime Minister's reaction to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.

To speak of the "*balance sheet*" of history and to question the "*practical benefits of the Inquiry*"⁴² reduces human experience and understanding to some kind of single entry accounting system where everything of practical benefit can be weighed and measured.

*We all have a responsibility to keep the damn thing in perspective.*⁴³

I agree. The first responsibility is to get a perspective rather than to prejudice and pre-empt the Inquiry's report and recommendations. The Prime Minister's view is consistently self-centred and defensive: guilt dominates. His past references to the "*guilt industry*"⁴⁴ and current stance appears based on the belief that Indigenous Australians are looking for personal contrition and self-flagellation for the past by present day Australians.

I sympathise fundamentally with Australians who are insulted when they are told that we have a racist, bigoted past. And Australians are told that quite regularly. Our children are taught that...

*Now, of course, we treated Aborigines very, very badly in the past – very, very badly – but to tell children whose parents were no part of that maltreatment, to tell children who themselves have been no part of it, that we're all part of, a sort of, a racist bigoted history, is something that Australians reject.*⁴⁵

While passing acknowledgement is made of very, very bad treatment, the perspective is consistently and the sympathy is avowedly, fundamentally, with what the Prime Minister would term the 'mainstream'. He is particularly tender towards the experience of children who might be hurt by an imbalance in the telling of history. That is right, however, the Prime Minister is less forthcoming in his consideration of those who had the direct experience of this history as children.

There is also concern to focus the picture by noting "*that some of the people who were involved in the maintenance of those practices [of separation] genuinely at the time believed that what they were doing was right. I think that must be borne in mind.*"⁴⁶

40 The Prime Minister, The Hon. J. Howard, MP, *op. cit.*, 8 October 1996.

41 The Prime Minister, The Hon. J. Howard, MP, *op. cit.*, 30 October 1996.

42 The Prime Minister, The Hon. J. Howard, MP, *op. cit.*, 8 October 1996.

43 The Prime Minister, The Hon. J. Howard, MP, *The John Laws Show, op. cit.*

44 The Hon. J. Howard, MP, reported in *The Sunday Telegraph*, 17 January 1993.

45 The Prime Minister, The Hon. J. Howard, MP, *The John Laws Show, op. cit.*

46 The Prime Minister, The Hon. J. Howard, MP, *op. cit.*, 8 October 1996.

Similarly, Senator Herron, while describing practices of removing Aboriginal children from their families as “*horrific*”, quickly passes on to say:

*...but you cannot visit the sins of the fathers and the mothers on the children, which is what we are in today's society. We can look back and say these terrible things were done, but we can't blame ourselves because it would not occur today... We can't relieve the past. I think we can be regretful, we can be sorry, but we can't change the past. The past has occurred, we have to accept it for what it was, and it was horrific, it was unbelievable.*⁴⁷

On the contrary it is quite believable. And in different forms the separation of Indigenous children from their families continues. Although Indigenous youth comprise only 2.6 per cent of the population between the ages of 10-17 years in Australia, on 30 June 1996 they represented 36 per cent of all juveniles held across Australia in detention.⁴⁸

Balance and perspective are certainly required, but many Australians, not only Indigenous Australians, do not find them in these minimal acknowledgements and copious extenuations.

Guilt and blame do not encompass the profound issues raised by the removal of our children and the conscious endeavour to cut the descent lines of our identity, our languages, our cultures and spiritual beliefs. The repercussions of separation are not matters of the past, they shudder through the lives of our people today, they precipitate death: 43 of the 99 deaths investigated by the Royal Commission into Aboriginal Deaths in Custody involved people separated from their families as children.

I believe that in large part the Prime Minister's reactions are driven by a specific practical consideration: the apprehension that the immediacy of the harm done to living people may justify compensation or some other form of reparation. That is for the Government's ultimate determination.

The constant reference to “*guilt*” and “*black armband*” versions of history are wilful exaggerations of Indigenous views, designed to caricature and obscure the proper examination and comprehension of the past and to denigrate our current assertion of rights as a form of emotional blackmail. This is a divisive and dangerous game.

From my perspective of having heard many hundreds of Indigenous Australians who have told their stories, I am overwhelmingly impressed by their stoicism, courage and generosity in accepting the path of their lives. There is grief, pain and anger. There is a call for a practical response. Predominantly, there is a desire to tell their stories and to be heard.

Primarily there is a call on non-Indigenous Australians to listen to our experiences, to listen, quietly, with respect. Both in the telling and in the listening there can be catharsis and a recognition of common humanity.

In the telling we assert the validity of our own experiences and we call the silence of two hundred years a lie. And it is important for you, the listener, because like it or not, we are part of you. We have to find a way of living together in this country, and that will only come

47 Senator, the Hon. J. Herron, Minister for Aboriginal and Torres Strait Islander, Hansard, 8 October 1996.

48 Atkinson, L., (forthcoming) *Detaining Aboriginal Juveniles as a last resort: variations from the them*, Trends & Issues, Australian Institute of Criminology.

*when our hearts, minds and wills are set towards reconciliation. It will only come when thousands of stories have been spoken and listened to with understanding.*⁴⁹

*Having been locked out of government for 13 years, the Coalition risks destroying, rather than consolidating, the common ground which has been won through negotiations with Aborigines and Torres Strait Islanders.*⁵⁰

*We also accept that to know the past is to grow. If we remember only the good things we have done and forget our mistakes, we cannot mature. In the western tradition, we have lived with the knowledge of good and evil since the Fall. It is the human fate to struggle with the temptations of evil and the prescriptions of good, and that struggle within each individual and within human groups, between life-affirming and life-denying impulses and desires, remains the very stuff of the great human drama.*⁵¹

There can be no mistake about the importance of this time for Australia. It is not about the past. And in the past I include the last nine months. It is about our common futures within this country, our relations with our neighbours and our stature as a nation. Compassion, anger, tolerance, fear and generosity are drawn from the depths of individuals. Each potential can be catalysed by leaders. Our values are carried forward by action, not merely words. There are always possibilities to see difference as a cause for resentment, or to collapse into denial. There is another way. It rests in human understanding. I affirm the words written in my First Report 1993:

*It is my belief that when the Aboriginal and Torres Strait Islander story of Australia is heard and understood then there will be a true reconciliation. The abstract language of human rights and justice will settle down on the realities of the lives and aspirations of individual men, women and children who wish simply to have their humanity respected and their distinctive identity recognised.*⁵²

Chapter 2: Diversion from Custody

*I'll tell you what. You sentence young people away, they do their time and then after a while they're released back to the community. They roll in like a fattened up bull from the paddock, from three meals a day in the jailhouse. Back to the community, have a bit of grog and now they'll be standing in the street, yelling out, "I'm a gaol bird, I know what gaol is". He thinks he's a hero. That's shocking.*⁵³

These beefed-up 'gaol birds' who come back home from the 'big house', a faraway prison or correctional centre, are our young people transformed. Often untouched by the stigma of being locked up, they come home and boast of their new found identity.

It is a perverse graduation ceremony. Our kids go to gaol to become adults. They find a niche in the bare cement and wire institutions designed to punish them.

49 C. Edwards and P. Read (eds.), *The Lost Children*, p. vii, in Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991, Vol 2, p. 44.

50 Brennan, F. 'Howard must build on politics of trust', *op. cit.*

51 McCalman, J., *The Age*, Tuesday, 29 October 1996.

52 Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, p. 19.

53 Interview with Elder Mr. Bruce Yunkaporta, Chief Justice, Aurukun Justice of the Peace Court, Aurukun, Queensland, 1996.

*...in situations where a person is basically ignored and devalued by existing institutions, and thus attains a "presence" by going through the formal processes of the criminal justice system...the process of stigmatisation, while viewed negatively from the consensus mainstream, may be experienced as a positive from the point of view of those who wish to assert "I am" in a world that generally does not recognise their existence.*⁵⁴

It is the families and Elders in our communities who see and most directly experience the chaos and dysfunction affecting our youth.

*These young men once were warriors. Now they've got no status at all. In the communities they've got no jobs, no education, nothing. They walk around with their arse hanging out of their jeans. They go home and there's six others sleeping in their lounge. They've got no space, nothing of their own. When they go to prison, they get their own room and TV. They have their day in court and get flown out of the community. The whole thing is status.*⁵⁵

Where do you come from, what is your life, if going to gaol gives you status? As the Australian Law Reform Commission report⁵⁶ identifies, the issue of juvenile offending is a complex "social problem, beyond the power of the criminal justice system to resolve".⁵⁷ This is the view inside our communities:

*...prison is no deterrent and really does not address the issue of why our young people are committing offences. The Aboriginal community is hurting and especially the young children and our old people are actually physically suffering from the many problems associated with juveniles committing offences.*⁵⁸

Throwing kids behind bars is doing nothing to resolve the substantive reasons. Why are they getting into trouble? Incarceration is no answer. It just deepens the damage.

Statistics, as at 30 June 1996, tell us that the national level of over-representation of Indigenous Australian children in juvenile corrective institutions is 21.3 times the rate of non-Indigenous Australian children. They also tell us that our kids are:

- 41.1 times more likely to be incarcerated in Queensland
- 31.6 times more likely to be incarcerated in Western Australia
- 20.5 times more likely to be incarcerated in New South Wales
- 19.0 times more likely to be incarcerated in the ACT
- 13.7 times more likely to be incarcerated in South Australia
- 9.8 times more likely to be incarcerated in Victoria
- 8.2 times more likely to be incarcerated in Tasmania
- 3.8 times more likely to be incarcerated in the Northern Territory⁵⁹

54 White, R., 'Shame & Reintegration Strategies: Individuals, State Power and Social Interests' in *Family Conferencing and Juvenile Justice - The Way Forward or Misplaced Optimism?* Alder, C. & Wundersitz, J., eds., Australian Institute of Criminology, Canberra, 1994, p. 193.

55 Interview with a Murri Queensland Corrective Services Officer, 1996.

56 Law Reform Commission of Australia *The Recognition of Aboriginal Customary Laws*, Summary Report, No. 31, Canberra, 1986.

57 In Hazelhurst, K., ed., *Popular Justice & Community Regeneration - Pathways of Indigenous Reform*, Westport, Praeger Press, 1995, p. xx.

58 Interview with Mr. Gordon Gertz, 1994 Kowanyama Community Development Officer (Justice), 1996.

59 Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions*, No. 75, June 1996, Table 7.

What is the 'factory' that is producing the 'offenders' in growing numbers? We may sausage machine the delinquents through rehabilitative wonderlands or incarcerate them forever but there are more coming behind. Claims that a 'small group' of 'recidivist' young persons are mainly responsible keep the focus on individuals and appear to deny or avoid the big issues.⁶⁰

We have to move now to stop our youth haemorrhaging from their homes to far away lock ups. We have to understand the bigger picture, the forces that shapes lives and link the 'offenders' and the 'offences' with their wider generative causes. Any response to juvenile crime which concentrates on the 'criminality' of the offender and which fails to addresses structural inequalities will necessarily have limited impact.

Reforms in this area tend to be centred on 'juvenile justice' (rather than social justice), 'young offenders' (rather than depressed or oppressed communities) and 'restorative programs' (rather than structural inequalities).⁶¹

Indigenous Australians are largely excluded from the practical enjoyment of the same rights as enjoyed by other Australians. Our young people return from gaol to the very same conditions of daily existence that create the patterns of offending in the first place. The whirl of the revolving door is never far away.

The popular construction of 'Aboriginal youth offending' is to see our kids as social predators, careless about the damage they cause. The most characteristic response remains punitive: to impose more severe sentences. There is a further tendency to spread the burden of blame onto the parents and Indigenous communities.

Not only is this view shallow in its failure to take into account the underlying matrix of social disadvantage that engulfs our people, it also fails to acknowledge that the primary impacts of our kids' troubles fall within our own communities. These are our sons, daughters, brothers, sisters, nephews and nieces.

We despair watching the impact of incarceration on our young people. Fourteen year olds come home street-wise sullen men. The current system damages our children, while doing nothing to protect our communities and protect the wider community in any lasting way.

Returning from the gaol's Activities Officer, the strenuous gym work out, the enforced daily structure, many Elders fear that their kids find their community too oppressive. The results of years of prison rehab and 'social integration' seem to wear off fast when kids come home and confront the daily grind.

When I went down to that prison camp down there in Lotus Glen I saw the boys. Lots of Kowanyama boys there. We Elders went down to visit them. Big strong men now. I gave them all talking up. I said, "If you can do a good job here whilst you're in prison, well you can sure do a mighty job at home too, in our community. When you come home, you just want to sit down, you don't want to do anything else, just sit down and eat. That's no good. If you can do it for white people, look after yourself in here, you can do it at home too. You've got to help yourself, help your own colour and community. So therefore when you

60 Davies, G., State Consultant, Uniting Church Community Youth Services, 'Car Theft and Chases', *Western Impact*, June 1991.

61 White, R., 'Taking Custody to the Community - The Dynamics of Social Control and Social Integration', *Current Issues in Criminal Justice*, Vol 3, No 2, November 1991, p. 184.

*come home, you've got to start doing something good for yourself, not sitting on your backside, you've got to do something, something good for yourself".*⁶²

Not only do our Elders recognise that imprisonment in gaols does not rehabilitate our young people, they also realise that it is a further insidious way of dislocating and alienating our youth from their culture, community and traditional values, which may guide them into more constructive lives.

'Get tough' legislation, such as the *Children (Parental Responsibility) Act 1994* (NSW) is a clumsy and ineffectual means of compelling more active participation by parents. Many families are already struggling with the inter-generational effects of the parents' own contact with the welfare and criminal justice systems. The daily stress on families coping with unemployment, poverty, poor parenting skills and substance abuse are only aggravated by imposing further liabilities. Ironically, the aims of 'Parental Responsibility' legislation and the ultimate aims of more severe sentences imposed on our kids, have an objective which is shared by our communities: to see our kids keep out of trouble, grow up straight and take up such opportunities for schooling and employment as exist.

The cycle must be broken. To break it **does** involve more participation by Aboriginal and Torres Strait Islander parents, extended families and communities. But it is a matter of autonomous participation at a much earlier stage of the cycle of conviction, detention, release, recidivism, re-conviction and ever-lengthening periods of detention.

Strategies of diversion from the welfare and criminal justice systems are the key. The Royal Commission into Aboriginal Deaths in Custody was unequivocal on this point:

*That governments and Aboriginal organizations recognize that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organizations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities...*⁶³

Recommendation 92 of the Royal Commission into Aboriginal Deaths in Custody states:

*That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilized only as a sanction of last resort.*⁶⁴

The notion of 'prison as a last resort' has been logically extended and developed into the notion of 'formal agencies as a last resort'. This development rests on the understanding that the longer entry to the formal pathways of the criminal justice system can be delayed, the better is the prognosis.

The *Guidelines for the Prevention of Juvenile Delinquency* state:

*Community-based services should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. **Formal agencies of social control should be utilized only as a last resort.***⁶⁵

62 Interview with Elder Mr. B. Patterson, Kowanyama, 1996.

63 Royal Commission into Aboriginal Deaths in Custody, Recommendation 62, *National Report*, 1991, Vol. 2, p. 252.

64 Royal Commission into Aboriginal Deaths in Custody, *National Report*, 1991, Vol. 3, p. 52.

65 United Nations, *Crime Prevention: Seeking Security and Justice for All*, 1996, p. 90. [emphasis added]

These agencies are the police, welfare and correctional departments and, of course, the courts.

The need for “*greater community involvement in the management of criminal justice*” necessarily involves a devolution of power by formal agencies as part of the move towards “*depenalisation, decriminalisation, [and] the principle of minimum intervention*”.⁶⁶

Quite bluntly, the longer kids are able to be diverted away from formal sanctions, the better are the prospects that they will avoid future problems. Contacts with the police, welfare and justice systems can, in themselves, be criminogenic.

The more contact kids have with formal agencies, the greater the likelihood of future contact – the process is known as ‘contamination’. The aim is to not only to minimise contact with formal agencies but to allow communities to take greater responsibility before triggering state intervention. Diversion is the process which channels kids into community-based alternatives and then back into the community.

Australian formal agencies maintain tight control over the system and the mechanisms of intervention into young peoples lives.

In Recommendation 62, the Royal Commission advocated that strategies should be developed to reduce the **involvement** of Aboriginal kids in the criminal and welfare systems. Involvement occurs from the moment a young person is picked up by the police and can be exacerbated by subsequent decisions of both the arresting officer and the agencies which then take over the management of the case.

Calls for crimping the role of formal agencies resonate beyond Australia. *The Standard Minimum Rules for Non-Custodial Measures* are an international benchmark. In the rules it says:

*...contact with the formal system can contaminate young people who would otherwise avoid involvement in further criminal activity if just left alone.*⁶⁷

Strategies that maintain high levels of involvement with formal agencies, coupled with low levels of community involvement, are not truly diversionary.

The *Guidelines for the Prevention of Juvenile Delinquency* urge governments to develop policies and measures that recognise:

*...that youthful behaviour that does not conform to overall social norms and values is often part of the **maturation and growth process** and tends to disappear spontaneously with the transition to adulthood.*⁶⁸

Most kids need help not condemnation. Instead of sending kids to court the community has an opportunity to guide them, particularly first offenders and those who have committed minor offences.

66 United Nations, 'Standard Minimum Rules for Non-custodial Measures' in *Crime Prevention: Seeking Security and Justice for All*, *op. cit.* See appendix 1 for full text.

67 Blagg, H. and Wilkie, M., *Young People and Police Powers*, Australian Youth Foundation, 1995, p. 56.

68 United Nations, 'Guidelines for the Prevention of Juvenile Delinquency', *Crime Prevention: Seeking Security and Justice for All*, *op. cit.*, p. 91. [emphasis added]

Throwing kids in jail can not be the answer when we know that 65 per cent of Indigenous kids in custody graduate to the adult criminal justice system. If the ultimate aim of the criminal justice system is to protect the community from harm, its current operation is a failure. Innovation must occur. Diversionary strategies are not a panacea. But they are the best alternative on offer. The massive over-representation of Aboriginal and Torres Strait Islander juveniles in the criminal justice system serves nobody.

*We must have a number of programmes, operated by both Government and private agencies, not working against each other, but side by side to give a new direction, a goal for the future, to the young people who find themselves in the juvenile courts.*⁶⁹

A new direction

Diversion as a process embodies a whole range of strategies and necessitates diverse approaches. Different kids and different contexts need different strategies, although some will be more generally useful than others.

Strategies that target Indigenous kids, whether community-based or otherwise, must look at the bigger picture of life: beyond the immediate offence and the juvenile justice system. Kids need direction, employment and a place to live. The criminal justice system clearly cannot, by itself, deliver these necessities. But through the adoption of diversionary programmes based on the philosophy of restorative justice the necessary guidance and links can be made.

Restorative justice looks to instil a sense of responsibility for the wrong done, to make reparation and plan for a future which minimises the pressures to re-offend. It cannot be achieved without substantial inter-departmental support.

In New South Wales the Aboriginal Mentor Program provides assistance and support to Aboriginal kids on remand or under supervision to “*encourage positive growth and facilitate reintegration into the community*”.⁷⁰ The *Ending Offending Program* offers post-release support to Indigenous kids discharged from custody. The programme, launched in Kempsey, will be implemented in areas with a high incidence of offending amongst young Aboriginal people. In Victoria the *Koori Justice Worker Program* provides a similar service.⁷¹

Realistically, we must look beyond punishment and victim satisfaction. Both have a role. But predominantly we must invest in rehabilitation strategies which provide young Indigenous people with skills and training opportunities to lead them away from incarceration. Unfortunately, in Australia, the collective mind-set underpinning justice remains retribution. Too much emphasis is placed on punishment and security, too little on rehabilitation and community care.

Look at the policy statements and slogans which characterise juvenile justice in most Australian jurisdictions and you will see what I mean. In New South Wales the juvenile justice policy of the Carr Government is entitled: *Tough on Crime, Tough on the Causes of Crime*, intimating a punitive, hard-line approach to young offenders. In South Australia, following the enactment of the *Young Offenders Act (1992)*, the juvenile justice system adopted a “*much stronger emphasis...on holding young people accountable for their behaviour, on imposing penalties of sufficient severity to act as*

69 Hurcomb, M., *The Responsibility of Government and Parents in the Rehabilitation of Juvenile Offenders*, p. 58.

70 New South Wales Department of Juvenile Justice, *Department of Juvenile Justice Initiatives to Address the Over-Representation of Aborigines in the Juvenile Justice System*, 1996, p. 2.

71 See, *Lake Tyers Case Study*, p. 52.

*a deterrent, on increasing victims' access to reparation and on ensuring greater community protection".*⁷²

Punishment – the centrepiece of retributive justice – fails when used in isolation. Indigenous kids are locked away to stop them from offending. Their confinement is supposed to reform them from 'delinquents' into balanced, responsible young adults. But imprisonment simply does not work. It has a 65 per cent failure rate. It builds resentment, anger and sows the seeds of further, more serious, offending.

Real diversion involves more than punishment. It is an integrated approach which couples the punitive element with the aim of getting kids back into the community. It is a process designed to inhibit the development of entrenched criminal careers.

This is a fundamental principle of the Guidelines for the Prevention of Juvenile Delinquency: *"by engaging in lawful, socially useful activities and adopting a humanistic orientation, young persons can develop non-criminogenic attitudes"*.⁷³

If we can get it right, kids will have a far better chance of emerging from the system with a genuine respect for themselves and for others. More importantly, they will have a chance of finding a place for themselves and a future with their families and communities.

The *Standard Minimum Rules for Non-custodial Measures* support reintegration:

*Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate reintegration.*⁷⁴

Diversion with the objective of reintegrating kids into the community asks the questions: How do we restore the well-being of the victim, the community, and the offender?⁷⁵ Why is this person here? What is their inter-generational history? How can they be helped?

The *Standard Minimum Rules for Non-custodial Measures* recommends that:

*Efforts should be made to understand the offender's background, personality, aptitude, values and the circumstances leading to the commission of the offence.*⁷⁶

For Indigenous kids, who enter the juvenile justice system at a faster rate than non-Indigenous kids, restorative justice is a constructive solution to the problem of over-representation. So what is being done about it? Some headway has been made but it is important to distinguish what is effective from what is not.

72 Wundersitz, J., *The South Australian Juvenile Justice System: A Review of its Operation*, Office of Crime Statistics, South Australian Attorney-General's Department, p. xvi.

73 United Nations, *Crime Prevention: Seeking Security and Justice for All*, *op. cit.*, p. 90.

74 United Nations, *Crime Prevention: Seeking Security and Justice for All*, *op. cit.*, p. 87.

75 Conswdine, J., 'Restorative Justice: Healing Effects of Crime' in *Aboriginal Law Bulletin*, Vol. 3, No. 77, December 1995, p. 21.

76 United Nations, *Crime Prevention: Seeking Security and Justice for All*, *op. cit.*, p. 87.

Non-custodial measures

At the pre-court level conferencing offers a limited range of options for kids who commit minor offences. They enter into ‘undertakings’ to do certain things. They can garden at the local school for a couple of days, write a formal apology to the victim or they can pay for damage from their own pocket. In some cases they can be required to attend educational courses. Many will never re-offend and never experience conferencing again.

For those who re-offend, court is frequently the next step on the ladder. Conferencing, as an alternative to court proceedings, should always remain an option. Notions that ‘you don’t get a second chance’ are unnecessarily restrictive. A discretion must always be available to respond appropriately to the particular circumstances. Mandatory requirements or sentences are particularly counter-productive in the juvenile field.

Once court has been reached, a second range of non-custodial sentencing options are available to enable kids to confront the wrongs they have committed while providing constructive development. For Indigenous kids who walk through the courtroom door, it is recommended “*that greater emphasis be placed on the use of community service orders*” than on more punitive measures.⁷⁷ Community work clearly returns something of value by way of general reparation. Well-constructed community service orders can be a source of satisfying work which develops some pride in achievement. It may build relationships in the local community, particularly if the supervision of the order is imaginatively carried out.

In New South Wales the *Ending Offending Program* is an “*alternative to the incarceration of juvenile young offenders*”.⁷⁸ Young people referred to the programme attend a group session one day a week for 12 weeks to discuss such issues as: values and attitudes; the impact of offending; peer pressure; independent living; and, employment.

In Victoria, work is being undertaken to increase the opportunities for access to, and participation in, accredited vocational training for young offenders on community-based orders.⁷⁹ Such training has the obvious potential to enhance employment prospects.

The juvenile justice system of South Australia has developed a number of alternatives for Indigenous kids with a strong emphasis on follow-up. The *Wilderness Challenge Program* includes a two week wilderness component of physically demanding activities and a six week follow-up component to build on the wilderness training.

The *Quorn Aboriginal Program*, for Indigenous kids with limited experience in the justice system, encourages learning and success and involves Aboriginal Elders in the process. It also provides continued support to the kids once they have completed the programme. Other options include or will include: Youth in Motor Sport; Operation Flinders; Mobile Work Camps; Aboriginal Training Programs; and, National Parks and Environmental Management.

But what about kids who have not yet offended? Do we really have to wait until its almost too late before we try and unravel the knot? It makes sense for governments to offer programmes to kids **at**

77 Cunneen, C. and Luke, G., *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, p. viii.

78 New South Wales Department of Juvenile Justice, *Department of Juvenile Justice Initiatives to Address the Over-Representation of Aborigines in the Juvenile Justice System*, *op. cit.*, p. 3.

79 See *Lake Tyers Case Study*, p. 52.

risk of offending as a logical step in preventing criminal behaviour, by channelling more resources into pre-court diversion than post-court sentencing options.

In this context ‘pre-court diversion’ crosses the boundary of departments. It should not be the responsibility of welfare and justice portfolios to pick up the work of other service agencies. It should not be the responsibility of justice programmes to provide education, training schemes, apprenticeships and employment.

The recent review of the South Australian juvenile justice system recommended:

...programs for ‘at risk’ Aboriginal youths be developed and monitored to prevent these young people from becoming involved with the juvenile justice system in the first place.⁸⁰

In many areas facilities for Indigenous programmes are sparse. Government agencies on the ground are hard pressed to stretch limited dollars to initiate a basketball game or craft class. The obvious outcome is boredom – kids spend a lot of time ‘hanging around’. Just take a drive to somewhere like Ceduna and you will see that for yourself.

One may legitimately ask why it is only the perceived potential for criminal offending that motivates action to address the needs of our kids.

Some communities have ‘solved’ the problem by empowering police to pick kids up off the street and take them home. If no one is home, they are held in custody. Does anyone really think that’s a solution? It’s an introduction service.

The absence of opportunities for kids is too frequently taken by police as requiring ‘pre-emptive strikes’, which propel kids with nothing to do straight into the mechanisms of the justice system. There is a real question of broader responsibility here.

The *Children (Parental Responsibility) Act 1994* (NSW) is pertinent to consider in this context. It is legislation enabling such ‘street-sweeping’ exercises. Although it is argued that the legislation is non-discriminatory, it is notable that in the areas where it has been enforced there are significant numbers of Indigenous kids. And while such legislation is quick to attribute responsibility to parents following an offence, where is the state’s earlier responsibility to constructively pre-empt offending by providing adequate resources to community programmes? Instead of throwing any amount of money at the prison system to keep kids locked up, why not put even half the amount into community infrastructure and close a few detention centres, which are filled with kids who don’t need to be there anyway?

Incarceration is the most expensive sanction yet devised in both financial and human terms. It costs \$35–\$50,000 per annum, per juvenile: 65 per cent will re-offend. The whole community pays massively for the illusion of protection.

Anyone who cuts through the rhetoric of law and order will be appalled by its cost. Both economic rationalism and social justice demand increased expenditure on programmes which tackle the causes of juvenile offending. They are cost efficient on every front and offer better long-term community protection.

Instead we see cuts, not only in such programmes, but in basic service delivery. The Community Development Employment Program (CDEP), or ‘work for the dole scheme’, will be slashed by

80 Wundersitz, J., *The South Australian Juvenile Justice System: A Review of its Operation*, op. cit., p. xii.

\$326.5 million in the 1995/96 year. More than 25 per cent of all employment for Indigenous people is part of the CDEP scheme⁸¹ and the massive cuts will only “ensure the defunding of many hundreds of Indigenous community organisations, placing their employees on the dole queues”. This will culminate in:

*An increase in incarceration rates and consequent deaths in custody as a result of the withdrawal of many programs aimed at diverting Indigenous Australians, and particularly young people, from the justice system. Many of these programs were generated in response to the Royal Commission into Aboriginal Deaths in Custody.*⁸²

This is sheer perversity.

Can the net get bigger?

While it is important to target kids ‘at risk’, care must be taken to ensure that a proliferation of crime prevention policies and programmes do not undermine the principle of diversion by allowing earlier intervention, extending into new populations and creating new agencies:

*There is a perception that young people are objects to which ‘something must be done’ or which ‘need fixing’, not people who have rights and need special consideration due to their immaturity.*⁸³

In some circumstances, notions of ‘diversion’ have widened the net and diverted Indigenous kids into the criminal justice system, not away from it, by creating new avenues for tarnishing kids through contact with the law.

‘Diversionary’ programmes are frequently rigid in their structure. Contrary to Recommendation 62, they are not designed in close consultation with Indigenous communities or adapted to local circumstances. They are packaged in remote ‘policy’ units and driven or posted into communities.

We see diversion delivered to us in a package because ‘they’ know what is best for ‘us’. The paternalism of such diversion reflects the earlier policies of ‘care and protection’ and ‘assimilation’ that permitted the removal of Indigenous children from their families up until the 1970s.

*It is important to realise the continuities with earlier policies which legitimated the removal of Aboriginal children from their families. Indeed the process of criminalisation has replaced the previously overt genocidal doctrine of ‘breeding out’ Aboriginality. Aboriginal youth are no longer apparently institutionalised because they are Aboriginal, but rather because they are criminal.*⁸⁴

Real diversion recognises the context of Indigenous lives and begins with a genuine concern for kids, not as stereotypical delinquents, but as young people of equal status to their non-Indigenous counterparts. Ill-planned strategies only further exacerbate the problems diversion seeks to resolve.

81 Taylor J., ‘Aboriginal Job Prospects Wilt’ *Canberra Times*, 16 September 1996, p. 11.

82 Miss Lois O’Donoghue, Chairperson of the Aboriginal and Torres Strait Islander Commission, Statement on the 1996 Federal Budget, p. 2. [emphasis added]

83 Palmer and Walters, ‘Crime Prevention Camps for Youth At Risk: Blurring the Boundaries of Care and Control in *Warp of Resistance*, p. 161.

84 Cunneen, C., *Enforcing Genocide? Aboriginal Young People and the Police*, Institute of Criminology, Sydney University Law School, Unpublished, 1993, pp. 15-16.

The Milan Plan of Action is referred to in the United Nations publication entitled *Crime Prevention: Seeking Security and Justice for All*. The Plan warns that:

*...the problem of crime demands a concerted response from the community of nations...**unbalanced or inadequately planned development contributes to an increase in criminality**, and the criminal justice system should be **fully responsive** to diverse and evolving political, economic and political systems.*⁸⁵

Australia has not been fully responsive. A fully responsive criminal justice system would have acted on the recommendations of the Royal Commission into Aboriginal Deaths in Custody when, five years ago, they spelt out, loud and clear, how important diversionary programmes are and identified the need to negotiate the structure of such programmes with Aboriginal organisations.

Since the Royal Commission into Aboriginal Deaths in Custody in 1991, the rates of Aboriginal juvenile incarceration have increased markedly.

The failure to divert our kids from prison results from the failure of governments to listen to our people. If effective strategies are to be found we must have the chance to discuss what will have impact on Indigenous kids and what will simply bounce off.

If governments could just stop and listen they might get closer to the mark.

Nobody has the complete answer. But we know our children and we have the greatest possible incentive to work through to solutions. In many parts of Australia Indigenous communities have initiated their own programmes. I refer to several in this chapter. We cannot do it alone, nor should we be expected to. We should be supported, not be left to sink or swim as soon as the word 'self-determination' is mentioned. It all comes down to commitment and support.

The support we are talking about requires an active role by governments in: monitoring the conduct of discretionary decision-makers such as the police and magistracy; ongoing training of all personnel who come into contact with young Indigenous people; evaluating non-custodial sentencing options and reporting outcomes back to the magistracy who can then assess their own sentencing patterns.

Such forms of monitoring are straightforward, practical measures which put some checks and balances into the system and enable remedial action to be taken.

Where monitoring takes place, it consistently reveals racial disparities in sentencing patterns and access to diversionary programmes. The patterns and causes of systemic discrimination in Australia's juvenile justice system are described in chapter 1 of my Third Report 1995.

Quite simply, our kids are far more likely than non-Indigenous kids to be put in detention. They are less likely to access non-custodial options. The wretched thing is that where these disparities have been identified, they remain entrenched or have become worse. Attitudinal influences can be tracked in jurisdictional and regional variations in sentencing patterns.

We need greater scrutiny of police decision-making as it impacts on Indigenous kids. The fault line for conferencing models in South Australia, New South Wales and Western Australia is watched over by the police.

85 United Nations, *Crime Prevention: Seeking Security and Justice for All*, *op. cit.*, p. 72. [emphasis added]

In these conferencing programmes, which offer an alternative to court proceedings, the police stand alone at the gate to decide who gets in and who is left out. Not only do Indigenous kids reach the threshold of the courtroom more often than non-Indigenous kids, they are pulled through it faster. Discretionary decisions by police have an immense impact on the disposition of Aboriginal kids and their prospects for the future.

In NSW Community Youth Conferencing (CYC) has proven so unworkable it will be abolished. A recent evaluation conducted by the Director of Public Prosecutions blames “*attitudinal problems on the part of police to certain groups of offenders*” and “*lack of commitment by police to the Scheme*” for the failure.⁸⁶

Under Community Youth Conferencing the arresting police officer determines whether a person is eligible for referral to a conference and that officer may actually sit on the panel to determine the young person’s fate. The scheme was established in six pilot areas. In only two of the areas have kids been diverted to the conferencing option. In those areas there was a staggering over-representation of Indigenous kids appearing before the courts: 14 per cent of all referrals to court involved Indigenous kids while they represented 1.8 per cent of the total NSW youth population.⁸⁷

Similarly, Family Group Conferencing in South Australia encounters regional disparities in referrals, reflecting police attitudes. As a result Indigenous kids “*are less likely to be diverted to a caution or a conference and more likely to appear in court*”.⁸⁸ Research suggests that in developing the South Australian model insufficient consultation was carried out with Aboriginal people in some areas, and that in those areas where consultation took place, the views of Aboriginal people were not adequately taken into account.

Research also appears to reflect the self-evident: that where there is marked racial bias and antagonism by the police, it adversely affects and distorts the exercise of discretionary powers vested in police.

In New South Wales the model builders have been forced back to the drawing board, where they have devised the latest version: Accountability Conferencing. But unless the new model can combat racial bias, like Community Youth Conferencing, it too will fail.

Accountability Conferencing Model

New South Wales has examined the New Zealand Family Group Conferencing and developed Accountability Conferencing as a new model of diversion. Although most conferencing in Australia only partially replicates the successful programme developed by the Maori peoples, New South Wales has developed a model which, on paper, looks as though it could deliver justice to Indigenous kids for the first time under an Australian approach to conferencing. Whether it can deliver justice in practice remains to be seen.

Under the new model, the power held by police to determine who gets in and who is left out has been diffused. Referral to the programme is via a Specialist Youth Officer who consults with a Conference Co-ordinator to determine the course of action. If a conference is appropriate, the Conference Co-ordinator will then, taking into account cultural needs, select a Conference Convenor. If a court referral is made at this juncture, the court or the Director of Public Prosecutions

86 New South Wales Attorney-General's Department, *Minor Offenders Punishment Scheme (MOPS) Working Discussion Paper*, p. 5.

87 *Ibid.*, p. 4.

88 Wundersitz, J., *The South Australian Juvenile Justice System: A Review of Its Operation*, *op. cit.*, p. xviii.

can refer the case back to conferencing. This is an important safeguard for Indigenous kids. Referral to more punitive options cannot happen unless “*consideration has been given to whether the matter could be dealt with by way of warning or caution*” at each level as the case progresses towards the courtroom.

There are some encouraging aspects to the latest model.

First, the statutory foundation of Accountability Conferencing operates on a presumption favouring conferencing for summary matters and indictable matters capable of being dealt with summarily. This may counter the problem of poor co-operation and support by police, evident in the evaluation of Community Youth Conferencing, which revealed that 83 per cent of Conferences were held in only two of the six pilot areas.⁸⁹

Next, unlike other conferencing models in Australia, kids will not be excluded from the process because they have a previous history of offending or have had previous matters dealt with by a conference. The South Australian conferencing model has been strongly criticised for excluding repeat offenders.

Finally, selection criteria for the Conference Convenors will take into account cultural considerations and regional proximity. Questions arise: how many trained Indigenous convenors are available? Are there opportunities available to create in-roads for greater participation?

At this stage it is unclear whether Conference co-ordination will be within the Department of Juvenile Justice or the Attorney-General’s Department but regardless of where an office is located and the new names and titles, we need to know which people will decide the fate of our children and how they are appointed.

The policy statement of the Carr government, *Tough on Crime, Tough on Causes of Crime* announced that magistrates and police will be involved in training. This is an improvement although limited to a 1/2 day workshop every few months. What we really need are more Indigenous people touching the lives of Indigenous kids at every level of the system.

It is not enough for Indigenous people to be involved as offenders. This is not empowerment – it is entrenched disempowerment. There needs to be clear provision for us to assume responsibility in the operation of this programme. Under the Maori model of Family Group Conferencing, there is Indigenous ownership of the process and checks and balances to ensure equitable access and outcomes for Maori kids.

It remains to be seen whether the Accountability Conferencing model will treat Indigenous kids more fairly than in the past or whether it will produce another subtle avenue for the expression of racial bias. It particularly remains to be seen whether ‘higher bodies’ will actually operate as a safeguard and refer kids back. In South Australia, the courts are empowered to refer young people back to conferencing but it rarely happens. Close monitoring with transparent public reporting is essential, as is co-ordination with the services of other departments and community organizations.

It is hoped that the proposed Accountability Conferencing model will reverse the appalling New South Wales trends in relation to Indigenous kids and achieve the positive results of Family Group Conferencing in New Zealand.

89 Attorney-General's Department, *Minor Offenders Punishment Scheme (MOPS) Working Paper Discussion Paper*, *op. cit.*, p. 4.

Cautioning

Alongside conferencing is the parallel option of cautioning. Cautioning basically means that the police can formally warn young offenders and then release them and in so doing divert kids from being charged and consequential court proceedings. Again, it is the police who decide who will be diverted by this means. In New Zealand cautioning diverts the first layer of kids from exposure to juvenile justice forums altogether and ‘soaks up’ approximately 60 per cent of those who would otherwise go to court or conferences when a caution is all they need.⁹⁰ A further 30 per cent of young offenders are cautioned after participating in the family group conferencing. In addition, 10 per cent of young offenders are referred by the courts to family group conferences. In some parts of Britain cautioning rates are around 80 per cent of all cases.⁹¹

Typically, in Australia Indigenous kids do not benefit from cautioning. They are under-represented when compared to non-Indigenous kids. This can be attributed to both racial bias and general police policy. Any argument to the contrary must answer for the massive regional differences in cautioning patterns and referrals to family conferences by police. They appear attributable to either attitude or *de facto* policy. What we confront again is the urgent need for the close monitoring of discretionary police decision-making.

In New South Wales it is intended to increase the ratio of cautioning to conferencing under the Accountability Conferencing scheme. The Carr Government Policy statement proposes to “*expand and adapt the Cautioning program piloted by Wagga Wagga Police, to targeted areas*”. It recognises that effective diversion will depend on “*successfully combined cautioning and the Family Group Conference approach to minimise the exposure of juveniles who commit minor offences*”.

In NSW it was found that Aboriginal first offenders “*had a greater chance of being prosecuted by police and thus a lower chance of receiving a police caution*”.⁹² Meaning Aboriginal first offenders, at the point of initial contact, were never given a second chance.

In other parts of the world, like Britain and New Zealand, minority groups have experienced similar problems and it has “*taken significant work to shift the practices of the police in this area*”.⁹³ It is necessary to address this problem in this country if diversion is ever to be effective.

The solution, it has been argued, is for a “*stronger focus on improving equity at the policing level*”⁹⁴ through the following means:

- (i) *Reduce the discretion of police by establishing clear legislative rules for the use of cautions (and other diversionary options as they arise) and court attendance notices and to ensure that these rules are enforced.*

90 Wundersitz, J., *The South Australian Juvenile Justice System: A review of its Operation*, *op. cit.*, p. xviii.

91 Crime Research Centre, University of Western Australia, *Aboriginal Youth & The Juvenile Justice System of Western Australia*, 1995, p. 12.

92 Cunneen, C. and Luke, G., 'Discretionary Decisions in Juvenile Justice and the Criminalisation of Indigenous Young People' in *Youth Studies Australia*, Summer 1995, p. 42.

93 Blagg, H. and Wilkie, M., *Young People and Police Powers*, *op. cit.*, p. 57.

94 Cunneen, C. and Luke, G., *Discretionary Decisions in Juvenile Justice and the Criminalisation of Indigenous Young People*, *op. cit.*, pp. 45-46.

(ii) *Monitor police actions more closely and feed this information back to managers so they can better implement anti-discriminatory policies. For example, in Victoria police still arrest people for public drunkenness despite holding the discretionary power to caution.*⁹⁵

Monitoring the cautioning process would quickly reveal bias by police. In Britain this is standard practice but in Australia it has not been taken seriously. The Police Services are loath to collate statistics demonstrative of their own failings. But such statistical monitoring is the basis for senior police to ensure operational compliance. A transparent feedback system is essential.

In New South Wales the problem of racial bias in police discretionary decision-making is to be addressed by more indirect means. The Government will “*establish a Police training program*” and “*boost in-service training for police*”.⁹⁶

While training is a start in tackling attitudinal problems, it is inadequate to shift entrenched institutional practices. Statistical monitoring and requiring reports as to the grounds for declining to caution are better tools for senior police to identify problems and ensure operational compliance with official policy.

There is little point in diversion if the gatekeepers to diversionary options are racially biased. Unless monitoring is adopted, cautioning simply cannot be relied on as useful tool of diversion for Indigenous kids.

Cautioning - Western Australia

Between August 1991 and December 1994 Western Australian police cautioned 12,887 juveniles: only 12.3 per cent were Indigenous.⁹⁷ Considering that Aboriginal representation among juveniles who are charged is as high as 69 per cent, it is clear who is not benefitting from this diversionary option. Police in Western Australia are not required to caution a child in the presence of a parent or guardian, nor to ensure that an interpreter is present so the child actually understands the caution. Families need have no involvement or responsibility in the process and will often be the last to know about it. “*Parents get no information. Your kid is a criminal before you get to hear about it*”.⁹⁸

Section 22 of the *Young Offenders Act* instructs police to consider cautioning a child, taking into account the seriousness of the offence and the child’s offending history (sections 22, 23(1), 23(2)). Other ‘extra-judicial’ considerations which may inform the officer’s decision include whether the child has a stable family background, is still at school, or is employed. Judged by these criteria a lot of Aboriginal kids don’t stand a realistic chance of being diverted from more serious formal intervention. Disadvantage compounds disadvantage. An example of the unwillingness of the police to caution is evidenced by a 1995 case in which a young Aboriginal person from Kalgoorlie was held in custody (in a police lock up and in the Rangeview Remand Centre) while awaiting a Pre-Sentencing Report after the theft of an ice cream.⁹⁹ Instead of being cautioned, this child who had committed a minor offence felt the full weight of the law.

Police decisions not to caution a child can result in a further ‘compounding bias’. “*It may be through the accretion of these trivial incidents that the dramatic big picture of young Aboriginal offenders*

95 Media release, Aboriginal and Torres Strait Islander Commission, 4 July 1996, p. 1.

96 New South Wales Government, *Tough on Crime, Tough on Causes of Crime*, p. 2.

97 Crime Research Centre, University of Western Australia, *Aboriginal Youth & the Juvenile Justice System of Western Australia*, *op. cit.*, p. 13.

98 *Ibid.*

99 *Ibid.*, p. 17.

with hundreds of charges to their names is created".¹⁰⁰ Because of police discretion some kids will be ineligible for diversionary options by the time they are teenagers and be branded as habitual or serious offenders when subsequently appearing before a court. In Western Australia, statistics highlight the failure of this approach to diversion: Indigenous children between 10 and 14 years of age are 31.6 times more likely to be charged by the police than non-Indigenous children of the same age.

Although the Police Cautioning Scheme forms the central plank in Western Australia's juvenile justice strategy, Family Group Conferencing, adapted from the New Zealand model, has also been introduced.

The Western Australian model is based on a partnership between the key agencies involved in juvenile justice, co-ordinated by the Juvenile Justice Division of the Ministry of Justice.

Aboriginal community support for the model is widespread. However, Aboriginal youth access is minimal. A Caseload Census conducted by the Ministry of Justice in October 1995 found that 25 per cent of the Juvenile Justice Teams' current cases related to Aboriginal children. One of the reasons for the low referral rate is that a child with three or more court appearances is excluded from access. This inflexible cut-off shuts out kids who might have attained a record for minor misdemeanours, such as stealing an ice cream. Responsiveness is essential to effective diversionary schemes.

The front-end influence of police discretion is a consistent reason for the low rate of Aboriginal youth referrals to Family Group Conferences. A key recommendation, repeatedly highlighted in inquiries and reports (Police/Youth Task Force 1993, Select Committee on Youth Affairs 1992, State Government Advisory Committee on Young Offenders 1991), is to limit police discretion through the introduction of Youth Aid sections within Police Departments, as in New Zealand where Youth Aid sections increased the 'escape valves' and decrease police discretion. Such a development in the Western Australian model would have salutary effect.

The management of the South Australian cautioning scheme includes a set quota to be achieved. As expected, Aboriginal kids were poorly represented in the statistics and, as expected, there has been no concerted endeavour to examine the administration of cautions. The most recent review of diversion in South Australia admits that "*because of time restraints*" the review was "*not able to pursue other lines of inquiry such as...directly observing how cautions are administered or how family conferences...are conducted*".¹⁰¹

The South Australian figures repeat the national pattern: only 17.4 per cent of cases involving Aboriginal young people result in a formal caution against 35.8 per cent of non-Aboriginal cases: 63 per cent of Indigenous kids were referred to court compared with only 42.5 per cent of non-Indigenous kids.¹⁰² So while South Australia's cautioning programme is producing encouraging statistical results overall, it has not come to grips with internal racial disparities.

Monitoring, in terms of broad comparative figures, merely shows you that you have a problem. Until the details of discretionary decision-making by police are transparent, and until "*time restraints*" are overcome to inspect the reality of the administration of cautions, nothing will improve. Detailed monitoring at divisional, district and station, down to officer levels, is necessary to shift entrenched police practices.

100 *Ibid.*, p. 15.

101 Wundersitz, J., *The South Australian Juvenile Justice System: A Review of Its Operation*, *op. cit.*, p. xvi.

102 *Ibid.*, p. xx.

Given the consistent under-representation of Indigenous kids in the conferencing process and the disproportionate number of Aboriginal kids flowing into the court system, the apathy of Australian governments toward monitoring the process is simply unconscionable. Real effort must be made to harness police discretion. Otherwise, diversion through conferencing and cautions will continue to exclude Indigenous kids and push them over the threshold into the prison system at a rate and pace well ahead of all other kids.

Sentencing patterns

The spotlight should not focus on police conduct alone. The court system is as much in need of scrutiny. There are marked disparities in sentencing practices between country and metropolitan courts.

In country areas non-specialist children's courts tend to hand down harsher sentences which has led to the "*perception that children receive a different, and inferior, standard of justice in country courts*". Indigenous kids are "*far more prevalent in country courts, as many live in country towns with less access to education and employment*".¹⁰³

Specialist children's courts in New South Wales dispense custodial sentences with shorter minimum terms and longer additional terms. Non-specialist courts, confronted with 55 per cent of all kids who enter the court system, tend to give sentences with longer minimum terms and shorter additional terms.¹⁰⁴

*Many of these [children] are Indigenous. On a number of country circuits, children are more likely to receive a custodial sentence than in the specialist Children's Courts; in one area in the northern part of the State, children are two and a half times more likely to receive a custodial order.*¹⁰⁵

Such patterns are not confined to New South Wales. Ideally the judiciary should only see a small number of kids walking through courtroom doors, but this is not the case in Australia.

A recent review of the South Australian juvenile justice system shows that the Youth Court is still processing 30 per cent of all cases. In New Zealand only 10 per cent of kids reach the court system with 90 per cent syphoned into alternative channels.¹⁰⁶

Magistrates of non-specialist country courts are an important link in the chain of diversion and need to better understand Indigenous kids and young people generally. The *Standard Minimum Rules for the Administration of Juvenile Justice* recognise that:

Professional education and in-service training, refresher courses and other modes of instruction shall be utilised. Juvenile justice personnel shall reflect the diversity of juveniles in contact with the justice system. Efforts shall be made to ensure fair representation of...minorities.

103 Submission by the Senior Children's Magistrate, The Children's Court of New South Wales, S. H. Scarlett, to the Australian Law Reform Commission, May 1996.

104 New South Wales Department of Juvenile Justice, *Aboriginal Juveniles in Custody: An Analysis of Sentencing Practices in the NSW Children's Court (1994/95)*, p. 1.

105 Submission by the Senior Children's Magistrate, *op. cit.*

106 Wundersitz, J., *The South Australian Juvenile Justice System: A Review of Its Operation*, *op. cit.*, p. xviii.

All magistrates should be informed of the sentencing options available to divert children into rehabilitation.

The Royal Commission into Aboriginal Deaths in Custody advised in Recommendation 101 that:

*Authorities concerned with the administration of non-custodial sentencing orders take responsibility for advising sentencing authorities as to the scope and effectiveness of such programs.*¹⁰⁷

Further, the Royal Commission argued that the effectiveness of diversion will “*improve when sentencing authorities come to believe that non-custodial sentences are the sentencing disposition most likely to allow for the rehabilitation of offenders*”.¹⁰⁸

Regular conferences of magistrates dispensing juvenile justice should be convened. Patterns of sentencing should be analysed to identify the disparate exercise of sentencing discretion. Such conferences could serve as a forum for correctional administrators to advise of diversionary strategies and their utilisation. In my view, the legal representatives of juvenile defendants also hold a clear responsibility to put imaginative diversionary options to the court and to advocate strongly for their use.

Home-grown diversion

Unfortunately, many of Australia’s diversionary programmes are hybrids of models developed in other parts of the world with the real spirit of the diversionary process completely lost in all but a few cases. Our participation, as Aboriginal peoples and Torres Strait Islanders, is essential to the process of diverting Indigenous kids from custody. This is the core message of Royal Commission Recommendation 62.

Effective diversionary strategies need to be home-grown, adapted to our circumstances. With this firmly understood, it is useful to examine international experience: not so much to find a blueprint but to appreciate the dynamics of successful programmes.

In 1989 New Zealand introduced major reforms to its youth justice system in a move to reduce the over-representation of Maori youth in custody through the groundbreaking *Children, Young Persons and their Families Act*.

Within four years of the introduction of the Act, the judiciary witnessed an 80 per cent decrease in the number of young people before them.¹⁰⁹

The reforms were largely driven by Maori determined to take a role in designing and administering the youth justice system. Maori concerns over the entrenched enmity between youth and police, the gross over-representation of Maori youth in custody and their negative perceptions of the justice system engendered vigorous debate before the introduction of the legislation. Maori groups began “...*focusing on the young person’s criminal acts, strengthening the family so they could deal with the young offender, and involving the victim of the crime in sentencing. This idea of family or*

107 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 3, p. 80.

108 Roeger, L. S., 'The Effectiveness of Criminal Justice Sanctions for Aboriginal Offenders' in *The Australian and New Zealand Journal of Criminology*, Vol. 27, No. 3, December 1994, p. 265.

109 Chief District Court Judge R. L. Young, *Youth Justice in New Zealand - A New Approach to Crime Prevention*, Conference on Youth Crime Prevention, AIC, Canberra, p. 8.

Whanua is central to Maori society and central to the 1989 Act".¹¹⁰ Out of these debates, the new system, designed "to restore power to Maori and to families in partnership with the state" emerged.¹¹¹ The Act explicitly recognises Maori traditional systems of justice and endeavours to "...empower Maoridom, to involve Maori directly in decisions about their young people and thus to acknowledge their identity as tangata whenua [people of the land]".¹¹²

The Act takes an approach to juvenile offending, which acknowledges that social/economic inequities may be reasons for offending but they are never an excuse.

The objectives of the Act include:

- *promoting the well-being of children, young people and their families and family groups by providing services which are appropriate to cultural needs, accessible and provided by persons and organisations sensitive to cultural perspectives and aspirations;*
- *providing measures to deal with offending which strengthen the family, whanua [extended family], hapu [clan], iwi [tribe] and to foster their ability to deal with offending by their children and young people; and,*
- *keeping young people in the community and in contact with their culture.*¹¹³

The approach emphasises:

- *Justice – accountability for offences, due process, proportionality of punishment.*
- *Diversion, Decarceration and Destigmatisation – avoiding the use of institutions, frugality of penalties, avoiding processes that stigmatise and label young offenders as ‘crims’.*
- *Victim Involvement, Mediation, Reparation and Reconciliation.*
- *Family Participation and Consensus Decision-making – applying aspects of traditional Maori conflict resolution practises where the extended family, clan and tribe have a major role in the decision-making process and in reaching reconciliation between the victim and the offender.*¹¹⁴

Central to the reforms is the Family Group Conference (FGC). The FGC is a meeting at a time and place chosen by the offender's family and attended by their extended family, the victim and their supporters, the police, the offender's lawyer (if one has been appointed) and anyone else the family invites to attend. The FGC deals with all charges, except for murder and manslaughter, providing commission of the offence is admitted. Close to 90 per cent of all juvenile offences are referred to a FGC either by a Youth Justice Co-ordinator or, if an arrest and charges have been laid, by the Youth Court. In 1993 there were approximately 6500 Family Group Conferences. Of these 6200 (95 per cent) reached agreement between the victim, young offender, family, police and social welfare agency.¹¹⁵

110 *Ibid.*, p. 3.

111 Olsen, T., Maxwell, G. & Morris, A., 'Maori & Youth Justice in New Zealand' in 'Popular Justice & Community Regeneration - Pathways of Indigenous Reform', Hazelhurst, K., ed., Praeger Press, p. 48, 1995.

112 *Ibid.*, p. 48.

113 *Ibid.*

114 Maxwell, G. M. & Morris, A., 'The New Zealand Model of Family Group Conferences', in *Family Conferencing and Juvenile Justice - The Way Forward or Misplaced Optimism?*, *op. cit.*, p. 15-16.

115 Chief District Court Judge R. L. Young, 'Youth Justice in New Zealand - A New Approach to Crime Prevention', *op. cit.* p.8.

*The Family Group Conference allows the victim to have a say, to feel part of the criminal justice system. It forces the young person to see that the victims of crimes are real people. It allows the victim to obtain proper reparation for the loss suffered. It provides the opportunity for the young person to feel shame and remorse. It allows the victim to forgive the young person, and for the healing process to begin. This process is the most powerful tool for crime prevention in the Children, Young Persons and their Families Act... It is significant that the Court is not directly involved. It is significant that the victim plays a major part in the resolution of the crime. Families have a pivotal role in the conduct of the Family Group Conference. The young person understands the shame he has brought to his family, he understands that his responsibilities are not only to the victim, but also to his community and more particularly his family. It will also expose the needs the family might have within the community. What support and help do they need?*¹¹⁶

Significant co-reforms were also enacted placing strict controls on police powers to arbitrarily stop, question, search and detain young people. The Act outlines compulsory procedures for the police when confronting, arresting and interrogating youth. These changes aimed to decrease police contact with youth and to decrease police discretion. No longer could the police decide who would or would not benefit from a diversionary scheme. By law, the new gatekeepers are the Youth Justice Co-ordinators appointed by the New Zealand Children and Young Persons Service within the Department of Social Welfare. Over half of the Youth Justice Co-ordinators identify as Maori.

For many Maori the reforms to the system were a validation of self-determination:

*...it has both created new structures and has shifted the balance of forces in a crucial region of Maori concern...if we are to capture what is, in relation to Aboriginal peoples, its most innovative characteristic, it must be read as an empowering and de-colonising process which has led to the recovery of lost authorities, social relationships and ceremonies: while reducing the extent of welfare and penological colonialism.*¹¹⁷

Non-Indigenous professionals involved in juvenile justice have been slow to relinquish control of their old terrain. Referred to as 'professional pollution', evaluators of the model have been surprised by the reluctance of professionals to withdraw from Conferences at the stage when families are left alone to find a reconciliation plan.

Although regarded as the crucial point in the Conferences, 42 per cent of social workers, police and others sampled, dug their heels in and refused to go. Youth Justice personnel describe the implementation of the Act as "...painful for social workers. There was a massive retraining of social welfare staff. They were told to let go the power".¹¹⁸

It should not be thought the Maori model is without teething problems. However, the inherent recognition of self-determination has led to a specifically Maori jurisdiction being mapped in national policy. Maori researchers believe the flaws in the implementation of the Act are largely the result of:

...ignorance of the Act, a dearth of resources and mismanagement rather than any inherent faults in the legislation itself... We feel that the Act for the most part is an excellent piece of legislation which promises exciting possibilities for the future. When the processes outlined

116 *Ibid.*, pp. 4-5.

117 Blagg, H., 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia', *British Journal of Criminology*, forthcoming, p. 5.

118 McDonald, R., *Face to Face Justice*, Good Weekend Magazine, Sydney Morning Herald, 18 May 1996, p. 23.

*in the Act are observed, Maori families were indeed empowered and able to take an active part in decisions concerning their young people.*¹¹⁹

Indigenous peoples in Australia have followed the reforms with considerable interest and concern. In the early 1990s Australian police study groups were quick to cross the Tasman, study the 'New Zealand model' and duty-free it home. Criminologists were enthusiastic "...*the communitarian approach which underpins family group conferences has been used by Aboriginal people all over the world for ages*".¹²⁰ Backed by superficial readings, police co-ordinated facsimiles of Family Group Conferencing started in Australia. But they missed the essence completely: at its base-line, the Maori model recognises the central role of Maori families in determining youth justice policy. The *Children, Young Persons and their Families Act* is essentially about reinforcing the family, not the State, as the prime source of responsibility for the behaviour of children. Police do have a role in the New Zealand model but it is not significant. As one Maori judge commented on Family Group Conferences as practised in Australia: they have "...*substituted the police for the people*".¹²¹

Conferencing in South Australia

Ceduna is an isolated South Australian township, home to Aboriginal peoples from many areas including Port Augusta, Port Lincoln, Kalgoorlie and Yalata.

Race relations are tense and local Aboriginal people experience discrimination on a daily basis. The hotel is unofficially divided with a 'black bar' and a bar for everyone else. This division is justified as 'local custom'.

The Family Conferencing Team who facilitate and administer the Conferencing process in Ceduna are part of the Courts Administration Authority.

Minor property offences and petty theft are a recurrent local problem, particularly among young Aboriginal people. Most of the Conferences deal with offences like breaking a window, stealing salami, stealing a sock, stealing an inflatable ball, stealing biscuits from a house, borrowing a stolen bicycle, smoking cannabis.

The most striking aspect of models developed *for* Indigenous people are the problems encountered with cultural difference, evident in the manner of young people and their families during conferences.

Young Indigenous people from a traditional upbringing can react quite differently to kids from a more urban background. This is an important consideration in a place like Ceduna and points to the need for community consultation and negotiation to develop models apt to local circumstances. The success of the Koori Justice Worker Program in Victoria can be attributed, in part, to this 'tailoring' process.¹²²

Social structures are an important consideration in conferences involving Indigenous families. Conferences can come to a grinding halt, with little response from the offender, if certain courtesies are not observed. If it is more appropriate to direct initial questions to the father and they are

119 Olsen, T., Maxwell, G. & Morris, A., 'Maori & Youth Justice in New Zealand' in *Popular Justice & Community Regeneration - Pathways of Indigenous Reform*, *op. cit.*, p. 59.

120 'Real Justice Forum 1995' in Blagg, H., *A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia*, *op. cit.*, p. 10.

121 Former Youth Court Judge Mick Brown in Blagg, H., *A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia*, *op. cit.*, p. 5.

122 See, *Lake Tyers Case Study*, p. 52.

directed to the young person, he or she may not respond. The father may become disgruntled. Women tend to be very quiet.

Language difficulties are also a barrier. Aboriginal people often speak Indigenous languages or Aboriginal English and may not be able to articulate their feelings and opinions when questions are directed to them in standard English. The result is silence. This can be seen as sullenness and cause the victims to respond with anger and frustration. This is problematic in a conference which relies heavily on the goodwill of the participants who should, ideally, walk away feeling satisfied with the outcome.

Finally, the mobility of Indigenous peoples, particularly in an area like Ceduna where Aboriginal people pass through from all parts of the State, make home visits critical. Correspondence may not reach the people who most need to attend the forum. Illiteracy is a problem. Home visits are being phased out, not because Aboriginal people want this but because the policy has simply been changed.

The development and implementation of Family Group Conferencing in South Australia, while a welcome initiative, does raise several issues of concern.

First, it is only police officers or magistrates who can divert a young person into Family Conferencing.

Second, the growing imposition of rigid administrative restrictions on the conference process, like short time frames and the removal of home visits, renders Family Conferencing more difficult to accomplish, and less effective in results.

Third, recommendation 62 of the Royal Commission into Aboriginal Deaths in Custody makes clear that strategies designed to reduce the involvement of Aboriginal juveniles with the welfare and criminal justice systems should be negotiated by governments with Aboriginal organisations. No such negotiation has shaped the strategy of Family Conferencing in Ceduna.

The structure of Family Group Conferencing runs the risk of slotting Aboriginal people into a structure which inadequately reflects the needs and the cultural realities of its participants. The structure, as it now stands, is failing to adequately accommodate cultural differences. Its effectiveness is consequently diminished.

*...the Family Conference Team, in consultation with the Aboriginal community, develop a range of processes and strategies to ensure that the differing needs of Aboriginal youths from urban, rural and traditional communities are met.*¹²³

Wagga Wagga Model

*Police departments are like all bureaucracies; they justify their existence by expanding.*¹²⁴

The police cautioning programme in Wagga Wagga, New South Wales, was the first significant manipulation of the New Zealand Family Group Conferencing (FGC) model. Police officers coordinated and ran the conferences instead of youth-justice personnel. The theoretical and

¹²³ Wundersitz, J., *The South Australian Juvenile Justice System: A Review of its Operation*, op. cit., 1996.

¹²⁴ Stephen, J., 'The Age' 6 April 1993, in Sandor, D., 'The Thickening Blue Wedge in Juvenile Justice', *Family Conferencing & Juvenile Justice - The Way Forward or Misplaced Optimism?*, op. cit., p. 153.

philosophical foundations of the Wagga model were strongly informed by Braithwaite's "*shame and re-integration model*".¹²⁵

Basically, this model focuses on restorative not punitive justice; on reparation not retribution. The model concentrates on the needs and involvement of the victim/s. 'Reintegrative shaming' is an attempt to avoid stigmatising and removing offenders from the community. The offence is 'shamed', not the offender. The offender is 'reintegrated' once they have acknowledged the harm they have committed, apologised and made up for their offence.

In the Wagga model conferences were staged in the police station with police staff acting as facilitators, mediators, umpires and 'shamers'.

After the release of the New South Wales Government's White Paper on juvenile justice, which called for new strategies for 'Community Alternatives To Court Processing', the Wagga model was dumped. The White Paper, which followed an extensive review of the model, opted to reform conferencing process to give less discretion to the police.

Resurfacing in the ACT and Queensland, police-led conferencing schemes have, however, continued. Interestingly, although police in several jurisdictions have been disinclined to reform their systems of policing, they have not been unwilling to latch on to the idea of 'shaming'. Braithwaite concedes that even he is "*regularly surprised*" by the "*imaginative*" ways the police are applying the philosophy of "*reintegrative shaming*".¹²⁶

For Indigenous Australians the police-led conferences resting on Braithwaite's theory are cause for concern. Unlike the New Zealand model where power devolves to Indigenous families via a process that explicitly recognises their culture and their desire to take a central part in rehabilitating their youth, the Australian variations are largely based on an unfortunate collaboration between existing powerbrokers and the coercive powers of the police. Indigenous parents are sidelined in a process originally designed to bolster and empower families to help their young people.

In the Wagga model the police station was used for conferencing. It was considered a 'neutral' location. To describe a police station as a neutral venue, which "*favours neither victims nor offender*",¹²⁷ is a transparently misconceived and naive proposition. To allow the police the unfettered power to run victim/offender meetings, to determine punishments and to 'shame' children totally undercuts the dynamics of the conference which should be about the offender and family assuming responsibility.

*Supporters of the Wagga Wagga model claim that the New Zealand process expanded police 'options for dealing with young offenders'. The significant dimension of the process from a Maori perspective was the degree to which it did precisely the opposite and restricted police discretion – a critical polarity in interpretation that defines the dominant ideology of conferencing in Australia.*¹²⁸

For many of our youth, who have experienced the full brunt of the criminal justice system since they were children, contact with the police may be so 'normal' that a police-led shaming may have little impact. In Wagga Wagga the police also supplanted the role of other welfare agencies. Without the

125 Braithwaite, J., *Crime, Shame & Reintegration*, Cambridge University Press, Melbourne, 1989.

126 Blagg, H., 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia', *op. cit.*, p. 20.

127 Moore, D., 'Facing the Consequences' in *National Conference on Juvenile Justice*, Atkinson, L. & Gerull, S.A., eds., Conference Proceedings No 22, Australian Institute of Criminology, 1993, p. 210.

128 *Ibid.*, p. 7.

back-up of a co-ordinated, multi-agency approach to juvenile offending, it will be the parents who alone assume the entire responsibility of 'reintegrating' the child. And how will 'reintegration' be achieved when our kids are among the highest unemployed and most marginalised in the country? For our youth, the 'shaming-reintegration' model will become a "...new form of alienating shame when tangible integrative opportunities are absent".¹²⁹

Increasingly it is also the parents who are being singled out and blamed/shamed for their kid's offences.

*The "...extent to which parents are blamed for youth offending has an impact upon whether or not youth crime in general will be seen as stemming from or linked to structural issues such as poverty, unemployment, racism or whether they will be simply tied to varying degrees of parental 'irresponsibility'. What has been called the 'criminalisation of inadequate parenting' can also serve to displace attention away from changes in social policies which affect family situations".*¹³⁰

Family violence and its nexus with juvenile offending is a pattern in the lives of some of our kids. It is a fact which cannot, and should not, be denied. Many children, who are regarded as 'offenders', have first been offended against. Any attempt to address youth offending must also address the substantive, generative causes of their behaviour. It is difficult to believe this will be achieved with the 'shame and reintegration' model being applied. For deeply disadvantaged families increased social assistance would be more effective than a dressing-down by a local sergeant. Improving police responses to incidents of family violence is a higher priority for crime prevention than hosting family conferences, and one which better fits within the central function of policing.

Family group conferencing may offer better prospects if the family is empowered to try and come to terms with the behaviour of their child and its causes. In the Australian adaptation of the New Zealand model an unfortunate distortion of the process has occurred which effectively reduces the power of parents and members of the extended family to have a real say in admonishing and supporting their child. I am not suggesting that police and other professionals should be excluded, but the 'professional pollution' that takes precedence in our hybrid local version of conferencing has throttled any potential for family decision-making. The family group should be strengthened rather than diminished by the process.

Sufficient evidence already exists to suggest that the police-run family group conferences have had little impact in reducing rates of recidivism¹³¹ or in satisfying victims' needs.¹³² They have not replicated the success attained in New Zealand.

*Since 1989 in New Zealand, the number of court cases involving juvenile offenders had been cut by 80 per cent and the detention rate was down by a third.*¹³³

Distinct from the Australian approach, Family Group Conferencing in New Zealand acknowledges that:

129 Sandor, D., 'The Thickening Blue Wedge in Juvenile Justice' in *Family Conferencing & Juvenile Justice - The Way Forward or Misplaced Optimism?*, *op. cit.*, p. 159.

130 White, R., 'Taking Custody to the Community - The Dynamics of Social Control & Social Integration', *Current Issues in Criminal Justice*, Vol. 3, No. 2, November 1991, p. 181.

131 Comarelos, C. & Weatherburn, D., 'Targeting Intervention Strategies to Reduce Juvenile Recidivism', *Australian & New Zealand Journal of Criminology*, 28, 1995, pp. 54-72.

132 Blagg, H. & Smith, D., *Crime, Penal Policy & Social Work*, Longmans, Essex, 1989.

133 'Jail as last resort, says Tickner' in *Issues for the Nineties: Juvenile Justice*, Healey, K., ed. Vol. 40, p. 9.

*...the best hope for solving the problem of families resides within the families themselves and their immediate communities of intimate support. What the state can do is empower families with resources.*¹³⁴

The Maori peoples participated extensively in developing their model. It is the very process of involvement in developing strategies and ownership of the process that builds the foundation of successful diversion. It is this dynamic which is missing from Australian practice.

The push for community involvement in diversion is not about questioning the status of the judiciary, the police or other formal agencies. It is about questioning the effectiveness of the agencies channelling kids into the process. It is about the devolution of responsibility. We are capable of determining what is best for our children.

Of course there must be a balance. Finding the balance begins by genuinely minimizing the role of formal agencies, coupled with consultation to negotiate the extent of community involvement in setting strategies suited to local conditions. We are Koori, Nunga, Murri and within these broader groups we live in particular communities with distinct characters, resources and needs. The common objective must be to negotiate what works for each community where conferences take place.

It is a matter of home-grown justice.

Lake Tyers¹³⁵

Lake Tyers Aboriginal Trust is a former Aboriginal 'mission' situated on the east coast of Victoria and home to approximately 250 Aboriginal people.¹³⁶ Heavy bars on the windows of the old supplies building are a reminder of life in the 1860s. Etched into people's faces are memories of the assimilation policy which operated less than twenty years ago. By 1978 at least one family member had been removed from every family on the mission not including the children sent on holiday camps who never returned home.¹³⁷

In 1995 the Victorian Department of Human Services, through the Koori Justice Worker Program, funded a Justice Worker at Lake Tyers.

The Koi Justice Worker Program is designed to:

- prevent Aboriginal youths from offending and re-offending;
- develop Aboriginal involvement in advocacy for, and supervision of, Aboriginal kids; and,
- strengthen links within the Aboriginal community.

It is available to kids on correctional orders and kids **at risk** of offending. It is a programme that the community owns and actively participates in. It works. Recent statistics establish it as one of the most successful and effective juvenile justice systems in Australia. In the period from March 1994 to March 1995 there was a 46 percent reduction in the total number of Aboriginal kids admitted to correctional orders.

¹³⁴ Braithwaite, J. and Mugford, S., 'Conditions of successful reintegration ceremonies' in *British Journal of Criminology*, Vol. 34, No. 2, 1994, p. 157.

¹³⁵ *Bung Yarnda* is the Aboriginal name for the area chosen by the Gunai tribe as a location for the mission.

¹³⁶ Garlick and Stewart, *Report on Augmentation of Lake Tyers Aboriginal Trust's Water Supply System*, January 1988.

¹³⁷ *Lake Tyers Aboriginal Trust: Environmental Health Study* December 1995, p. 17.

At Lake Tyers the community initiated a surf-board making course. The kids were given a shed for a workshop where they learnt how to construct the boards using basic materials and to paint them with their own designs. The boards are so distinctive they have been seen at surfing competitions from Stradbroke Island to Bells Beach and have been displayed at the Australian National Gallery.

Alongside surfboard making, a course is being offered to young men to train as security guards. The re-established boys' football team has been a huge success and there's a girls' team in the making. Each activity is part of a strategy to guide kids away from the criminal justice system and to offer them genuine work and pride in their achievements.

Kids previously dismissed as no hoppers, troubled kids with nothing to contribute, now run a surf-board making business called 'Kurnai Waters'. This is a diversion.

A diversionary justice programme tailored to the specifics of one community may sound like an exceptionally difficult and expensive exercise. It is not.

In Queensland a collaboration between a State agency and several communities has produced successful community-run programmes which have dramatically reduced local rates of juvenile and adult offending and begun to gradually chip away at some of the underlying problems facing each community. These programmes deserve close consideration.

Family empowerment and social control

In 1991 the Queensland Corrective Services Commission (QCSC) initiated a comprehensive evaluation of the perceptions of Indigenous peoples from north Queensland of the delivery of QCSC services. The QCSC supported Yalga Binbi Institute for Community Development Aboriginal and Torres Strait Islander Corporation (YBI) in applying for a research grant from the Criminology Research Council to undertake the evaluation.

The initial QCSC report found that communities were confronting overwhelming difficulties with maintaining local law and order.¹³⁸ Family and intra-community violence was out of control. Social breakdown, endemic unemployment and alcohol and drug abuse were contributing factors. The family was overburdened and traditional Aboriginal mechanisms for dealing with conflict and regulating antisocial behaviour were weak. Many Indigenous people felt a deep sense of frustration at the inability of the police, QCSC, courts, schools and Shire/Community Councils to effectively combat local law and order issues.

The report argued that the key to start addressing the disorder was to identify what roles communities, clans, family groups and kinship networks could have in changing patterns of destructive behaviour. Enlisting the support of senior members of the community to administer Aboriginal community justice as well as striving for a co-ordinated effort between the community and State agencies was strongly recommended.

The report asserted that behaviour of juvenile and adult offenders “...could not be divorced from the general life of the community, and that preventative and rehabilitative measures must be worked out in a community-wide process of dialogue and decision making”.¹³⁹

138 Blackman, S.F. & Clarke, B.A., *Aboriginal & Islander Perceptions of the Delivery of Correctional Services to People in North Queensland*, Yalga Binbi Institute for Community Development, 1991.

139 Adams, J. & Bimrose, G., *Review of Community Justice Groups - Kowanyama, Palm Island, Pormpuraaw*, Yalga Binbi Institute for Community Development, 1995, p. 14.

To their great credit, the QCSC agreed to fund a pilot project to develop community-specific models for Aboriginal Elders' justice groups in three communities: Palm Island, Kowanyama and Pormpuraaw. QCSC further funded Yalga Binbi to establish justice groups in each community. The three main elements of the community justice response were:

- *the development of a community justice group made up of Aboriginal people elected by community members. Independent, skilled community development facilitators to assist community members in developing the justice group;*
- *a full time community-based development officer to provide ongoing support to the group; and,*
- *the justice group members, together with members of the community and other relevant organisations such as the Community Council, Police Service, School, Corrective Services and other community organisations to develop local responses to community problems of law and order.*¹⁴⁰

Yalga Binbi Institute set up meetings with local Elders, leaders, community council workers and families in order to discuss what role community justice would have and to determine each group's overall aims and procedures.

Initial community discussions focussed on local Elders' understanding of "*...Aboriginal Law and how it could be exercised (together with European law) to deal with law and order problems experienced by the community*" and "*the lack of recognition by the European criminal justice system of Aboriginal Law and the desire to increase the respect for Aboriginal authority because '...white law is too weak, the young fellas take no notice'*". Elders wanted to "*help people get off the grog and look after their children properly*".¹⁴¹

Locals strongly supported making Aboriginal Law central to their community justice model. Elders in all three communities discussed what role Law could have in dealing with day-to-day problems: underage drinking, underage gambling, non-compliance with parole and community correction orders, theft, destruction of property, children referred by police for cautioning and unlawful use of motor vehicles.

Elders recognised that Aboriginal Law could be used to enforce correct behaviour in the community, to sort out disputes, to support families in crisis and to punish community offending. The role of Law was "*firm and uncompromising, hard and strong as cement*" but tempered by compassion for community members and a strong commitment to resolve conflicts by counselling, negotiating and arbitrating.

Each community recognises that success will not be achieved by working in a vacuum and is striving to improve communication with the judiciary, local police, Shire and Aboriginal Councils and schools.

In Palm Island four hundred community members were interviewed and asked to nominate Elders who were respected, fair-minded, possessed authority and had wisdom and understanding of their people. A working group of twenty people was formed. The selection process ensured that there were several representatives from the main social groups. In Kowanyama Elders from the three main

140 *Ibid*, p. 7.

141 *Ibid*, p. 16.

linguistic groups, Kokobera, Kunjen and Kokomnjena, selected three men and three women from each of the groups.¹⁴² Elders resolved to:

*...address the issues of law and order in a way that the community understands is right and in accordance with its own customs, laws and understanding about justice; recommend and, if appropriate carry out certain kinds of community punishments for some law breakers; look at ways of preventing law and order problems in the community; consult with magistrates and judges about punishment and sanctions considered appropriate; provide advice to the Children's Court and to the Department of Family Services and Aboriginal and Islander Affairs about juvenile justice matters; and provide recommendations to government departments on social justice matters.*¹⁴³

The Queensland Corrective Services Commission supported the development of this innovative programme. The Commission's financial support to the groups was, and is, frugal. The elders receive no salary, have no statutory authority, receive five thousand dollars for administrative expenses and the support of a full time Community Corrective Services Officer. Bearing this in mind, what have these groups achieved since their inception in 1994?

Kowanyama

Kowanyama used to be a mission and is located near the Gulf of Carpentaria in Cape York. Despite being a small community of approximately one thousand people, forty to fifty charges were dealt with each month in the Kowanyama Children's Court.¹⁴⁴ Locals described many of the kids as "rowdy and totally out of control".¹⁴⁵

Nine months after the first meeting of the Kowanyama Community Justice Council in March 1994, not one child had been charged by the local police. Police statistics in October 1994 showed that break and enters had decreased by 82 per cent, theft by 91 per cent, receiving stolen goods by 98 per cent, assault by 68 per cent, and grievous bodily harm by 66 per cent.¹⁴⁶

The impact of the Elders' community justice model is strong. In 1996 the local Children's Court only dealt with the occasional case every few months. It is the belief of many Kowanyama locals that the significant reduction in local crime is due to the impact of the eighteen Kokobera, Kokomnjena and Kunjen Elders that make up the Kowanyama Justice Council.

The use of Aboriginal Law is central to the Elders' emphasis on making kids, teenagers and their families accountable for their actions. Elders ask kids involved in a dispute and their families to front up to a meeting held in a local community hall "before his or her own people". Each party is given a chance to explain their version of the incident. The Elders give their view of how the child or the group of kids has behaved and then they ask the kids and families to respond. The group considers whether the child's actions are as a direct result of wider issues such as overcrowding, neglect or

142 For more information on Aboriginal Community Justice listen to the radio programmes, *Working It Out Locally - Aboriginal Community Justice & Meditation* available from the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996.

143 Adams, J. & Bimrose, G., *Review of Community Justice Groups - Kowanyama, Palm Island, Pormpuraaw*, op. cit., p. 37.

144 *Ibid.*, p. 41.

145 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Working It Out Locally - Aboriginal Community Justice & Mediation* radio research project.

146 Adams, J. & Bimrose, G., *Review of Community Justice Groups - Kowanyama, Palm Island, Pormpuraaw*, op. cit. p. 40.

other conflicts at home and may recommend referrals and increased support to the family. Sitting down and talking with the child's parents and counselling is a vital part of the Elders' work.

If the child's behaviour is the result of peer group pressure, the Elders will call for all the children involved and all their families to attend a meeting.

Despite having no formal enforcement power no one has ever refused to attend. Elders seek to get to 'the truth'. Kids will receive a stern warning and an unequivocal message that their behaviour is unacceptable. Shaming a child plays a strong role in the process. However, considerable attention is also given to encouraging the children and reminding them of their potential.

Children are told to make up for whatever harm they have caused. Apologies must be offered and community work completed. Occasionally, public punishments will be meted out by members of the juvenile's family. But sanctions such as banishing a youth from the community or a physical punishment are regarded as a last resort, only used if the child's family agrees. Elders emphasise the importance of swift justice. Offending behaviour is dealt with almost immediately. Kids recognise that there will be a direct consequence for whatever wrong they commit.

Elders recognise that boredom is a prime catalyst for juvenile offending. The Kowanyama Justice Council's Support Officer has initiated several sport, cultural and recreational programmes to divert the kids' energies. Regular excursions to other communities in the Cape region are part of this strategy. Concerned with not rewarding the behaviour of young offenders, Elders invite all young people to participate.

They have had a major impact in community life and when I say that it is because they've made people think that they will now be held accountable for their actions whether it is domestic violence, bullying old people or stealing money off our old people.¹⁴⁷

Make sure you look after them, take good care of them. That's what you're there for, to take good care of them, rear them up proper way, not just running them loose. When they get out of hand, they're gone forever. You might never catch up on them again. Look after your child properly, the way you want to see them and the way we want to see them too.¹⁴⁸

The Justice Council dealt with some kids that were very out of hand at school, too big for their boots. The Elders spoke to them about what it was like for the teachers. Then a few of the Elders sat in on their classes. That really jammed them up!¹⁴⁹

Palm Island

Enforcing Aboriginal law, making children accountable for their behaviour, counselling their families, working closely with the Townsville judiciary, QCSC, local police and schools and attempting to make the Palm Island community a more hospitable place for youth are part of the multi-faceted strategy to reducing the high levels of juvenile crime and community conflict employed by the Palm Island Elders Community Justice Group.

Peena Geia, spokesperson of the Group, explains how Elders dealt with a group of local teenagers who broke into the school. *"The biggest one was the break in at the schools. All the muck up they did in the Home Economics room. At the time some of them did some silly things. It must have been*

147 *Ibid.*, Interview with Mr. Gordon Gertz, 1996.

148 *Ibid.*, Interview with Kokomnjena Elder Mr. B. Patterson, 1996.

149 *Ibid.*, Interview with Gordon Gertz, 1996.

more than a dozen kids. The group really got a hold of them and we brought them in here and took them all back down to the school and stood over them and their parents were with them, they were not allowed to have any lunch, 'Nothing until you clean up all this mess!', we said. Because they messed their faeces in these cooking pots and rubbish bins, they threw all the meat and everything out, they turned the freezers off. So they had to clean up and make up for it. And nobody was to leave, they were under supervision from morning until afternoon until we thought it was ready for them to have something to eat. We just showed them and since then they've never broke in again, even with graffiti - that's all stopped... Then their attendance at school was really good after that."¹⁵⁰

Approximately twenty Palm Island Elders meet in the tiny local court house whenever there's a disturbance or a matter is referred to them by the court, police or community. A remarkable 60 per cent of youth offenders counselled by the Elders do not re-offend. The Palm Island Community Justice Group has also set up a structured community breach programme run in conjunction with the Townsville Magistrates Court. 86 per cent of the breaches of community orders supervised by the Group have been successfully completed.¹⁵¹

The Group's Community Corrections Officer, Bruno Bryant, believes that although shaming wrongdoers is integral in the group's approach, young people also receive "*loads of love and compassion*" from them. The Elders spend hours with local kids counselling them and seeking to understand the causes of their antisocial behaviour:

One boy, he came over here to Palm Island. He was a real trouble maker, a hard case. He's not from here. But he come in and I know he's had problems. The Group talked to him and he turned around and said, 'thank you'. He cried and he said, 'I want to thank you people for opening my eyes'. He was a young teenage man and he said, 'I want to thank you because I've never had any one to talk to me'. And he had gone from home to home and he'd been adopted out and he came right here to Palm Island to find himself and now he's one of the happiest boys whereas he used to be a thug on the street...he's a gentlemen today.

Peena Geia

I think what the Palm Island Community Justice Group have achieved is great. They've been very effective. When I visited the Group I was so impressed by the Elders' compassion and also their ability to look objectively at their own people. I found their work very impressive and seeing them in action further enforced my confidence in receiving recommendations from them. Their success with the judiciary is also in part due to having an intermediary involved with the group who has the status of a Community Corrections Officer. That's also been very important.¹⁵²

...they know it's a shame thing with our people, amongst our people that many of them know that they can abuse and mis-use the white man's laws and trust but they can't do it amongst their own. They know the Murri law is stronger, it always has been and it always will be. This is where we have and we can put a point across to any white person, you know, our laws are very real - they're not just fake things like a lot of people might make out. They are real. And if they did not interfere in the first place we wouldn't have all the trouble we have today.

Peena Geia

150 *Ibid.*, Interview with Ms. Peena Geia,, Spokesperson for the Palm Island Community Justice Group, 1966.

151 *Ibid.*, Interview with Mr. Bruno Bryant, Palm Island Community Corrections Officer, 1996.

152 *Ibid.*, Interview with a Queensland magistrate.

Aboriginal Community Justice - Beginnings of Reform?

Aboriginal community justice is not the panacea for the complex problems our people experience.

It is unrealistic to imagine that any one diversionary approach will resolve the fundamental problems caused by dispossession and the consequent lack of an economic base.

What Aboriginal community justice can undoubtedly achieve is a far more humane and comprehensive approach to tackling the interlinked issues of social control and juvenile offending. As the models in Kowanyama and Palm Island demonstrate, community justice can also reinvigorate Aboriginal culture and provide an effective way of resolving everyday disputes.

The success of these programmes makes one thing clear. Solutions to our problems require a collaborative, intelligent, co-ordinated approach which honours the principle of self-determination.

Aboriginal people in Kowanyama and Palm Island strongly believe that the flexible, broad-minded, unbureaucratic, 'no frills' support provided by the QCSC has been very important to the success of these models.

These models allow Indigenous families and communities to determine responses to community strife and to control culturally relevant sanctions. Each community has also begun to address the underlying social problems plaguing the lives of their youth.

The collaborative nature of these models has also resulted in tentative bridges being built with the formal criminal justice system. I have little doubt that the establishment of these programmes run by our people will also provide salutary outcomes for both Aboriginal offenders and victims. Empowering our old people and revitalising dispute resolution through community programmes have the potential to restore a greater degree of social control and divert our kids from custody.

The success and optimism surrounding these programmes should not disguise several crucial issues which our communities will encounter as they move to take greater control over the delivery of justice to our kids.

Aboriginal community justice should not signal a 'go-slow' for other State agencies. The disputes aired by elders should catalyse a more co-ordinated approach from government departments to support the community-building work that is integral to the development of community justice programmes. Agencies need to link the experiences of Aboriginal victims and offenders with the wider social, economic and political dimensions of Aboriginal community life. While the front-end of the resolution of conflicts and criminal behaviour must be carried by the community, government agencies need to be active in addressing the sources of stress which manifest in disruptive behaviour.

Some underlying issues which arise from the community justice models developed in Queensland include:

- lack of adequate educational outcomes, sporting activities and employment opportunities impact directly on rates of juvenile offending.
- family violence and inadequate care of children are chronic problems requiring urgent supportive attention.
- high levels of alcohol and drug related offences reflect intense problems of substance abuse endemic to many communities.

- community feuds are promoted and exacerbated by housing shortages and the design of community living areas and public space.

Community justice cannot, and should not, be regarded as some kind of patch-up solution to the manifold underlying issues identified by the Royal Commission into Aboriginal Deaths in Custody. Our Elders should be recognised and respected for their contribution to developing their communities but the onerous duty of having to deal with all the problems and accumulated needs should not be thrust upon them. Community justice programmes need to be integrated with other programmes, particularly Commonwealth and State services which go to the causes of crime.

Model building

All our communities have undergone cultural assaults to varying degrees. It is not only the intentional suppression of our laws and culture, but the displacement of several groups into one large artificial 'community' which gives rise to a complex tidal pool of influences within any one place. Many communities no longer hold a consensus in values. Tensions between the 'old ways' and the 'new ways' often divide our people. What self-determination means for the old people in Kowanyama will differ greatly to what others will think in, say, Ceduna. The search for justice and the revitalisation of our own means of social control will need to be more than some superficial 'bringing back of the old ways' based on romantic yearning for the past. *"The complexities of communities must be accommodated and the search for justice must acknowledge and reflect these complexities"*.¹⁵³

Governments agencies are routinely seduced by 'one size fits all' solutions to multi-layered social problems. A solution for a remote Aboriginal community may prove unworkable in an urban community. This is obvious. What is less apparent is that the informal dynamics within apparently similar communities will dramatically affect the success of any programme imported into those communities. To promote a 'ready-to-assemble' model for dispute resolution denies the reality that exists within each community. A city neighbourhood of Indigenous peoples will, if supported, be able to match their own model with the immediate reality of their children's situation. A rural community will do the same. However, other urban and other rural communities may make their own choices.

The challenges of creating alternative justice models that are responsive to the differing needs of our communities are considerable. It is a more exacting task to build community-specific models than to import an outside model into which local content is 'inserted'.

Communities that harness their own cultural strengths to deal with their problems deserve Government recognition and support.

Despite the extreme cost-effectiveness of community justice schemes when compared to all other methods of imposing and enforcing sanctions; despite the marked success of the pilot projects commissioned by the QCSC; despite the plain commonsense of supporting communities to assume responsibility for sorting out their law and order problems, the necessary level of support for community justice schemes has been very slow in coming.

153 La Prairie, C., 'Community Justice or Just Communities? - Aboriginal Communities in Search of Justice' in *Canadian Journal of Criminology*, October 1995, p. 527.

Since 1992 the Queensland Department of Aboriginal and Torres Strait Islander Affairs has received an annual allocation of \$600,000 to oversee the development of Local Justice Initiatives. To date, a total of only \$200,000 has been spent.¹⁵⁴

The Department's reluctance to back proposals is perceived as a refusal to empower "*Murris to let us get on and deal with our own affairs*". Trying to obtain funding has been likened to 'pulling teeth'. The programme guidelines are seen as 'utterly paternalistic', inflexible' and 'bureaucratic'. Now, in response to community pressure to spend the available money, there is a real concern that drought may be transformed into flood and that money will be thoughtlessly splashed about to demonstrate departmental activity. To say the least, it is paradoxical that a State which has piloted some of the most promising community justice projects has found it so difficult to deliver the necessary administrative support and resources to build on these beginnings. Instead of enthusiasm there is caution, reluctance and equivocation.

It is useful to consider some of the attitudes and perceptions which vex the development of genuinely constructive and sustainable relations between Indigenous communities and government departments in the field of community justice. These are not limited to Queensland by any means. They are general, and affect the development of good community justice models throughout Australia. There are the obvious difficulties in the co-ordination of approaches: a lack of consistent responses between departments and even within the same departments. The gamut runs from officers who show energy and enthusiasm to those who demonstrate suppressed hostility.

There is a range of views in Indigenous communities as well. Most communities have difficulty in obtaining adequate financial support for their proposals. However, in some places there is ambivalence about relying on government money. There is real apprehension that along with any funding will come a form of institutionalisation of community initiative so that 'support' will be the kiss of death "*... it will be welfare capture*".

Ironically, it is a similar feeling of apprehension that colours the attitude of many government officers towards community justice proposals. The threat they perceive has a different source. It stems from any proposal that would have Indigenous people assume responsibility for social control mechanisms. The threat they perceive is to the integrity of the state: it's not their business to take on the public role of the police or magistrates or Corrections.

In one way or another there is a common concern about who controls what and who has ownership. To this I respond that community justice projects must be addressed in the context of a particular proposal. I believe that it is by dialogue, not abstract theorizing, that a workable model can be built in virtually any circumstance.

It is interesting to see that often people who were most opposed in principle to a project, become very keen supporters once it gets off the ground. Some police officers in the Northern Territory had strong reservations about the introduction of night patrols by community members – undertaking, essentially, front-line policing in tackling disturbances. There followed strong support from police after the practicalities of the night patrol became clear. No question as to the patrol members exercising police powers arose.

It is a matter of the co-ordination of police services with the work of the patrols, with the police seeking guidance as to how they might most effectively intervene. These kind of straightforward management questions were addressed in a way that ensured the autonomy and the spirit of the

154 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Interview with Queensland Department of Aboriginal and Torres Strait Islander Affairs staff, August 1996.

community initiative were respected and preserved, while the police did not feel usurped of their legitimate role. Following the first successful patrol run by Julalikari Council, in co-operation with the police at Tenant Creek, the concept spread to other communities.

I give this as a concrete example of how abstract ‘jurisdictional’ issues may be raised in objection to community proposals. These issues are unlikely to prove insuperable with a little thought, and, perhaps, a lot of talking.

A classic example of an abstract, theoretical point of ‘jurisdictions’ becoming a road-block to progress is the recognition of Aboriginal law. Frequently, Indigenous people want to centre the rebuilding of social order within their communities on a re-invigoration of traditional structures and processes. Government officials think, automatically, of ‘pay-back’: that they are being asked to fund a justice project based on pre-mediated assault.

There is a massive misunderstanding of contemporary Aboriginal and Torres Strait Islander laws, both in recognising the authenticity of their connection to tradition and in recognising their adaption and translation into meaningful practice today. ‘Pay-back’ and ‘leg spearing’ are the pervasive, lurid images which shape non-Indigenous people’s understanding of our laws. This focus artificially isolates one aspect of traditional law, and takes it as emblematic of a monochrome culture, frozen in practices offensive to human rights. It reinforces a view which denies the dynamism of Indigenous laws, their humanity, their diversity, their adaptability. It reduces the range of their application to the most sensational denominator.

I am not suggesting that the full legal recognition of Aboriginal law is a simple thing, or that some traditional punishments do not raise distinct human rights concerns. What I do say, most strongly, is that the role of Aboriginal and Torres Strait Islander laws, the sanctions proposed, the legal powers and authorizations necessary should be considered in detail, from a practical, operational perspective. It is a matter of functional recognition in line with the Law Reform Commission’s extensive recommendations.¹⁵⁵ At present, unless it is purely a question of counselling by Elders, the ramifications of employing Indigenous law seem to be either denied or ducked.

Aboriginal and Torres Strait Islander Elders are frequently placed in a position where they act with the authority of their own law but without any other source of authority or protection. The benefit of their standing and their effort is reaped, but they are left in a position of vulnerability.

Powers conferred by delegation or appointment under correctional or other legislation may reinforce traditional standing and authority. From the Indigenous perspective, power sourced in such legislation may be regarded as counter-productive. The point is that issues such as these should be identified and examined. They are too frequently dealt with on the basis of, as one government official put it, “*What we don’t see won’t hurt us*”. Alternatively, proposals based on Indigenous laws and procedures are simply dismissed out of hand.

The Queensland Department of Aboriginal and Torres Strait Islander Affairs’ Local Justice Initiatives Program funding guidelines are cautious, ambivalent and, ultimately, restrictive. On the one hand I read: “*The Local Justice Initiatives Program will enable communities to extend traditional and culturally appropriate approaches to dealing with justice related issues by generating innovative solutions using community development processes*”. Turn the page and I find the following: “*Any initiatives developed will need to fall within the confines of the existing State systems. In particular, it should be noted that justice groups have no statutory authority*”

155 Law Reform Commission of Australia *The Recognition of Aboriginal Customary Laws*, Canberra, 1986.

*...consequently, justice groups have no direct responsibility under the Program for punishing misbehaviour”.*¹⁵⁶

This is unnecessarily restrictive. It adopts a rigid, *a priori* position. Each proposal should be examined, put into its particular context, and the practicalities weighed up: in direct consultation with the proponents and representatives of other relevant agencies. All community justice models are ultimately about the legitimate empowerment of Aboriginal and Torres Strait Islander people to take charge of their lives and the lives of their kids. This is an endeavour to be supported, not feared or obstructed.

*Empowerment will not be achieved until Indigenous communities can secure responsibility and authority over programs which directly impact on their own communities. Increasing responsibility without authority will only produce negative outcomes for communities and the programs which have been imposed upon them. Firstly, it will create false expectations as to what outcomes the community can realistically achieve. Secondly, without authority, indigenous communities will become dependent upon the program and the bureaucratic mechanisms which operate it. Thirdly, indigenous participation will decline when it is realised that the community’s initial expectations cannot be met. Therefore, a program originally intended to increase indigenous responsibility and participation as an administrative bridge from dependency towards autonomy will only create further dependence and frustration unless the community is recognised as having the authority, ownership and control of the program.*¹⁵⁷

The philosophical and practical arguments in favour of the diversion of our kids away from arrest, away from remand, away from court and away from detention are overwhelming. As I stated in my Third Report 1995:

Five years ago the Royal Commission into Aboriginal Deaths in Custody identified the over-representation of our kids at every level of the juvenile justice system as having “...potentially dangerous repercussions for the future”. That dangerous future has arrived.

At one level it is a simple matter of arithmetic.

Consider this,

- *22 per cent of the whole population of Australia is under 15 years of age*
- *40 percent of the Indigenous population is under 15.*
- *7 percent of the whole population of Australia is under 5 years of age*
- *15 percent of the Indigenous population is under 5.*

Proportionately, we have about double the number of young people in our population than does non-Indigenous society.

If we combine these demographic figures with the current imprisonment rates of Indigenous youth, and project them a few years into the future, the implications for our kids become clear:

¹⁵⁶ Queensland Office of Aboriginal and Torres Strait Islander Affairs, *Local Justice Initiatives Program*, Program Description and Funding Guidelines, pp. 10, 13. [emphasis added]

¹⁵⁷ Sykes, R., 'Self Determination: Implications for Criminal Justice Policy Makers', in *Justice Programs for Aboriginal and other Indigenous Communities*, Proceedings, Aboriginal Community Justice Workshops No. 1, Hazelhurst, K. (ed.), AIC.

- *in 6 years, by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention.*
- *in 16 years, by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention.*

This is the crisis. It is on us already. It will simply become more acute in the future, as our kids, who are now babies, move with the relentlessness of mathematics into what has become their birthright as the Indigenous children of this country.

Just as, on average, adult Aboriginal and Torres Strait Islander peoples can expect to die 18 to 20 years earlier than other Australians, so our kids can expect more abrasive encounters with the police, more frequent arrest and more frequent detention.¹⁵⁸

It is with intense sadness and anger that a year later I must report that the figures for the over-representation of Indigenous kids have not only continued their relentless trend, the trend has become sharper, deeper and more damaging. The above figures were calculated on a national multiplying factor of 18.6. The most recent figure is that Aboriginal and Torres Strait Islander children are 21.3 times more likely to be held in detention than other children.

Although Indigenous youth comprise only 2.6 per cent of the youth population (10-17 years) in Australia, on 30 June 1996 they represented 36 per cent of all juveniles held across Australia in detention. New South Wales, Queensland and Western Australia together held 87 percent of all detained Indigenous juveniles...¹⁵⁹

Effective diversionary schemes are absolutely essential. And they are not the answer. I have endeavoured to point out how community justice models will, at best, link into and be co-ordinated with broader community development. But until the social issues underlying the criminal justice issues – health, housing, education and employment – become comparable to what other Australian kids enjoy, then our kids will continue to go the way of the generations that came before them. They will graduate to adult gaols. Some will die in there. I am talking of people who are now children.

Chapter 3: Housing

On 14 April 1986 Barbara Denise Yarrie died in Royal Brisbane Hospital. She had been arrested ten weeks earlier for being drunk in public and placed in the Brisbane City Watch-house. There, sometime late in the afternoon of 31 January 1986, Barbara lapsed into a coma triggered by profound diabetic hypoglycaemia. She never regained consciousness.¹⁶⁰

Barbara's journey to the ward where she died began long before that day.

She was born in 1956 to a family interned in Woorabinda Aboriginal Settlement in central Queensland. Barbara was a year old when her family was granted an exemption from the provisions of the Queensland *Aboriginals Preservation and Protection Act* and was free to move to her father's country in south-east Queensland.

158 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, pp. 15-16.

159 Atkinson, L., (forthcoming) *Detaining Aboriginal Juveniles as a last resort: variations from the theme*, Trends & Issues, Australian Institute of Criminology.

160 Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrie*, AGPS, Canberra, 1990, p. 1. The death in custody of Barbara's sister, Fay Lena Yarrie, was also investigated by the Royal Commission.

But, as with so many other Aboriginal people, this ‘ticket to freedom’ did not allow entry into the life lived by non-Indigenous Australians. Although no longer confined by the harsh restraints of settlement life, the Yarries were still denied basic citizenship rights and participation in the Australian community. Amongst other things, this meant that the family, like many other Indigenous families, was much more likely to live in poverty:

*For the next eight years the family battled with difficult living conditions and inadequate accommodation, with limited financial resources and prospects and health problems.*¹⁶¹

These circumstances made the children vulnerable to removal on the ground of neglect.

In early 1966 the Queensland Department of Children’s Services and the Department of Native Affairs found that “[t]he conditions under which this family are living are far from satisfactory and it is felt that action should be taken to protect the welfare of the children”.¹⁶² Barbara’s parents’ exemption certificates were revoked and the family were taken back to Woorabinda. The following year the Yarries were once more permitted to leave the settlement. They moved through central Queensland as Barbara’s father searched for work.

In March 1970, the State intervened again. This time all the Yarrie children were removed from the family and placed under the care and protection of the Director of the Queensland Department of Children’s Services on the ground of neglect.

Barbara, then 13 years old, was placed in a series of homes. Soon after this first separation from her family her entry into the criminal justice system began.

Barbara’s contact with the welfare system and later the criminal justice system was not caused by criminal behaviour. It resulted from a departmental decision about her family’s living conditions. Living conditions to which they were condemned by the circumstances of their race. Her parents battled. They loved their kids and cared for them as best they could.

By the time of her death Barbara had been taken to watch-houses in Brisbane and Rockhampton at least 40 times for drunkenness. Prison records indicate that she served terms of imprisonment for failure to pay fines for various stealing, obscene language, disorderly conduct and motor vehicle offences. She was once sentenced to imprisonment for two months hard labour for stealing \$49. The judge cited Barbara’s previous record as justification for his sentence.¹⁶³

‘Care and protection’

*A recurring theme in the individual case reports that have been published by the Royal Commission is childhood separation of the deceased, largely as a result of ‘care and protection’ orders made in response to housing conditions.*¹⁶⁴

Housing is not just about bricks and mortar. As Barbara Yarrie’s story shows, it may be your ticket into the welfare and criminal justice systems.

161 *Ibid.*, p. 2.

162 *Ibid.*, p. 8.

163 *Ibid.*, pp. 19-20.

164 Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991, Vol. 2, p. 425.

The links between substandard housing and infrastructure, the numbers of Indigenous kids in care and the disproportionate numbers of Aboriginal and Torres Strait Islander people in the criminal justice system are clear to anyone working in the area. Or to anyone else who cares to look.

However, in a system divided into distinct policy areas – housing in one department, criminal justice in another – the links are rarely integrated into policy.

The relationship between poor housing and poor health is more widely recognised and has had some, albeit limited, impact on policy.

Poor living conditions:

*...give rise to health risks for members of communities living in those conditions. Lack of essential services such as water and sewerage create environmental health risks...*¹⁶⁵

*It is universally accepted that the attainment of a satisfactory standard of health in any community depends on the provision of certain basic amenities including water supply, sanitation and sewerage facilities, housing and electricity. The high incidence and recurrence of many infectious diseases amongst Aboriginals...result largely from their unsatisfactory environmental conditions.*¹⁶⁶

“The lack of facilities available to Aboriginal people in the places in which they live has been seen as a direct or indirect cause of ill health, both physical and mental” and has been documented in numerous government reports.¹⁶⁷ The extreme disadvantage of Indigenous peoples with respect to housing and infrastructure was succinctly summarised in the 1993 Industry Commission Report into Public Housing:

*...a high proportion of Aboriginal and Torres Strait Islander people continue to be housed in conditions that most Australians would consider unacceptable. They live in houses that are overcrowded, do not meet local government building standards, and do not cater for their cultural needs. Funds for repairs and maintenance fall well short of requirements, and communities often lack basic amenities such as water, sewerage and transport infrastructure. The responsibility for co-ordination and provision of services to communities in rural and remote areas and fringe locations is unclear. Sub-standard housing and infrastructure contribute to problems of health and community welfare generally. The criticisms apply to both urban and remote settings.*¹⁶⁸

The Coalition’s Aboriginal and Torres Strait Islander Affairs Policy recognizes that:

*...much Indigenous ill health is preventable and can be blamed on the poor state of public health infrastructure – water quality, housing and sewerage...*¹⁶⁹

The Royal Commission Inquiry into the death of Barbara Yarrie documents some of the Yarrie children’s health problems caused by their poor living conditions. Barbara and her sister Fay were treated for intestinal parasites and their brother Darrel admitted to the Mater Hospital, Brisbane with

165 *Ibid.*, Vol. 2, p. 426.

166 *Ibid.*, Vol. 2, p. 451.

167 *Ibid.*, Vol. 2, p. 451. The *National Report* of the Royal Commission into Aboriginal Deaths in Custody summarises these reports at Vol. 2, pp. 451-452.

168 Volume 1, AGPS, 1993, p. 141.

169 *Aboriginal and Torres Strait Islander Affairs Policy*, February 1996, p. 16.

pneumonia in 1963 because of the unhygienic state of the council reserve where the family was living. In May of the same year the youngest boy, Sidney, died from bronchopneumonia. In 1966 the youngest child, Carol, died after admission to hospital with gastroenteritis.¹⁷⁰

The illnesses the Yarrie children suffered are classic examples of sickness caused by poor housing and inadequate environmental health hardware.¹⁷¹ It has been known for centuries that living without clean water and sanitation predisposes young children to high rates of diarrhoeal disease such as gastroenteritis.¹⁷² In contemporary Australia, Indigenous children suffer these diseases at a rate that far exceeds all other Australian kids.

In the mid 1980s, for example, Indigenous children were still eighty times more likely to be admitted to hospital than non-Indigenous children for x-ray proven pneumonia.¹⁷³ In the Northern Territory Aboriginal children are seven times more likely to be admitted to hospital for parasitic diseases than non-Aboriginal children.¹⁷⁴ Northern Territory Aboriginal children also have the world's highest documented rate of rheumatic fever: a disease which thrives in overcrowded housing and in conditions of poverty. Rheumatic fever is rare in developed countries.¹⁷⁵

Dispossession ... Dispersal ... Homelessness

The homelessness of Indigenous people is directly linked to dispossession:

*The collective historical experience of Aboriginal people has been one of exclusion from the lands they traditionally occupied and used. As a consequence of that exclusion Aboriginal people lost control over the location, design and function of their living spaces.*¹⁷⁶

The Yarrie family's homelessness began in the same place as that of all Indigenous Australians – with dispossession and exclusion from traditional lands.

*Aboriginal people have been denied the right to live in the locations of their choice or under terms within their control.*¹⁷⁷

After removal from her family, Barbara lived in foster homes, institutions for Aboriginal girls, watch-houses, hospital wards, prison cells. Barbara:

*constantly rejected the harsh institutional settings to which she was habitually committed by the welfare and criminal justice systems, preferring the freedom of the lifestyle of the street.*¹⁷⁸

170 Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrie*, *op. cit.*, pp. 7, 9.

171 Health hardware refers to housing infrastructure like taps, toilets, drainage and septic systems.

172 Pholeros, P., Rainow, S. & Torzillo, P., *Housing for Health - Towards a Healthy Living Environment for Aboriginal Australia*, Health Habitat, 1993, p. 7.

173 *Ibid.*, p. 4.

174 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Diets and Dependency: The Right to Good Nutrition*, speed delivered at the Conference of the 13th National Dieticians Association of Australia.

175 Menzies School of Health Research quoted in "Rheumatic fever plagues Aborigines", *Illawarra Mercury*, 22 April 1996, p. 9.

176 Royal Commission into Aboriginal Deaths in Custody, *National Report*, *op. cit.*, Vol. 2, p. 428.

177 Royal Commission into Aboriginal Deaths in Custody, *National Report*, *op. cit.*, Vol. 2, p. 429.

178 Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrie*, *op. cit.*, p. 3.

Barbara Yarrie's life ended in homelessness. The Royal Commission found that a high proportion of the people who died in custody were homeless.¹⁷⁹

Barbara's story is not uncommon. For many Indigenous people the cycle of institutionalisation and homelessness begins in a mission, a settlement or a town camp where living conditions are substandard and infrastructure non-existent.

The Yarries were forced to live on a settlement, subject to far-reaching controls, invasions of privacy and not free to come and go without fear of eviction.¹⁸⁰ Yet their internment did not provide them with basic infrastructure services: water supply; waste removal; access to health care; and food supplies.

The Yarries' relocation was not a mere matter of convenience or a means for clearing land for non-Indigenous possession and use. Housing was one of the central mechanisms by which integration of the Indigenous community was to be achieved. A 1957 Queensland Native Affairs Annual Report states:

*Housing has always held a very high priority in State Government policy aimed at the ultimate assimilation of the Aboriginal people into the white community. Equally with education, housing provides that medium of uplift without which assimilation could never materialize.*¹⁸¹

The rationale underpinning the use of housing as a tool of assimilation was:

*Aboriginal people would begin to behave like other Australians if they occupied a house which resembled the type occupied by non-Aboriginal people.*¹⁸²

Needless to say, the houses they were 'given' were far from the standard houses occupied by non-Indigenous people. Commonly, housing for Indigenous people: was without internal water supply or had low water pressure; was without electricity or had low voltage supply; lacked adequate communal facilities; and, was poorly maintained, if at all.

Nevertheless, if, as was virtually inevitable, the Indigenous Australian family failed to meet the standards of European/Australian lifestyle required by the authorities, they were punished. They were either sent back to lower level housing; or, worse, declared as having an unfit environment for their children, who would then be removed.

The removal of the Yarrie children, for example, was based on rigid presumptions about what constituted a 'good home'.

Aboriginal parents...were constantly assessed as to how well they were looking after their children according to standards of housekeeping set by non-Aboriginal male bureaucrats....These inspectors literally snooped into women's wash baskets, checking to see if there was unfolded washing. They were tirelessly concerned with how much food was stored in the cupboards, and whether the children's noses were clean.

179 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 2, p. 429.

180 Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrie, op. cit.*, p. 3.

181 Quoted in Paris, C., *Housing in Australia*, MacMillan, Melbourne, 1993, p. 215.

182 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 2, p. 437.

*Aboriginal women were expected to behave like the idealized advertising images as portrayed in contemporary Women's Weekly.*¹⁸³

The children were removed despite official recognition that “*although the living conditions were substandard, the children were well fed and quite happy*”. In none of its reports did the Department question Barbara's parents' love for their children.¹⁸⁴ Nor was it considered that better housing might have provided an alternative to the removal of the children.

Just as assimilationist policies assumed that Indigenous people would want to, and should, live like non-Indigenous people, housing policy has consistently assumed that the nuclear family is the basic unit of every community and that accommodation should reflect this fact.

In general, policy takes no account of the cultural needs of Indigenous people like avoidance relationships, extended kinship ties, responsibilities among family members and visiting patterns.

Indigenous people do not always equate ‘home’ with the built structure of a house. The notion of home for Indigenous people is intimately tied to land and to family:

*Aborigines have repeatedly stressed that, for them, home is wherever a family member extends sustenance, whether emotional or physical... Moreover, the extended family network and family obligations and expectations mean that a person even temporarily living with relatives is never ‘homeless’.*¹⁸⁵

The Aboriginal population also occupies an atypical position within the general Australian population. It is disproportionately young: 40 per cent of the Indigenous population is under the age of 15 as against 22 per cent of Australia's population as a whole.¹⁸⁶ Rates of new household formation are therefore disproportionately high in the Indigenous community. Further, the Aboriginal community has disproportionate numbers of large families living together in comparison with the non-Indigenous community: 20 per cent of Indigenous people live in dwellings with eight or more people.¹⁸⁷

The disparities between the composition of Indigenous families and non-Indigenous assumptions about ‘family’, and the gulf in the understanding of a ‘home’, underpin many of the problems in contemporary housing policy. For example, an Indigenous family may consider the essential features of a home as including location on country, space for extended family, abundant outdoor areas, ease of access to the outside of the house and appropriate buffer zones between houses within a community. A three bedroom brick veneer close to the supermarket hardly fulfils such needs.

Government housing policies denies Aboriginal concepts of how a living space should be used. It is another manifestation of the state preventing Indigenous people living according to their cultures and depriving Indigenous people of control over their lives at a most intimate level.

183 *Ibid*, p. 512.

184 Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Barbara Denise Yarrrie, op. cit.*, p. 12.

185 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 2, p. 433.

186 ATSIAC, *Indigenous Australia Today: An Overview by the Aboriginal and Torres Strait Islander Social Justice Commission*, AGPS, 1995, p. 34.

187 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey*, 1994.

Transitional housing

‘Transitional housing’ was the mechanism for assimilation through housing adopted in remote areas during the 1950s. The idea was that Aboriginal people living on reserves would be provided with simple one, two or three room dwellings without amenities (stage one), before being allowed to progress to similar dwellings with basic amenities (stage two) and finally to standard, fully equipped suburban-type dwellings like those occupied by the non-Aboriginal population (stage three).¹⁸⁸ If an Aboriginal family could live like a non-Indigenous family they were permitted to move on to the next stage.

But transitional housing, like missions and settlements, was often built without appropriate infrastructure:

*Transitional houses appear to have given Aboriginal people the worst of both worlds – dislocation of community social life and poor climatic control, without many compensations in household facilities.*¹⁸⁹

In rural and urban centres housing was used to fragment Aboriginal communities and Indigenous identity. Aboriginal people were provided with housing in rural or urban centres but in the process housing authorities intentionally broke up communities. Aboriginal people were relocated to urban centres where families were ‘scattered’ amongst non-Indigenous households. Not surprisingly, those selected under such schemes had to comply with European standards:

*The Chief Secretary gave an assurance that allocation was made by an officer who was ‘fully conversant with the Aboriginal problem in the Walgett district’ and that ‘the behaviour of the tenants will be kept under review to ensure that they maintain the standard of living expected from them by the Board’.*¹⁹⁰

Australia is at a turning point in public policy in relation to the provision of basic citizenship services. The policy being developed right now will have far reaching effects for all Australians. It will determine the degree to which and the manner in which Australians can exercise their fundamental human rights – to adequate health care, to water, to housing and shelter.

Without decent housing, peoples cannot live decent lives. Ensuring that people can live without fear of deprivation or persecution is ultimately the reason for insisting on adequate housing. In addition, Australian governments are under a legal obligation to ensure that all citizens enjoy the right to housing.

No Australian can survive without these basic goods and services – but some Australians have not been able to count on their availability. If there is one commitment this country must make to social justice, it is that no Australian will be deprived of the basics of survival; if there is any consensus about the future of this country, it must be that all its people have enough to eat, somewhere to live, safe water to drink.

Will the housing policy currently being developed deliver this outcome? In particular, will Aboriginal and Torres Strait Islander peoples be excluded from the delivery of basic citizenship services?

188 Paris, *op. cit.*, pp. 215-216.

189 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 2, p. 444.

190 *Ibid.*, p. 441.

Profile of Indigenous housing

Since colonisation, irrespective of changing policy approaches, one thing has remained true – housing and infrastructure for Aboriginal and Torres Strait Islander peoples has been inadequate.¹⁹¹

The Coalition's pre-election Aboriginal and Torres Strait Islander Affairs policy recognised the huge backlog of need for housing and related infrastructure in Indigenous communities.¹⁹²

The statistics on Indigenous housing and infrastructure needs are stark indicators of the living conditions of most Aboriginal and Torres Strait Islander Australians.

- In 1994 an estimated \$3.1 billion was required to cover the accumulated backlog of Indigenous housing and infrastructure need in rural, remote and urban areas.¹⁹³
- It is estimated that this backlog will take 20 years to address at existing levels of funding.¹⁹⁴
- Between 1986 and 1991 there was no overall reduction in the backlog of housing need of Indigenous Australians, suggesting that the housing provision for Indigenous people has just kept pace with population growth and family formation.¹⁹⁵

The 1992 *National Housing and Community Infrastructure Needs Survey* carried out by ATSI found that:

- 34 per cent of discrete communities had a water supply which was below the standard set by the Commonwealth Government as being safe for human consumption.
- 13 per cent of discrete communities did not have a regular water supply.
- 64 per cent of discrete communities had less than 50 per cent of their internal roads sealed.
- 71 per cent of discrete communities had less than 50 per cent of their access roads sealed or had no road access.¹⁹⁶

The findings of the ATSI *National Housing and Community Infrastructure Needs Survey* underline the status of Aboriginal and Torres Strait Islander peoples as the most disadvantaged group in the Australian community with respect to housing.

- 17 per cent of all families are in housing need, while 38 per cent of Indigenous families live in housing need.¹⁹⁷
- Indigenous families are 20 times more likely to be homeless than non-Indigenous families.¹⁹⁸

191 Royal Commission into Aboriginal Deaths in Custody, *National Report, op. cit.*, Vol. 2, pp. 442, 447.

192 *Aboriginal and Torres Strait Islander Affairs Policy*, February 1996, p. 18.

193 Aboriginal and Torres Strait Islander Commission, *ATSI Annual Report 1994-95*, AGPS, Canberra, 1995, p. 148.

194 *Ibid.*

195 Jones, R., *The Housing Need of Indigenous Australians, 1991*, Centre for Aboriginal Economic Policy Research, ANU, 1994, p. 164.

196 Summary of Survey found in "Building a Partnership", *Discussion Papers of the Indigenous Australians Shelter Conference*, November 1993, p. 39. A discrete community is a community with a majority Indigenous population.

197 ACOSS, *Federal Budget Priorities Statement 1996-97: ACOSS Paper No. 79*, June 1996, p. 85.

- Indigenous people are twice as likely as the rest of the population to be in after-housing poverty.¹⁹⁹

Indigenous Australians occupy a unique tenure position in Australia. In comparison with the broader community, levels of home ownership are very low and reliance on public rental and community managed housing very high.

- 31 per cent of Indigenous people rely on public rental housing in comparison to 6.8 per cent of the non-Indigenous population.²⁰⁰
- 13 per cent of dwellings occupied by Indigenous people are being purchased by them while a further 13 per cent are owned by a usual resident of the household. In comparison, the general Australian population has a home ownership rate of about 70 per cent.²⁰¹

By any standard of judgement, be it a basic commitment to equality, to a decent standard of living, to international legal principles or to domestic commitments, this situation is insupportable.

Australia is a developed, wealthy, first world nation. It has failed to deliver the most basic rights to its First Peoples. This is not news. Australians are well aware of, and some periodically condemn, this blatant failure.

Every few years, the figures are dragged out, accompanied by a predictable cycle: public outcry, political commitment, delegation to departmental committees, silence. A few months later, when public attention has moved to something else, Aboriginal and Torres Strait Islander peoples and maybe just a few others will be aware that there has been little or no action. And little or no change. How do you reconcile that?

In 1994 ATSIIC found that \$3.1 billion would be needed to supply adequate housing, water, sewerage and electricity to Indigenous communities. In response the Labor Government allocated an extra \$232 million to be spent over five years on Indigenous housing and infrastructure. A sum that the then Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, acknowledged fell 'short' of what was required.²⁰²

In 1996, in its pre-election policy, the Coalition stated that, should it win government, the provision of water, sewerage and housing to Indigenous communities would be its "*highest priority*".²⁰³

More than bricks and mortar

The key fault in housing policy to date has been a lack of attention to practical outcomes. In the convoluted debates about housing the ultimate objective is all too often lost, and the real question

198 Jones, *op. cit.*, p. 158.

199 *Ibid*, p. 163. After housing poverty exists if the residual income available after housing costs have been met is insufficient to maintain a reasonable standard of living. The after-housing poverty line (AHPL) is a benchmark of the disposable income required to support the needs of the household for other non-housing goods and services. If the residual after-tax household income available after deducting housing cost payments falls below the AHPL the household is said to be in after housing poverty.

200 Jones, *op. cit.*, p. 149 and Department of Housing and Regional Development, *op. cit.*, p. 18.

201 ABS, *National Aboriginal and Torres Strait Islander Survey 1994*, Canberra 1995, p. 25; ATSIIC, "The Indigenous Australians Shelter Conference" *op. cit.*, p. 67.

202 Quoted in Tatz, C., "We fail Aborigines if we prune the past", *The Australian*, 3 July 1996, p. 13.

203 *Aboriginal and Torres Strait Islander Affairs Policy*, *op. cit.*, p. 18.

not asked – at the end of the day, are Aboriginal and Torres Strait Islander peoples living in decent houses with essential services, in the way that they want to live?

Audits of how much money is spent mean nothing if the dollars and cents are not buying what people need. There is not much point in having nicely drafted legislation, superb contracts for consultants and attractive committees, if taps do not work or houses are falling apart two years after they are built.

Historically, attention to real outcomes has been notable in its absence. Policies have not been result oriented. They can and do run ad infinitum and continue to receive funding while delivering appalling outcomes.

For example, a policy requires a certain amount of money to be spent on providing a specified number of houses in a given area. The houses are built, the box is ticked and we have, apparently, successful implementation. Does anyone ask what the houses are like? Are people able to live in them for more than a few months? When they do live in them, can they wash their children? Do the toilets work? Can they prepare a meal? Do the houses suit the peoples' needs?

No such questions are regularly asked. There is no evaluation of the quality of the outcomes.

What is more, the way in which funding is provided actually makes it more likely that bad houses will be built.

First, particularly in remote and rural locations, builders and trades people may be scarce. Knowing they will almost certainly get this job or the next, they need pay no attention to the quality of their work.

In fact, providing a defective product can generate more business – building repairs will be needed; a replacement house will have to be built two years down the track.

Second, when a shoddy product is delivered, no one, other than the Aboriginal people who have to live there, checks or notices. The systemic absence of adequate monitoring means that, from the contractors' point of view, there is no cost to providing a sub-standard service.

Such carelessness is camouflaged by well-established racist stereotypes. The blame for the rapid depreciation of new housing stock is easily dumped on the inhabitants.

Even when attempts are made to provide 'quality' services to Indigenous communities the absence of adequate monitoring sees the failure of expensive and well intentioned projects. The 1994 *Water Report* of the Race Discrimination Commissioner found that conventional technology introduced into Indigenous communities often fails. Failing technology can be the result of a community placing different cultural values on the service to the values of the experts delivering the service. Its deterioration may also be accelerated by denying the community control of the service and by a lack of training for community members who could otherwise maintain it.

The failure of policy-makers to evaluate this often problematic relationship between Indigenous communities and experts and technicians means that Aboriginal and Torres Strait Islander peoples:

- continue to be provided with housing and infrastructure projects that fail;
- continue to be denied the opportunity to negotiate alternative options for service provision;

- continue to be expected to have expert knowledge of housing and environmental health matters not expected of the non-Indigenous community; and,
- continue to be required to make decisions on projects in their communities, often involving significant sums of money, after inadequate consultation and with inadequate advice.

The failure of housing policy to monitor qualitative outcomes is illustrated by its inability to provide Indigenous people with meaningful training opportunities. Some housing policy involves local community members in training and skills programmes in the construction phase. Training has not, however, encompassed other stages of service delivery like design, project supervision or repairs and maintenance which means that once a project is completed community members may have amassed skills they are unable to use and projects will have a short life span because no-one in a community has the skills to sustain them.

Third, systems generally do not provide a feedback loop which includes the consumer. The experience of the people who live in the houses, the people who know best whether the policy has been a success or failure, do not inform future policy development and service delivery.

Admittedly, policy makers have acknowledged this problem, and many systems now have some built-in evaluation component. However, evaluation is all too often at a general level, which fails to detail the experience of what it is like to live in the house.

The Aboriginal and Torres Strait Islander Commission's Health Infrastructure Priority Projects (HIPP), for example, contractually require that works carried out under the projects are inspected both during and on completion of a project. The Indigenous community involved must agree that final completion of the project has been achieved.

But even the HIPP projects, acknowledged as leading examples of best practice in housing policy, have been criticised. It is suggested that they lack an in-built formal assessment procedure to measure outcomes and that the evaluation procedure, as it now exists, overlooks the many complex details of living in a house on a daily basis.²⁰⁴

Evaluation must be evaluation of real outcomes for children, women and men in communities. Until there is that type of attention to concrete outcomes on the ground, we are missing the point.

The right to housing

There has been a great deal of elaboration of the content of the right to housing at an international level. International human rights jurisprudence (that is, the law and its elaboration) can offer Australian policy-makers much guidance on the content of this right.

Since its inception in 1945, the United Nations has developed a substantial body of explication of the meaning and nature of human rights. The primary statement of the right to housing is Article 11 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which provides in part that:

*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate ... **housing***

204 See pp. 44-48.

The Committee on Economic, Social and Cultural Rights is responsible for overseeing the implementation of the *ICESCR*. In General Comment No. 4, 'Right to Adequate Housing',²⁰⁵ the Committee clarifies some of the implications for States who ratify the *ICESCR* regarding their commitment "to respect, to protect, to promote and to fulfil"²⁰⁶ the right to adequate housing. It is a central document for housing policy-makers.

General Comment No. 4 makes it clear that the right to housing is about more than simply having a roof over your head. It embraces the broader circumstances of your accommodation.

In every day language, it states that the right to housing includes the following:

- having sufficient infrastructure – in other words, being able to bath your kids, to cook your meals and to stay healthy;
- being able to enjoy your culture while still being adequately sheltered; and,
- being able to live in a place where you have the chance to get a job.

State parties to the *ICESCR* must ensure its citizens have housing conforming with this broad interpretation and, in particular, give priority to disadvantaged groups to achieve this standard. The General Comment recognises housing policy must be developed in consultation with those who need to be housed, and that they should also participate in the delivery of policy. It is about the practical participation of the people who will actually live in the house being designed.

Article 2 of the *ICESCR* does not require that State parties to the Covenant immediately deliver all its citizens adequate housing. It requires instead that the full realization of the right be achieved progressively by all appropriate means and to the maximum of a country's available resources.

The meaning of the right to housing has received further attention and clarification by the UN appointed Special Rapporteur on Housing Rights. The Special Rapporteur undertook a three year study on developing practical measures toward realising the right to housing as a human right.

As well as evaluating what the right to housing involves, the Special Rapporteur, Justice Sachar, clearly set out what the right to housing is **not**.

He stated that:

The legal recognition and obligations inherent in housing rights, at the most basic level do not imply the following:

- (a) *That the State is required to build housing for the entire population;*
- (b) *That housing is to be provided free of charge by the State to all who request it;*
- (c) *That the State must necessarily fulfil all aspects of this right immediately upon assuming duties to do so;*

205 "The General Comment is the single most authoritative legal interpretation of what the right to adequate housing actually means in legal terms under international law. The Comment provides a broad-reaching definition of the right to housing and contains numerous clauses and principles which are, in one way or another, relevant for all countries", Leckie S., *Legal Provisions on Housing Rights; International and National Approaches*, COHRE Booklet, 1994, p. 59.

206 For a more detailed analysis of what these four components imply for the right of housing see Leckie, S., *Towards and International Convention on Housing Rights*, The American Society of International Law, 1994, pp. 21-25.

- (d) *That the State should exclusively entrust either itself or the unregulated market to ensuring this right at all; or*
- (e) *That this right will manifest itself in precisely the same manner in all circumstances or locations.*²⁰⁷

The Special Rapporteur recognized that qualifications must be made to some of these findings so that States do not ‘misinterpret or abrogate’ responsibility, especially towards disadvantaged groups:

- (a) *That once such obligations have been formally accepted, the State will endeavour by all appropriate means possible to ensure everyone has access to housing resources adequate for health, well-being and security, consistent with other human rights;*
- (b) *That a claim or a demand can be made upon society for the provision of or access to housing resources should a person be homeless, inadequately housed or generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights;*
- (c) *That the State, directly upon assuming legal obligations, will undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right in question.*²⁰⁸

In addition, this paper affirmed that the seven aspects mentioned in the General Comment constituted:

*...entitlements associated with a right to adequate housing...Any person, family, household, group or community living in conditions that do not fully meet the terms of entitlement could reasonably claim that a human right, their right to adequate housing, is being violated under international law.*²⁰⁹

One important aspect of the elaboration provided in these texts, is that it makes it clear that the right to housing is about achieving outcomes. They are not concerned with abstract theoretical discussions – they are concerned with the type of housing citizens of a nation state will actually live in.

The international elaborations could provide a useful working model for Australian policy-makers.

An outcome-driven definition of the right to housing is notably absent from Australian housing policy. Even the new Commonwealth-State Housing Agreement (‘CHSA’), currently Australia’s principle policy document on public housing, fails to give a clear statement of required outcomes. While performance indicators are built into the agreement, and very general principles set out in the preamble, they are relatively content free.

The core set of outcomes in the current CSHA relate, for example, to ‘the standard of rental housing provided’, ‘consumer satisfaction’, and ‘efficient use of assets’. The content of these measures is not included in the Agreement despite the claim that the Ministers and State Ministers have agreed to ‘a core set of nationally consistent outcome measures’. Specification of the outcomes and associated performance indicators is left instead to the Strategic Plan of each State and Territory Government under the Agreement.²¹⁰

207 Special Rapporteur's Report UN Doc E/CN.4/Sub.2/1995/12, p. 4.

208 *Ibid.*, p. 5.

209 *Ibid.*, p. 24.

210 Part 4(4) *Housing Assistance (Form of Agreement) Determination No. 1*, Gazetted 17 July 1996.

Australia has, historically, strongly advocated the importance of economic, social and cultural rights. However, in July 1996 at the United Nations Habitat II Conference, Australia backed away from this position. In its ‘Statement of Commitments’ Australia stated that it was committed to “*ensuring that there are specific provisions in place to protect disadvantaged members of the community*”. Specifically, it recognised that Aboriginal and Torres Strait Islander people experience housing disadvantage and stated that it was committed “*to raising housing and infrastructure standards and environmental health outcomes for indigenous Australians through a range of measures including affordable and appropriate housing*”. It also noted that “*the effectiveness of strategies depends on how well local communities are involved in the planning of projects and the ongoing management of housing and essential services*”.²¹¹

The Government’s statement failed, however, to include any reference to the right to housing as a human right. Nor did it include any definitive commitment to time frames or elaboration of how equal enjoyment of the right will be attained.

This move to deny the right to housing the status of a human right has recently been reflected in domestic policy. In the Second Reading Speech on the *Housing Assistance Act 1996* (Cth), the Government stated “*the Australian community holds housing and shelter to be a fundamental human need*”.²¹²

The Government asserted this although it had reaffirmed its commitment to *ICESCR* in its pre-election policy as well as supporting “*the UN as a vehicle for the advancement of human rights*” and recognising that “*international commitments are an important part of Australia’s relationship to the rest of the world*”.²¹³ It would seem that despite Australia’s commitments to various international treaties that include the right to housing, the Government declines to refer to the right to housing as a fundamental human right and is, instead, using the language of ‘need’ and ‘disadvantage’.

However, it should be noted that at Habitat II against the agenda item ‘International Decade of the World’s Indigenous People’, Australia circulated a statement containing some usefully explicit and concrete commitments. Specifically:

to improving the well being of indigenous peoples, and in consultation with indigenous peoples to raising housing and infrastructure standards and environmental health outcomes for indigenous Australians to, at least, the level equivalent to standards and outcomes available for non indigenous Australians by the year 2006. Special attention will be given to the importance of providing housing that meets the needs of the diversity of circumstances, particularly in rural and remote areas.

Such a commitment is commendable and clearly appropriate if the human right to housing is to be translated into practical results. While it is in line with the Coalition’s pre-election policy this statement is the most concrete commitment to outcomes yet.

But the status of this statement is unclear. Although it was circulated at Habitat II this document apparently did not receive Ministerial approval before it was given to Conference delegates. It has been impossible to verify whether or not the statement represents Australia’s official position on Indigenous housing and infrastructure or whether, had the Minister seen it, he would have refused its release onto the international stage.

211 Delivered by His Excellency David Evans p. 4 but not yet released.

212 *Housing Assistance Bill 1996* (Cth), *Second Reading Speech*, *op. cit.* p. 4.

213 *Law and Justice Policy*, February 1996, p. 25.

Bureaucratic bungling and uncertainty of this calibre is clearly unacceptable. It is extraordinary that the Australian Government should allow such an incident to occur at a United Nations conference and then fail to clarify its position on Indigenous housing and infrastructure.

The document's circulation at an international event like Habitat II necessarily gives it *de facto* standing as a statement of the Australian Government's position on Indigenous housing and infrastructure. It can confidently be predicted, however, that even if the statement does accurately represent the Government's position, fulfilling this commitment will not be a priority. In the current climate of fiscal restraint and given Government cuts to pivotal social welfare departments it is, to say the very least, difficult to see how this commitment will be honoured. They appear irreconcilable.

It is particularly troubling to contemplate that a statement made at an international conference endorsing this Government's support for the International Decade of the World's Indigenous People could be blatantly ignored at a domestic level. It is disturbing that after numerous inquiries to relevant Government Ministers and departments the status of the statement remains a mystery.

As a signatory to the *ICESCR*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*, Australia is required to provide progress reports to the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of All Forms of Racial Discrimination on its implementation of these instruments. Such reports should include information about the degree to which particularly disadvantaged groups, such as Aboriginal and Torres Strait Islander peoples, enjoy the rights under the Covenants, such as the right to housing. It should indicate difficulties experienced in attaining full compliance and, in clear and concrete terms, action it intends to take to achieve full implementation. The report should frankly assess progress towards operative goals.

Australia's reports to date have failed to provide such information or commitments in relation to housing. The third report under the *ICESCR* is now long overdue. This provides the Government with a chance to rule a line, set out its objectives and regularly, thoroughly report on its progress towards equality. Just as the Australian Government rightly requires accountability for specific expenditure of public monies, so the Australian Government should be accountable for specific outcomes.

What does Australian housing policy look like?

Commonwealth-State Housing Agreement

The major mechanism for providing public housing assistance in Australia is the Commonwealth-State Housing Agreement (CSHA), a series of financial assistance agreements between the Commonwealth and the States and Territories. These agreements, the first of which was negotiated in 1945, fund the construction and acquisition of public rental housing. The *Housing Assistance Act* 1996 (Cth) provides a framework for the current agreement.²¹⁴

The bulk of funding provided under the CSHA is in the form of untied capital grants to the States and Territories. Untied grants are allocated on a per capita basis and must be matched dollar for dollar by the State/Territory. The rest of the funding under the agreement is allocated in the form of tied grants to the States/Territories for specific programmes such as the Community Housing Program, which provides funds to enable local government, welfare and community organisations to purchase, construct, lease or upgrade rental housing.

²¹⁴ The principles guiding the CSHA are outlined under recital E of the agreement.

In 1979, recognizing the acute disadvantage of Indigenous Australians, the Commonwealth Government established the tied Aboriginal Rental Housing Program (ARHP) under the auspices of the CSHA. Its aim was to close the gap between Indigenous and non-Indigenous people in need of housing by accelerating Indigenous people's access to public and community rental accommodation.

The ARHP is intended to supplement, not replace, general public housing services. Each State and Territory is guaranteed a minimum amount of funding under the programme and is not required to match the funds. Allocations are made by the Commonwealth to the States and Territories on a needs basis drawing on data collected in the 1987 *Housing and Accommodation Needs Survey* conducted by the then Department of Aboriginal Affairs and the Aboriginal Development Commission. Since 1989/90 the total annual funding allocation for this programme has been set at \$91 million.

Community Housing Infrastructure Program and National Aboriginal Health Strategy

The Commonwealth also funds Indigenous housing and infrastructure through ATSIC's Community Housing Infrastructure Program (CHIP) and the National Aboriginal Health Strategy (NAHS).

CHIP is designed to supplement funding of infrastructure and essential services inequities:

As stated in the CHIP objectives, the main responsibility for providing housing and infrastructure to Aboriginal and Torres Strait Islander residents rests with the State/Territory and Local Governments. The ATSIC program is supplementary, to enable the catching up of the backlog caused by many years of neglect.²¹⁵

ATSIC uses objective data on unmet needs to allocate funds to areas with high levels of need. For health, housing and infrastructure programmes the *Housing and Community Infrastructure Needs Survey* provides this data. The allocation of programme funds takes into account community submissions to Regional Councils, Regional Plans and local and State/Territory initiatives and government policies.

Critiques of public housing policy

Public housing and the Commonwealth-State Housing Agreement have been the subject of extensive review by both government initiated processes and community-based organisations. These reviews have identified areas of reform for public housing arrangements and some have outlined problems with public housing for Indigenous Australians.

Several key criticisms appear consistently.

1. The lack of clearly delineated roles and responsibilities between levels of government providing public housing and infrastructure.

The Report into Public Housing of the Industry Commission included the directive:

...that a better delineation of responsibilities between the Commonwealth and the States be introduced such that the States become fully responsible for the purchase and construction of public housing. The Commonwealth's main role should be to provide income support (essentially via block grant rent assistance to the States) for all households in both public

215 Industry Commission, *Public Housing*, AGPS, 1993, Vol. 2, p. 318.

*and private rental. The Commonwealth should also provide specific support to encourage housing provision in particular States, for say, community housing initiatives.*²¹⁶

In its final report *Agenda for Action* in December 1992, the National Housing Strategy identified three preconditions for reforming the housing industry in Australia, including:

*...the need to cement co-operative and co-ordinated relationships between the three spheres of government, involving the industry and community.*²¹⁷

ATSIC's submission to the Industry Commission stated that:

*At present, confusion exists because of the duplication of programs and services and the number of Government Department and Agencies involved. On the one hand, high administrative costs result from these duplicated efforts while on the other hand, there are areas where the confusion as to who is responsible for the provision of services results in no services being provided at all. State and Territory Governments at present are not meeting their responsibility in providing services for their residents, necessitating ATSIC putting in greater effort.*²¹⁸

In its pre-election Aboriginal and Torres Strait Islander Affairs policy in early 1996 the Coalition repeated these criticisms and recognised that:

*The Commonwealth, States/Territories and Local Governments have not always met their responsibilities to Indigenous people. There are gaps in services, service duplication, and buck passing. This situation must be clarified to ensure that all levels of government are clear about their responsibilities to Indigenous Australians and fulfil these responsibilities.*²¹⁹

Again, the findings of the 1996 Audit Commission Report state that, with respect to general service provision to Aboriginal and Torres Strait Islander communities:

The need for greater efficiency and effectiveness in the delivery of services to Aboriginal and Torres Strait Islanders is broader and more pervasive than that arising from overlap and duplication with the States.

Despite considerable checking of inputs, there is no satisfactory accountability for results due to:

– the dispersal of responsibility amongst the Aboriginal and Torres Strait Islander Commission(ATSIC), other agencies with specific programs and mainstream Commonwealth and State programs

*– the lack of effective priority setting, coordination and monitoring of programs.*²²⁰

216 Quoted in Parliamentary Research Service, *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/9*.

217 See also summary of national workshop held by ACOSS in conjunction with national Shelter in Parliamentary Research Service, *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/95*, *op. cit.*, p. 15.

218 Industry Commission, *op. cit.*, Vol. 1, p. 147.

219 *Aboriginal and Torres Strait Islander Affairs Policy*, *op. cit.*, p. 13.

220 *Audit Commission Report*, AGPS, 1996, p. 61.

2. The lack of transparency and accountability in the provision of public housing.

The Industry Commission recommended that:

*...there should be greater transparency and accountability mechanisms in place for the housing authorities.*²²¹

ACOSS also agreed that:

*... the introduction of performance-based agreements related to the objectives of the CSHA be supported.*²²²

The 1996 Audit Commission recognised lack of accountability and monitoring of programmes as significant factors in the current inadequate delivery of services to Aboriginal and Torres Strait Islander peoples.

3. The inadequate resources for public housing.

An analysis of waiting lists for public housing, in particular the number of recent additions to waiting lists, shows that there is a substantial shortfall in public housing stock.²²³ The Commonwealth's investment in public housing fell by 40 per cent in real terms between 1986 and the mid 1990s. The net annual increase in the number of public housing dwellings, expressed as a percentage of total public housing dwellings, has declined from 5.5 per cent in 1986-87 to 1.9 per cent in 1992-93.²²⁴

The reviews of public housing have consistently identified:

*the need to provide adequate resources for housing and infrastructure.*²²⁵

The Industry Commission Report recognised the:

*...failure of public housing stock to keep pace with rising demand.*²²⁶

These reviews acknowledged the ongoing and desperate state of housing for Aboriginal and Torres Strait Islander peoples. The Industry Commission reported that Indigenous peoples are the most disadvantaged group in Australia with respect to public housing and recommended:

that the housing assistance provided to Aboriginal peoples and Torres Strait Islanders should be at least at the same level as that provided to other public housing tenants; and

221 *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/95, op. cit.*, p. 14.

222 *Ibid.*, p. 15.

223 Public Housing waiting lists increased by 40 per cent between 1986-87 and 1993-94. For every household accommodated in public housing over this period, two more households applied to be accommodated. ACOSS, *Federal Budget Priorities Statement 1996-97: ACOSS Paper No. 79*, June 1996, p. 88. See *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/95, op. cit.*, p. 1.

224 ACOSS, *Federal Budget Priorities Statement 1996-97, op. cit.*, p. 88.

225 National Housing Strategy, *Agenda for Action*, December 1992, p. ix.

226 Industry Commission, *op. cit.*

*that the Commonwealth should come to an agreement with the States and Territories on the funding responsibility for the housing costs for Aboriginal peoples and Torres Strait Islanders that exceed the capacity of the State public housing authorities.*²²⁷

ACOSS also recognised the extreme need in Indigenous communities for public housing:

*...the present provision of housing for Aboriginal and Torres Strait Islander peoples is “grossly inadequate”. Not only are more resources required to overcome this situation, but there is a need for greater self-determination with possibly the Aboriginal and Torres Strait Islander Commission playing a co-ordinating role. The provision of housing assistance should be part of an integrated package rather than housing being seen as a separate infrastructure need.*²²⁸

Responses to critiques

In April 1995 in response to such reviews of public housing, the Council of Australian Governments (COAG) endorsed principles for the reform of public housing policy, including:

clearer delineation of Commonwealth and State/Territory roles and responsibilities

national needs assessment

outcomes-based arrangements

*consumer rights and responsibilities*²²⁹

At this meeting the Premiers agreed to “*a major overhaul of the public housing system so that its operation better reflects the needs of low income earners and the location of employment opportunities*”.²³⁰ The commitments to the reform of public housing included:

the Commonwealth accepting responsibility for housing subsidies and affordability;

States and Territories taking responsibility for the management and delivery of public housing service; and

*improvements to Aboriginal housing via the Indigenous Housing Strategy.*²³¹

In June 1996, the COAG meeting reaffirmed its commitment to this reform agenda for the provision of housing assistance.

A new CSHA came into operation on 1 July 1996 under the *Housing Assistance Act 1996* (Cth). This agreement introduces some reforms while negotiations take place between the States/Territories

227 *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/95, op. cit.*, p. 14.

228 *Ibid.*, p. 16.

229 Department of Housing and Regional Development, *Annual Report 1994-95*, AGPS, 1995, pp. 21-22.

230 *Public Housing and the Commonwealth-State Housing Agreement: Current Issues Brief No. 44 1994/95, op. cit.*, p. 18.

231 *Ibid.*

and the Commonwealth with respect to “*further significant longer-term reform*” in public housing.²³²

National commitment

The recurrent problems in Indigenous affairs caused by overlapping bureaucracies and complex funding arrangements led in 1992 to the Heads of Government *National Commitment to Improve Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders (National Commitment)*. The *National Commitment* outlines key principles and objectives for achieving greater co-ordination of Aboriginal and Torres Strait Islander programmes and services.

In June 1993 the Housing Ministers’ Conference endorsed an eight point framework to carry out the *National Commitment*. In June 1994 the National Indigenous Housing Strategy was agreed to by the Commonwealth Minister for Housing and Regional Development and ATSIC as the basis for “*a joint partnership for planning and delivery of Aboriginal and Torres Strait Islander housing under a coherent national housing policy framework*”.²³³

The strategy envisaged bilateral agreements between the Commonwealth and States to implement more efficient arrangements for the planning and delivery of Aboriginal housing and infrastructure. The major long-term objectives of the National Indigenous Housing Strategy are to pool all identified Indigenous housing funds in each State/Territory and to establish fully Indigenous decision-making structures to take prime responsibility for planning, allocation and policy decisions at the State and local level.²³⁴

An objective of the *National Commitment* is that:

The Governments of Australia agree to:

- 3.5 *ensure that Aboriginal peoples and Torres Strait Islanders receive no less a provision of services than other citizens and in so doing aim to provide:*
- (a) *improved access of Aboriginal peoples and Torres Strait Islanders to mainstream programs;*
 - (b) *services which are adequate and culturally appropriate;*
 - (c) *appropriate information about their rights to and availability of services;*
 - (d) *effective resourcing of services; and*
 - (e) *Aboriginal peoples and Torres Strait Islanders and communities with the opportunity to negotiate, manage or provide their own services.*

The guiding principles of the *National Commitment* are:

- 4.1 *empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders;*

²³² *Housing Assistance Bill 1996 (Cth): Second Reading Speech*, p. 2.

²³³ Smith, B., Research notes for AIATSIS, *An Investigation of the Impact of Commonwealth/State Relations on Aspects of Community Development in Aboriginal and Torres Strait Islander Communities: Housing and Associated Services*, unpublished, February 1996, p. 14.

²³⁴ *Ibid.*

- 4.2 *economic independence and equity being achieved in a manner consistent with Aboriginal and Torres Strait Islander social and cultural values;*
- 4.3 *the need to negotiate with and maximise participation by Aboriginal peoples and Torres Strait Islanders through their representative bodies...in the formulation of policies and programs which affect them;*
- 4.4 *effective co-ordination in the formulation of policies, and the planning, management and provision of services to Aboriginal peoples and Torres Strait Islanders by governments to achieve more effective and efficient delivery of services, remove unnecessary duplication and allow better application of available funds; and*
- 4.5 *increased clarity with respect to the roles and responsibilities of the various spheres of government through greater demarcation of policy, operational and financial responsibilities.*

Homeswest

For too many Aboriginal families eviction is a part of life. The enormous human cost of being evicted – the disruption, instability, scarcity of housing options – can lead to homelessness.

In Western Australia the public housing provider is Homeswest. The recent push to corporatise the public service has caused a fundamental shift in the approach of Homeswest, which has worked vigorously to reform its operations in line with commercial business practices. This shift has resulted in Homeswest providing and managing public housing with increased emphasis on economic imperatives.

Bottom line, public housing authorities are responsible for providing safe, secure and affordable housing to the most disadvantaged in the community. In its 1995 Annual Report Homeswest stated that its mission “*is to provide a quality service to ensure Western Australians have access to housing*”.²³⁵ The quest for profit or even cost recovery may be incompatible with its mission.

In a commercial real estate agency, breaches of tenancy agreements are dealt with by evicting tenants, writing-off bad debts and replacing bad tenants with good tenants. Recent statistics suggest that Homeswest has adopted such an approach with its tenants, although Homeswest claims that eviction proceedings are instigated only when continual default of tenancy agreements occurs. From January to February 1995, Homeswest carried out 8 bailiff assisted evictions. In August 1995 that number had increased to 31. By 31 December 1995 Homeswest had instigated 101 bailiff assisted evictions – a three fold increase in the last quarter of 1995.²³⁶

On purely economic grounds such an approach is misplaced and short-sighted. If an eviction occurs for rental arrears or tenancy debts that money is lost if the eviction proceeds and is only recovered if a tenant later negotiates an agreement to repay the money.

Although carried out in the name of good business and cost recovery a strictly enforced eviction policy costs the state dearly – the costs are manifested in dollar terms in the criminal justice system,

235 Quoted in Perth Aboriginal Medical Service Inc., Media Release, February 1996. See also Human Rights and Equal Opportunity Commission, Transcript of evidence given by Ms Jodie Broun, Director Aboriginal Housing Directorate, Homeswest to National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Perth, 16 May 1996, unpublished, 1996, p. 240.

236 Deaths in Custody Watch Committee (WA), *Submission to National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Perth, 13 May 1996, p. 3.

in welfare agencies, in schools and in health centres and hospitals. The social costs of this approach are also significant – rising crime rates, social unrest and increased levels of violence. The human cost involved, especially to the kids, is enormous – physical, mental and emotional stress which often shapes a child's future.

Homelessness is frequently the final result of eviction from public housing, which places an increased burden on community organisations and other government departments. In many cases the eviction of a tenant by Homeswest displaces a problem – shifting it from the jurisdiction of Homeswest to that of another agency.

If the maintenance of Homeswest as a viable economic entity becomes the cornerstone of public housing provision, those most in need of housing in Western Australia will inevitably be excluded from it. For Indigenous families eviction often compounds their marginalisation and disadvantage. A very real link exists between eviction, increased levels of homelessness in the Indigenous community and the removal of Aboriginal children from their families.

A young Aboriginal woman with two small children, one with a chronic ear infection, is evicted from her home. The public housing authority which manages her property justifies her eviction on the grounds that she has breached her tenancy agreement by falling into rental arrears and on numerous occasions has had too many other family members temporarily staying in her home. The eviction goes ahead despite several letters from her young son's doctor outlining the impact eviction will have on the little boy's health.

Prior to the eviction, the woman's obligations to her family had taken a heavy toll on her paltry budget. Medications for her son's infection and funeral costs for her uncle's burial meant that she didn't have enough money to cover the rent for a few weeks...

...the impact of her eviction has an unfortunate domino-effect on her extended family. She 'stops' with relatives who also live in public housing. She knows she's also putting their tenancy agreements at risk. Fearing this, she sends her two children to the homes of other family members. The upheaval takes its toll on all of them - her young son's ear infection is now serious. He is in too much pain to attend school.

The young woman's debt with the housing authority will impact on her future capacity to rent from them - she will need to clear the debt or negotiate an agreement with the housing authority to repay it along with on-going rental charges if she is to be rehoused.

Collecting concrete information on Homeswest's operations has been extremely difficult. Until recently the authority apparently did not keep data on the ethnicity of its clients. Homeswest has always maintained that it was unable to identify the race of its clients from its statistical records. In the last year, however, Homeswest has produced some limited data relating to Aboriginality and believes that by the end of 1996 its information systems will have been upgraded to collect and disaggregate information relevant to tenants' race.²³⁷ Such changes are to be applauded.

In 1994, Aboriginal clients lived in 2 550 properties tagged specifically for Indigenous clients. While the actual number of Indigenous people also living in the 33 601 'mainstream' Homeswest houses is not known,²³⁸ it is estimated that Aboriginal people make up a further 11 per cent of Homeswest's

237 Human Rights and Equal Opportunity Commission, Transcript of evidence given by Ms Jodie Broun, *op. cit.*, p. 251.

238 Department of Housing and Regional Development, *Housing Assistance Act 1989: Annual Report 1993-94*, AGPS, 1995, p. 39.

tenancies²³⁹ and, therefore, represent a significant proportion of their client base. Homeswest escapes an important accountability check when it fails to monitor the impact of its policies on specific groups and the possible discriminatory operation of its procedures.

The need for public housing authorities to operate efficiently is not in question. It is essential to reform of the industry. As is the need for their clients to fulfil certain tenancy obligations to ensure the smooth operation of the authority.

Homeswest requires its tenants to pay the rent, maintain suitable property standards and live in harmony with their neighbours. These tenancy requirements are not in themselves problematic but “difficulties arise when these simple rules are contextualised over the range of tenancy situations presented to Homeswest at any one time”.²⁴⁰ Those lowest on the socio-economic ladder make up Homeswest’s client base. Social, cultural and economic stresses may leave tenants unable to meet the criteria of the ‘good’ tenant and lead to breaches of the tenancy agreement.

Homeswest has the ultimate weapon at its disposal - eviction. As such, and still recognising that it is crucial that tenancy conditions are ultimately fulfilled, it is axiomatic that Homeswest has the superior capacity to initiate reasonable options and strategies to short-circuit potential evictions. In response tenants must fairly confront the issues that have place their tenancy in jeopardy and consider the options being made available to them by Homeswest.²⁴¹

Eviction

As the houser of last resort, and as a landlord, Homeswest occupies the dominant position in the landlord-tenant relationship. It is crucial then that a balance is struck between the efficient operation of Homeswest and the fulfilment of its ultimate aim to provide affordable, safe and secure housing to those most in need. Policies, procedures and safeguards must preserve Homeswest’s aim, protect its clients and ensure non-discriminatory operations.

Mr Graham Kierath, Western Australian Minister for Housing, in apparent conflict with Mr. Joyce’s statement, recently stated that “Aboriginal families are treated in the same way as all other Homeswest customers”.²⁴² This is the basic problem with Homeswest’s approach, which partly explains why Aboriginal people in Western Australia have borne the brunt of Homeswest evictions. By treating all clients generically, as if they are the same, Homeswest fails to take into account the specific issues facing certain groups and fails to deliver equitable outcomes.

As a manager of public housing facilities Homeswest must tread a difficult path between ensuring that properties are well cared for and tenants act responsibly, and taking into account the special needs of some of the more disadvantaged members of the community.²⁴³

Mr Greg Joyce, CEO of Homeswest

239 Human Rights and Equal Opportunity Commission, Transcript of evidence given by Ms Jodie Broun, *op. cit.* p. 249.

240 Shelter WA, *Report from the Evictions Project*, September 1996, p. 4.

241 *Ibid.*, p. 5.

242 Mr Graham Kierath, Minister for Housing in correspondence to Mr Ted Wilkes, Director Perth Aboriginal Medical Service Inc., 2 July 1996.

243 Mr Greg Joyce quoted in Butler, B., "Tenancy eviction pleas rejected", *Sunday Times*, 10 March 1996.

Although Homeswest claims that “our policies are sufficiently flexible to ensure that we can account for cultural differences”,²⁴⁴ there is much to suggest that evictions by Homeswest have had a disproportionate impact on its Aboriginal clients.

Aboriginal people have to virtually abandon their families and culture if they live in a Homeswest house. You are not permitted freedom in a Homeswest property.²⁴⁵

Under the *Residential Tenancies Act 1987* (WA) (‘RTA’) several avenues exist for the eviction of a tenant. Section 64 allows a landlord to evict a tenant without specifying the grounds of eviction giving not less than 60 days notice to the tenant. Section 62 of the act allows a landlord to evict a tenant for a breach of the tenancy agreement which has not been remedied. Rental arrears, water consumption debt and tenant liability debt are often the cause of evictions under this section. This provision provides tenants with very limited time frames to remedy breaches.

It has been suggested that Homeswest’s use of section 64 has recently diminished but that evictions have increased dramatically under section 62 of the *RTA*.²⁴⁶

The time frames under section 62 disadvantage Aboriginal clients of Homeswest for a number of reasons. First, many Aboriginal people do not read or write. The issuing of written notices under this section means that many people threatened with eviction will be unaware of that threat and unable to remedy the breach within the short amount of time made available to them. This is particularly the case for notices issued for rental arrears.

Next, the acute disadvantage of many Aboriginal tenants means they will be unable to remedy breaches involving the payment of debts in the very short time stipulated under this provision. Family and cultural responsibilities may impact significantly on the capacity of Aboriginal clients to pay rent and other charges such as excess water. A funeral or illness in the family may leave Indigenous tenants with insufficient money to pay their rent and meet their other expenses.

In a decision to evict, Homeswest’s policy does not require that the decision-maker consider the implications of eviction for the health of the tenants concerned. Medical advice is often submitted to Homeswest by tenants attempting to resist eviction.

Homeswest does not require a medical practitioner to consider such evidence before the decision to evict is made and a medical practitioner is not involved in the eviction appeals process.

More than any other group in Australia, Indigenous people are suffering from life threatening and debilitating illnesses. For many Aboriginal tenants, eviction will have serious consequences for their health and often the health of their kids. Homeswest's eviction policy fails to recognise the difference in health status of its Indigenous clients.

Aboriginal people are often evicted by Homeswest for anti-social behaviour, many on the strength of neighbour complaints, without allowing the people involved to answer claims that they have engaged in such behaviour. Homeswest must ensure that complaints against Aboriginal tenants are not racially motivated or based on stereotypical notions of what amounts to proper behaviour, before any such

²⁴⁴ Mr Greg Joyce, CEO Homeswest, ABC TV, 8 March 1996.

²⁴⁵ Perth Aboriginal Medical Service Inc. quoting Mr Ted Wilkes, Media Release, February 1996.

²⁴⁶ Deaths in Custody Watch Committee (WA), *Submission to National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Perth, 13 May 1996, p. 1.

decision to evict occurs. The introduction of mediation based strategies may also be appropriate to deal with complaints from neighbours about anti-social behaviour.

Overcrowding is also justification for eviction by Homeswest. The effect of eviction of an Aboriginal family may be the overcrowding of other Homeswest houses jeopardising the tenancies of extended family members. It is imperative that Homeswest recognises the possibility of such a situation before the initial decision to evict is taken.

Overcrowding also results from inappropriate housing. There are few four and five bedroom houses available within Homeswest's housing stock. Very few large homes are available in the private rental market and those that are often fall beyond the economic reach of Aboriginal people. As a result Aboriginal families are placed by Homeswest in smaller houses, often of poor quality, while they wait for a larger home to become available.

The necessary corollaries are damage and overcrowding in the smaller house. Sometimes it also means that families are broken up and placed in separate houses. They may also find themselves liable for the damage a large, young family inflicts on a small home already in a state of disrepair even while Homeswest is unwilling to maintain it. Ultimately the accrual of such a tenancy debt may see an Aboriginal family evicted from the house despite the fact that it was inappropriate to the family's needs, inadequately repaired when they moved in and not maintained by Homeswest during the course of their occupation. Eviction with such a debt will also impact on the family's capacity to be rehoused by Homeswest in the future.

An approach to addressing potential evictions which addresses the context of eviction – health, family obligations and acute socio-economic disadvantage – and which provides reasonable options for tenants threatened with eviction must be more widely adopted by Homeswest. The development of intervention strategies and support programmes for Homeswest clients must not only occur at the eleventh hour, support strategies must lie on a continuum of intervention. Early intervention programmes and comprehensive support strategies must be developed by Homeswest in co-operation with other relevant community and government agencies. All such developments must enforce the principle of self-determination and minimise offensive interference by outside bodies in the day to day lives of tenants.

Special Housing Assistance Program

There is a mainstream programme running across Western Australia, the Special Housing Assistance Program (SHAP), which attempts to address the underlying issues which may lead to eviction. This programme is often run by Aboriginal community-based organisations. Each worker employed by the programme works intensively with six to eight families over an extended period of time to resolve what might otherwise be tenancy problems. Other related agencies are often involved by the SHAP workers to address issues like financial planning, family violence and matters relating to children's education. SHAP is a significant and generally supported Homeswest initiative. However, problems exist with its referral process which is overly informal and which gives excessive discretion to Homeswest Accommodation Managers. Improvements to SHAP should be considered and the development of similar programmes must be recognised as an urgent priority by Homeswest.²⁴⁷

²⁴⁷ For an extended critique of SHAP and concrete recommendations on how it may be improved see Shelter WA, *Report from the Evictions Project, op. cit.*, pp. 49-51.

Salt and pepper policy

Despite the 1989 findings of a Western Australian Aboriginal Legal Service report Homeswest still appears to maintain its discriminatory ‘salt and pepper’ policy. This policy allows Homeswest staff to overlook Aboriginal families who are next on the waiting list if they determine that placement of the family will not be appropriate to the social mix in the area of the property. Homeswest asserts that Aboriginality is not the primary screening device when allocating housing to public clients and that issues such as previous tenancy history are also taken into account in placement decisions. Homeswest also asserts that this policy applies to other groups of their clients such as single parents.

Much anecdotal evidence suggests, however, that this policy results in many Aboriginal people being overlooked in property placements simply because of their race and with little reference to other factors. There is a lot of talk that this policy is only ever used with Aboriginal clients.

It is a matter of great concern if Homeswest staff are using the ‘salt and pepper’ policy selectively, basing their decisions on discriminatory stereotypes about Indigenous renters and racist ideas about where it is appropriate for Aboriginal people to live. At its base such a use of the policy would be assimilationist – allowing the largely non-Indigenous staff of Homeswest to decide where, and near whom, it is appropriate for blackfellas to live.

Although attention does need to be paid to issues such as feuding between Aboriginal families and the possibility that location of Indigenous families in certain areas may result in racist violence, Homeswest must instigate policies and procedures which avoid recourse to antiquated and paternalistic ideas about Aboriginal people and how they should live. Involving Indigenous people in developing more appropriate Homeswest policies to deal with difficult issues like family violence and feuding as well as involving Aboriginal staff in Homeswest placement decisions will do much to alleviate current concerns about the ‘social mix’ policy. It is imperative that dialogue exists between Homeswest and Aboriginal people about the difficult policy area of placement. The management of this issue through recourse to archaic notions like the ‘salt and pepper’ policy is unacceptable.

Aboriginal Housing Directorate

Approximately two years ago an Aboriginal Housing Directorate (AHD) was established within Homeswest in an effort to better address Aboriginal specific issues. The AHD administers Aboriginal Housing Board programmes but it is not involved in the day-to-day management of housing. The AHD has an advocacy role. Aboriginal tenants are referred to it or contact it directly seeking assistance in their dealings with Homeswest. The AHD is also involved in projects with community organisations to develop early intervention strategies which may reduce evictions of Aboriginal tenants for breaches of their tenancy agreements. But the AHD’s position in the Homeswest structure necessarily impacts on its capacity to effectively address problems. On the one hand the AHD, as an advocacy service, often alerts Indigenous tenants to their rights and negotiates to save their tenancies. On the other hand Homeswest’s rental operations section is attempting to recover costs from its tenants and is actively wielding the eviction stick. It would be surprising if Aboriginal clients, recognising the inherent tension between the aims of these bodies within Homeswest, did not find it difficult to place their trust in the AHD as an advocate.

The recent establishment of pilot programmes in five locations by the AHD, which will see Aboriginal community-based organisations providing tenancy advocacy services to Homeswest’s Indigenous clients, is perhaps tacit acceptance of these difficulties. Further, the AHD can only negotiate for Aboriginal people if they seek assistance from, or are referred to, the body. Although the negotiation process adopted by the AHD is to “*look at the situation and each case has to be*

dealt with on its own grounds”,²⁴⁸ and although such negotiations can occur right up until eviction there are many, many Aboriginal tenants who are not given this opportunity.

...it provides an avenue for Aboriginal tenants who may be having problems with Homeswest where they don't have to come to Homeswest but can deal with the issue through an advocacy group...²⁴⁹

The work of the AHD is a step in the right direction towards the more equitable treatment of Homeswest’s Aboriginal tenants. The broader policy shift within Homeswest may, however, jeopardise the success of the AHD’s initiatives. If, as is suggested, eviction is being adopted as a management tool within the authority, the potential of the AHD and its projects with other agencies to impact on levels of Indigenous homelessness and evictions will be greatly reduced. Serious consideration must be given to the Directorate’s structural position within Homeswest.

It may well be argued that all the issues outlined above will disappear once the next stage of public housing reform is implemented. Such an argument would, however, be very naive. The criticisms which have been levelled at Homeswest with respect to its eviction policy and its increasingly economic rationalist approach to public housing provision have much relevance to the brave new world of housing provision in Australia.

When the proposed common subsidy reform of public housing is introduced Homeswest, and indeed all other public housing authorities, will no longer fulfil a role as housers of last resort. The problems currently experienced by Homeswest tenants in the face of the authority’s more corporate approach to eviction and debt recovery will flow on to the private rental market once the common subsidy system is introduced. They may still present problems for Homeswest as previous public housing tenants will undoubtedly be accepted by Homeswest as tenants under the new system.

Failure of the reform process to address these aspects of the housing issue will guarantee that the problems experienced by former public housing tenants are merely shifted from the housing sector to other sections of the community and will ensure that reform comes at a high economic, social and human cost.

The proposed reform of public housing, which is fundamentally grounded in notions of privatisation and profit, may well falter when faced with the reality of the tenancies of many of its clients which will not fit neatly into a private rental market ethos. The proposed reform package has no capacity to address the myriad social, cultural and economic factors which traditionally impact on public housing tenants and often jeopardise their tenancies.

What would an adequate housing policy look like?

Some basic principles

*You could put an extra \$100 000 into every community, using existing structures, and nothing would change.*²⁵⁰

248 Human Rights and Equal Opportunity Commission, Transcript of evidence given by Ms Jodie Broun, *op. cit.*, p. 247.

249 *Ibid.*, p. 242.

250 Pholeros, P., speaking at a round table meeting on housing in the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 July 1996.

The magnitude of the problem – that is, the housing shortage, the appalling conditions, the backlog of need – undeniably demands a greater share of the nations’ funds. In the long-term, without significant additional funding, the situation can only deteriorate. Insufficient expenditure is ineffective expenditure. More effort is expended, and money wasted, by constantly pumping to keep a leaking boat afloat rather than to repair it properly.

But good housing policy is certainly not just a matter of money. The quality of the policy will also determine the adequacy of the outcome. An analysis of past and current policies and practices leads to the conclusion that even if there were a massive injection of housing funds, many of the problems would remain.

An analysis of past successes and failures combined with some basic human rights and public policy principles will not provide a blueprint. But it will provide some standards and guidelines which can inform policy-makers, and against which proposals can be evaluated.

Principles of good housing policy

Domestic and international considerations of housing reveal the basic principles of good housing policy and practice.

1. It is well organised and co-ordinated, with clear lines of responsibility.
2. It is outcome oriented with transparent mechanisms of accountability.
3. It ensures adequate resources.
4. It recognises housing as a human right.
5. It places housing within a broader recognition of human rights and social indicators.
6. It is based on equality and gives priority to the greatest in need.
7. It guarantees minimum standards.
8. It ensures that housing consumers are involved in policy development and implementation.

Future directions for public housing

The Commonwealth Government initially proposed that the current CSHA would last up to three years while more significant reform of public housing was negotiated. But on 10 April 1996 the Prime Minister wrote to Premiers and Chief Ministers reaffirming the Commonwealth’s commitment to a two stage reform process and only assuring funding for the interim CSHA for 1996-97. The Prime Minister indicated that he was:

*...keen to implement longer term reforms as soon as possible.*²⁵¹

The core elements of reform appear to include:

- the Commonwealth discontinuing the payment of capital grants for public housing except in limited circumstances such as Crisis Accommodation and ARHP where capital funds will apparently be provided in the medium term;
- the States/Territories accepting full responsibility for housing services, and tenancy and property management;
- a move to the Commonwealth providing all people in housing need, both public and private tenants, with a common or equal subsidy probably paid directly to the individuals;

251 COAG *Communique*, *op. cit.*, p. 7.

- market rents for public tenants. It is proposed that State/Territory Housing Authorities will charge market rents. This implies that the market rent would be comprised of:
 - a Commonwealth housing payment to the tenant which includes the value of current state housing authority rent rebates and,
 - a tenant's contribution (rent) – adjusted for tenant's own income and fixed relative to benchmarks.²⁵²

What's wrong with this direction?

Indigenous people represent a distinct group with specific housing and infrastructure needs. It is therefore important to sound some cautionary notes as negotiations begin on the second phase of the reform process.

The decision to quarantine the ARHP from the proposed reforms is crucial given the huge Indigenous housing and infrastructure backlog experienced by Aboriginal and Torres Strait Islander peoples. A capital programme for Indigenous housing should be maintained and there should also be a substantial boost in funds to increase the supply of affordable and appropriate housing for Aboriginal peoples and Torres Strait Islanders in need.

Details of any capital programme which is retained for Indigenous housing have yet to be debated. It seems increasingly unlikely in the current political climate, where specific programmes for Indigenous people are attacked as excessive and unnecessary, that an Aboriginal housing programme will remain quarantined. There has been no guarantee that in a year ARHP will not be reformed in the same manner as all other funding for public housing.

The argument may well be raised that capital expenditure for housing and infrastructure should only be retained in rural and remote areas, justified by the acute need in these areas and the lack of a viable housing market. But the overwhelming need for housing and infrastructure in the Aboriginal and Torres Strait Islander community justifies the retention of a capital housing programme in urban, rural and remote Australia.

While a programme could be developed which recognised the differences in need which exist between rural and remote areas and urban centres it is nonetheless crucial that a capital expenditure programme for housing and infrastructure is retained in cities and large towns across Australia. Any debate about a continuing capital programme for Indigenous housing will need to closely consider the respective roles and responsibilities of the States, Territories and the Commonwealth, as well as ATSIC. Any attempts to 'untie' the ARHP must be vigorously opposed.

The discrimination which Indigenous people have traditionally experienced in the rental market also strongly points to the need for capital funding. Some Indigenous people are clients of mainstream public rental programmes and will therefore be subject to the proposed common subsidy.

If the ARHP is untied, all Indigenous tenants will be totally subject to the 'opportunities' of the private rental market. It is a matter of plain fact that the area of private rental accommodation is not an area of equal opportunity for Indigenous people.

Indigenous Australians experience specific housing problems which may make a generic model of public housing funding ineffective. A model which requires those in need to enter the marketplace and negotiate for housing will almost certainly be disadvantageous for Aboriginal peoples and Torres

252 ACOSS, *Federal Budget Priorities Statement 1996-97*, *op. cit.*, p. 89.

Strait Islanders. Illiteracy and disproportionate unemployment rates will be compounded by difficulty in securing private tenancy agreements.

Indigenous consumers may experience direct discrimination at the hands of housing providers or through the indirect operation of rental policies such as credit reference requirements. The 'average' rental property may not fulfil the needs of an Indigenous client base which has a unique demographic and tenure profile. Further, housing that would be appropriate and affordable under subsidies may not necessarily be profitable for private housing providers.

Finally, the mechanisms to allocate rental subsidies to Aboriginal and Torres Strait Islander peoples will have to take into account the specific situations of Indigenous people in the marketplace and in the broader community. It is unclear whether a common subsidy will do so. Income levels reveal much about the financial well-being of people. In 1994 the average income of 59 per cent of Indigenous people over the age of 15 was \$12 000 or less and the mean annual income for Indigenous people was \$14 046. Many Indigenous households support up to six people.²⁵³

Aboriginal and Torres Strait Islander peoples are therefore the most disadvantaged group in Australia in terms of income: a vast number of us live below the poverty line. In the stark reality of households living below the bread line with conflicting financial needs a common subsidy system paid directly into the hands of tenants may not be appropriate or effective. Tenancies may be placed in jeopardy by the non-payment of rents when a rental subsidy is diverted to a need more pressing within the household like medical expenses or shoes so the kids can go to school. The reform process must seriously consider rental payment options which divert such choices from tenants and which ensure the continuity of the tenancy. It must also consider the equity of the common subsidy system in light of the acute disadvantage of many Indigenous households.

There has, as yet, been little debate about how a subsidy will work for a client group with a radically different tenure profile to the majority of clients serviced by the public rental industry. For example, how will the subsidy be calculated? Will it be determined according to the number of people living in the house or will it only be calculated by reference to the lessee?

Close consideration of such issues is necessary before the reform agenda proceeds. Any allocation of the subsidy which ignores the reality of living patterns will create problems.

The Commonwealth has indicated in preliminary discussions with housing consumer representatives that once this reform package is in place it will not intervene in the marketplace to regulate rental practice. The Commonwealth will therefore have no role in ensuring that housing providers comply with non-discriminatory standards. The formulation of good public policy will be abandoned to the tender mercy of the marketplace.

The reform process has not addressed the perennial issue of the array of structures providing housing to Indigenous Australians. The new CSHA has more clearly delineated the roles and responsibilities of the Commonwealth and the States and Territories but has failed to significantly simplify the way that housing and infrastructure are delivered to Aboriginal and Torres Strait Islander peoples.

The failure of the reform process to embrace the principles of the *National Commitment* means that, with the exception of the Northern Territory, Aboriginal and Islander people will not see a co-ordinated approach from agencies providing housing and infrastructure in their communities. Although the *National Commitment* is about shared responsibility, it has had little impact on the continued buck passing which characterises service delivery to Indigenous Australians.

²⁵³ ABS, *National Aboriginal and Torres Strait Islander Survey 1994*, AGPS, Canberra, 1994, p. 48.

Despite its largely management role under the CSHA, the Commonwealth, through ATSIC, will continue to provide much needed housing and infrastructure in Indigenous communities. At the State/Territory level relevant agencies will also continue to provide public housing to Indigenous people.

The recent South Australian agreement on health services, as well as negotiations underway between ATSIC and the South Australian Government for the delivery of other services to Aboriginal people, indicate that a co-ordinated approach is slowly being recognised as both practical and efficient. A similarly co-ordinated approach to the provision of housing and infrastructure to Aboriginal and Islander communities is long overdue.

It is crucial that the reform process ensures that co-ordinated service delivery is a guiding principle of the process and that the Commonwealth is responsible for measuring housing outcomes for Indigenous people. The Commonwealth must, necessarily, involve Aboriginal peoples and Torres Strait Islanders in developing and evaluating performance indicators which accurately reflect Indigenous experiences of housing.

Community housing provided through community managed and owned mechanisms has been a very successful option for Aboriginal and Torres Strait Islander peoples. But the Indigenous community housing sector is not without its problems. The management capacity of some Aboriginal and Torres Strait Islander organisations is a matter of concern.

Poorly managed community housing in Indigenous communities can stem from a myriad of sources: the incapacity of community organisations to collect sufficient rent to maintain houses at an acceptable level; inadequate initial resourcing; or lack of management training and support within a community. Recognizing such structural issues within the current housing reform agenda is clearly necessary, but a realistic approach to reform must not be used to justify decisions to discontinue support for community housing which is a crucial component of the Indigenous housing sector.

Agenda for the Future:

What housing policy could and should look like

Some existing housing and infrastructure programmes provide ideas about possible ways to reform housing and infrastructure delivery to Aboriginal and Torres Strait Islander peoples.

SA Round Table Meetings

For approximately four years the Aboriginal Housing Unit (AHU) of the South Australian Housing Trust has hosted meetings of major stakeholders in Aboriginal housing on the Anangu Pitjantjatjara lands. The meetings do not concern funding but instead work on how dollars will be spent. This strategy has grown out of a 13 year process which saw staff from the AHU consult with the Anangu Pitjantjatjara Council and local Aboriginal community councils on housing policy development. The formal meetings at the AHU continue this process and represent the first attempt to document its findings.

Is it outcome oriented with transparent mechanisms of accountability? Does it ensure that housing consumers are involved in policy development and implementation?

Architects, a public health officer, the Aboriginal controlled health council, an Anangu Pitjantjatjara building inspector and members of Anangu Pitjantjatjara Community Councils provide technical, expert and community input. The meeting considers a wide range of issues like whether or not

houses are too hot or too cold, right down to discussion about light globes which continue to blow because insects get trapped in the lights.

The specifications of the South Australian Housing Trust have been modified for remote communities and are commonly believed to be more onerous than those which apply in other parts of the State. Prior to the meeting the specifications for particular housing projects, which may be significantly changed in the course of the meeting, are distributed in preparation for discussion.

This approach to policy development is concerned with outcomes. It provides all participants with an opportunity to give feedback on basic performance measures and it gives communities some ownership of the housing policy which directly affects them. The fact that community members can evaluate previous and proposed work in light of their experience of living in the houses also sheets home responsibility to the policy-makers.

Specifications for projects are put to public tender. Tenders are carefully considered by the AHU which then makes recommendations to the Anangu Pitjantjatjara Council Members who have the final word in the process by endorsing or rejecting the AHU's recommendations.

In the rest of South Australia the AHU is working to establish Housing Management Councils to develop local housing policy and strategies. This will mean that Aboriginal participation will occur at ground level through management committees, at a regional level through the AHU meetings and at the state level through the already established South Australian Aboriginal Housing Advisory Council. It is hoped that this Indigenous involvement in developing and implementing housing policy will deliver more appropriate housing and infrastructure outcomes for Indigenous housing consumers.

Health Infrastructure Priority Projects

In 1994, new national housing and infrastructure initiatives were established by ATSIC under the Community Housing Infrastructure Program (CHIP).

The objectives of the Health Infrastructure Priority Projects (HIPP) are:

- to improve environmental health in Aboriginal and Torres Strait Islander communities
- to increase commitment to Aboriginal and Torres Strait Islander communities from all levels of government
- to facilitate training of Indigenous community members
- to develop a comprehensive, documented response to any valid scrutiny of the expenditure of HIPP project funds.

ATSIC has developed a delivery strategy through HIPP projects which embraces many principles of good housing policy.

Is it well organised and co-ordinated, with clear lines of responsibility?

In its efforts to improve co-ordination between all levels of government, ATSIC draws on the principles of the *National Commitment*. ATSIC ensures that other agencies are committed to projects before they are permitted to proceed and attempts to formalise these arrangements into an agreement between ATSIC and the relevant agency.

Does the policy locate housing in the context of other human rights and social indicators?

ATSIC recognised that significant improvement in the health of a community is more likely to occur if the community can receive a comprehensive boost to its infrastructure and housing stock. HIPP

projects simultaneously address matters like water supply, sewage disposal, power supply, housing, roadworks, drainage and related physical works in a given community.

HIPP also aims to provide effective training programmes so Indigenous people participate not only in the construction phase of a project but also in the maintenance and operational activities of finished projects. This approach aims for higher levels of on-going project sustainability while improving employment opportunities within communities.

In the Northern Territory, for example, the Julalikari Council Aboriginal Corporation has established a Training and Career Development Strategy, which will provide accredited training for Aboriginal people in Tennant Creek and on surrounding homelands. The strategy has been developed by the Council in response to a strongly identified need in the community and in consultation with the communities of Tennant Creek and surrounding homelands. The first three years of the strategy will be integrated with Julalikari Council's HIPP project.

Trainees in the strategy will undertake accredited courses in building, associated trades and civil works. Trainees will be able to exit the strategy at various points – as qualified builders' labourers, at trade level or at supervisory level. From its second year the strategy will introduce training in environmental health, management and administration, retail, hospitality and tourism.

Is it outcome oriented, with transparent mechanisms of accountability? Does it ensure that housing consumers are involved in policy development and implementation?

Each project is managed by a HIPP Project Manager (HPM) who is responsible to the community on a day-to-day basis. ATSIC has also entered into an agreement with a Contracted National Program Manager (CNPM), which oversees the management of all HIPP projects.

Each HPM is responsible to the CNPM for its professional performance. The CNPM is also a resource for Indigenous communities for advice on managerial, technical and financial matters.

Prospective project managers and the community meet and make joint site inspections, allowing the community to question prospective project managers on any relevant issue. Submissions made by potential project managers are assessed and a recommendation is made to the community, which accepts or rejects the choice of project manager. The community then engages the project manager of its choice for the provision of services. The CNPM draws up contracts with extensive provisions relevant to consultation, feasibility and design studies, training programmes, tender documentation, tender evaluation and handover of facilities to the community.

This contract requires, for example, that the HPM employ staff with consultation and negotiation skills for work in Aboriginal and Torres Strait Islander communities. ATSIC insisted on this requirement so that the needs of communities are realistically met and that technical information is more effectively translated for community members. Contracts between the HPM and the community are constantly updated as the CNPM and ATSIC get feedback from the community about the project.

The HPM is required to complete a three stage process before tenders can be called for the proposed work. It must:

1. prepare a report for the community and the CNPM outlining the scope of the work, the adequacy of the project budget and the time frame for the project taking into account community needs like employment requirements which influence the time frame and the budget. The community and the CNPM must approve the report.

2. liaise with local, state and commonwealth regulatory authorities; consult with the Department of Employment, Education, Training and Youth Affairs, if appropriate; prepare a planning and design report for the community and the CNPM, including: recommendations for technical solutions to infrastructure requirements; preliminary housing concepts; and a project delivery strategy. The community and the CNPM must approve this strategy.
3. complete design work and document the project in preparation for construction with certified drawings, technical specifications and contract conditions. In conjunction with the CNPM carry out an appraisal of the draft documents. Evaluate alternative project delivery methods with the community and the CNPM and decide on the most suitable approach.

Tenders are then called for. The HPM must:

1. evaluate the tenders and recommend where contracts should be awarded. The community approves or rejects these recommendations, the process is overseen by the CNPM.
2. maintain a supervisory role during the life of the project carrying out periodic site inspections, certifying payment claims, evaluating progress and general contract administration.
3. continue to liaise with the community, attend site meetings and report regularly on the progress of the project. The CNPM also carries out supplementary site inspections with the HPM at significant times during the construction process.

Once the project is completed the HPM must:

1. prepare a final report for the CNPM which includes details of the community employment and training undertaken, the financial status of the contract and an overall project evaluation.
2. ensure that the community has received sufficient instruction and operator training to be able to operate the project works once they are handed over.
3. jointly inspect the completed works with the CNPM and with the community and agree that final completion of the project has been achieved.

The HIPP projects have been criticised for lack of in-built formal assessment of outcomes. It has been suggested that these projects still fail to adequately consider the detail of outcomes. Although inspections of works are carried out both during and on completion of a project it has been argued that they are not concerned with the minutiae of living in a house over time. Increased attention to detail when evaluating the success of HIPP projects may significantly improve the outcomes of the projects in Indigenous communities. Staged evaluations over time of the viability of houses are necessary to judge the longer-term quality of design, construction and maintenance regimes.

The success of the HIPP projects lies in the meaningful involvement of the community in developing and implementing policy, an approach which also supports the principle of self-determination. When measured against the principles of good housing policy, this approach has much to recommend it in delivering housing and infrastructure to Indigenous communities.

HIPP ensures a strategic approach to service delivery decisions are made at a central level on the allocation of scarce resources to try to give priority to the communities with the greatest need. In developing its HIPP strategy ATSIC was aware that the submission-based approach for the allocation of funds under CHIP often saw communities failing to access funding because of poor applications or because elected representatives had a lack of expert knowledge about a given

community. Communities in acute need were falling through the gaps in this process and missing out on urgently required basic housing and infrastructure.

In order to build a working house or effective infrastructure, funding decisions must be informed by the expertise of people who design and construct houses. Common sense dictates that the nexus between funding decisions and expertise is elementary in translating housing policy into nuts and bolts on the ground. The CHIP process, however, requires elected Indigenous representatives to make funding decisions when most have no expertise in either housing or infrastructure. It is ludicrous to expect Regional Councillors to make the complex decisions inherent in the translation of housing policy into a working house without expert technical support.

Most non-Indigenous people need never make such decisions. In Mosman or Carlton, or even in Mount Isa or Hall's Creek, decisions about sewerage disposal and water supply, for example, are the responsibility of State or Territory utilities and government departments. But Indigenous Australians are expected to make complex engineering decisions on the intricacies of sewerage disposal or water delivery.

Often the principle of self-determination is abused by State, Territory and local governments to justify the abrogation of their responsibility for the citizenship rights of Indigenous Australians and to mask the racially discriminatory provision of citizenship services.

'Cultural appropriateness' is used as a smokescreen for failing to provide adequate housing and infrastructure to Indigenous communities, but it is not used to ensure effective service delivery. A community's capacity to enjoy fresh water, to wash its children and to have waste removed is a basic right in all cultural contexts, a fundamental right that accrues to a people regardless of culture.

HealthHabitat

It is sometimes asserted that Aboriginal people don't wash, they trash their houses and the costs of constant repairs are prohibitive. Recent work by the environmental health and design consultancy HealthHabitat in Pipalyatjara, debunks many of the myths about the ways Aboriginal people use houses and infrastructure as well as providing clues on developing good housing policy.

The work of the consultancy found, for example, that if taps and showers and washing facilities work then people use them:

The study refutes the view that Aboriginal people will not use health hardware facilities. We demonstrated that Aboriginal people enthusiastically used these facilities when they are functioning and maintained.

*The major cause of health hardware breakdown is **not** overuse or vandalism but rather poor initial construction.²⁵⁴*

It is also a widely held belief that health hardware like taps, showers and drains cannot be maintained in communities and that the initial capital expenditure on such services will be wasted. HealthHabitat found, however, that health hardware was maintained in Pipalyatjara with a basic level of skill and at a cost which was affordable. The essential requirements were the application of the detail outlined by the project; in particular, appropriate initial design, construction and supervision.

254 Housing for Health, *op. cit.*, pp. x-xi.

Is it outcome oriented with transparent mechanisms of accountability?

This project focussed on maintaining and developing systems which would lead to sustainable health hardware and bring benefits to the health status of community members. The consultancy developed a set of tests to identify the specific and most pressing housing and infrastructure needs within a community. The surveys looked closely at health hardware including: showers, tubs/basins, main drainage, hot water services, solid fuel/chip water heaters, toilets both flush and dry, grey water sumps, septic tanks and soakage trenches, and taps. During the Pipalyatjara Project four surveys of the status and maintenance of health hardware in all the houses in the community were undertaken at three month intervals.

The surveys required a very detailed evaluation of this hardware. The shower in each house, for example, was tested for the adequacy of the following items: door and lock; lights; walls; soap holder/shelf; floor grade and finish; clothes hooks; ventilation; and towel rail.

An analysis of such survey results allows the consultants to build up a picture of the way people are living in and using the house and yard and their exact maintenance needs. Such detailed focus means that strategies developed are influenced by the reality of living in a community.

The results of the shower surveys (12 houses x 4 surveys) revealed that an average of 65 per cent of the items listed above were not provided or adequate. The range was 32 per cent adequacy in the poorest case to 85 per cent in the best equipped. The most common faults were: no working lights; lack of simple shelves or rails; poor ventilation; and poor floor grading.²⁵⁵

HealthHabitat tested the effective implementation of its sustainable health hardware programme in Pipalyatjara by measuring the health outcomes in the community from 1992-93. The rates of eye and skin infections were measured by comparing rates in the period January-March 1991 with January-March 1993. The consultants found there was a major reduction in both eye and skin infection rates between the two periods. Methodology problems – variations in the baseline population of the age group tested and under reporting – mean that these results cannot conclusively be shown to represent a true change in the health status of members of the community. The consultants note, however, that the results are encouraging.²⁵⁶

The overall findings of the Pipalyatjara study showed, among other things:

- that there is substantial evidence that improvements in essential health hardware in remote communities will lead to specific improvements in Aboriginal health status, particularly for children.
- that Aboriginal people enthusiastically use health hardware facilities when they are functioning and maintained.
- that the major cause of health hardware breakdown and the requirement for maintenance is not overuse or vandalism but poor initial construction.
- that to improve environmental health for Aboriginal people, the principles are no longer enough. It is attention to detail which is necessary to deliver the final health benefits.²⁵⁷

HealthHabitat's work in the Central Desert is about reality. It is based on practice and it is about practicalities. It documents sustainable improvements in the health of a remote Aboriginal community through the methodical application of robust commonsense. It demonstrates that the provision and maintenance of basic health hardware: taps and showers that work, producing good

255 Pholeros, Rainow & Torzillo, *op. cit.* p. 86.

256 *Ibid*, pp. 103-104.

257 *Ibid*, pp. x-xi.

quality water for drinking and hot water for washing, together with toilets that work and sewerage systems that work – these simple things, will achieve marked improvements in the lives of the members of the community.

Twenty years ago the infant mortality rate amongst central Australian Aboriginal children equalled the worst in the world. That rate has declined markedly since, but at the cost of an extremely high rate of evacuation from communities and hospitalization. During the period of 1982-1992 medical evacuations from Anangu Pitjantjatjara lands have been reduced by two-thirds. This reflects changes effected by Aboriginal people in building a healthier living environment and in managing their own health.

But these good news stories are few and far between. Recently a large amount of public money, close to three-quarters of a million dollars, has been spent by the Commonwealth Department of Health and Family Services on the construction of three brand new brick houses for doctors in communities in the East Arnhem region – Numbulwar, Galiwin'ku (Elcho Island) and Gapuwiyak (Lake Evella). East Arnhem has been made a priority by the Department which is trying to upgrade the health status of Aboriginal people in the region. East Arnhem has the highest death rate of any region in Australia.

But the frames and many other parts of these three new houses have been constructed from untreated radiata pine. This stuff is like cornflakes to the termites in Arnhem land. You can be sure that within 6 or 12 months the houses will be uninhabitable as the pine frames are completely eaten away.

None of those stupid bureaucrats in Canberra would have a clue about our climate or needs, and that is how this situation has arisen. The long distance bureaucrat strikes again...

This... counter[s] the assertion that all money spent on Aboriginal people has been pissed up against the wall or otherwise wasted by Aboriginal people. Here is a great instance of it being wasted by white bureaucrats who are totally out of touch and it is Aboriginal people who are paying the price in terms of their health status.²⁵⁸

It is this lack of attention to detail which plagues Indigenous housing and environmental health policy. It is this failure to consider the possible outcomes of a project and this lack of consultation with the people on the ground which ensures the continued failure of Indigenous housing and infrastructure programmes. It is failures like these which sees blackfellas living in Third World conditions with health to match while whitefella politicians worry about the health of the housing industry.

A commitment to the principle of self-determination, to the participation of Aboriginal and Torres Strait Islander peoples, is crucial if the Government means to fulfil its international pledge “to rais[e] housing and infrastructure standards and environmental health outcomes for indigenous Australians”.²⁵⁹ While a sense of moral and legal obligation to such international promises should be important to governments, it should not be the beginning and end of reference to international law. As long as we see international law as no more than ‘the big stick’ it offers little more than a threat.

258 Correspondence to Aboriginal and Torres Strait Islander Social Justice Commissioner, Numbulwar, 5 November 1996.

259 *Habitat II: Statement of Commitments*, delivered by His Excellency David Evans p. 4 but not yet released.

Reference to international law and to other benchmarks in the area of housing is crucial to the development and implementation of good housing and infrastructure policy. The recognition by the Government of housing and infrastructure as human rights issues has much to offer the housing reform process – it will result in substantial improvements in the health of Indigenous Australians and if it all must be reduced to a matter of economics, it will save the Government money.

Chapter 4: Royal Commission into Aboriginal Deaths in Custody

211: National Community Education Project

The National Aboriginal and Torres Strait Islander Community Education Project (NCEP) is about offering choices to people when they are confronted by the violation of their human rights and their dignity as human beings. Through providing people, individuals and communities, access to information about how ‘the system’ works, their active participation in the system is promoted. It enables them to protect and assert their rights.

The exercise and enjoyment of rights may be achieved through complaints lodged under anti-discrimination legislation. However, it is fundamental to the philosophy of the NCEP that the pursuit of formal complaints is not necessarily the first resort. It is critical that, armed with knowledge of rights and remedies, Indigenous Australians are able to devise methods of pursuing their rights at a local level, in their community, in the circumstances of their daily lives. Durable resolutions to problems arising from community action is the ultimate aim of the NCEP.

Indigenous Australians gave us a very clear message during the initial stages of developing the NCEP – that the educational materials comprising the NCEP product will be useless unless they are capable of effective translation into practice.

People stated that, though they may be interested in, and may need a product like the NCEP, it must be ‘true’: easy to understand, easy to use. Most importantly, it must be something people want to engage with, to interact with.

It is clearly not good enough for my Office to produce a handful of materials and then pat ourselves on the back believing we have implemented Royal Commission Recommendation 211. It is one of my greatest fears that, though we will create a potentially useful product, it will end up on the shelves of many co-operatives or resource agencies gathering dust. Justice would not be done to the process of consultation and development we embarked on if this were to occur. As I noted in my 1994 Report, ‘plastic products’; glossy posters and pamphlets, T-shirts, fridge magnets and so on, have limited uses.

Community education that is done well liberates. Liberation is not attainable through ‘plastic give-aways’. It is not enough to entice and enthuse, to skirt around on the fringes offering illustrations of justice. This would abrogate our responsibility.

Effective human rights training and education in Aboriginal communities, in Torres Strait Islander communities, must be interactive and experiential in nature, as our trialing process in north Queensland and parts of Western Australia has clearly demonstrated. Indigenous educators have for many years acknowledged the importance of this approach in the body of literature that exists on Indigenous teaching and learning styles.

People must be able to do more than just read about their rights. They must develop skills to use knowledge and information. Throughout the NCEP consultations my staff and consultants heard

Indigenous Australians voice the feeling that ‘for a lot of people racism is a way of life’. People have told us that they feel a sense of resignation when they experience discrimination.

If you don't give us proper training the whole thing will just sit here. We need to go a step further. People need to know what racism is and what they can do about it because a lot of people will leave a job without dealing with it. The whole thing is about confidence and that's where we Kooris fail. Victoria

For a lot of people the thought of taking legal action or community action seems futile.

People have an idea of their rights but are unsure of the ways to go about something. If they are victimised, they just put up with it. This is because in the past people have been victimised for standing up for their rights. Bunbury, Western Australia

Reprisals and victimisation of people who make complaints about unfair treatment are a reality for most Aboriginal and Torres Strait Islander peoples.

The smaller the town the greater the harassment – you lose your dog first, then the car... Kununurra, Western Australia

People clearly enunciated their need for support and for an honest appraisal of how long and how involved certain legal courses of action may be.

The problem with this sort of thing [community education projects] is that Aboriginal people won't do anything unless someone's backing them up, doing it with them. Western New South Wales

Self-esteem training and confidence training is also just as important because no-one is going to want to use the legislation or want to tackle a problem without it. Melbourne, Victoria

...in the education package we need to have specific information about what we might have to go through and what we'll need. People who do put in complaints will need a lot of information and a lot of our support. Victoria

While face-to-face training is initially resource intensive, in the long-term it is more effective: it is about training the trainers. People who are trained can train others, who will train others and so on. The quality of the initial training is critical to success.

A nationally co-ordinated effort is essential if the NCEP is to blossom and fruit. States and Territories, with the singular exception of the Northern Territory, have not lived up to their responsibility to implement recommendation 211. A recommendation they all supported. The Northern Territory Anti-Discrimination Commission has developed a plain English guide to their legislation as well as material translated into a number of Aboriginal languages. The complaint form has been adapted in consideration of its use by Aboriginal complainants. Two Aboriginal trainees are employed with a view to opening community access to the Northern Territory legislation.

I am aware that community educators in all State and Territory human rights agencies have agreed to explore ways of working together to assist with the implementation of the NCEP. This is a start but it is not enough. These agencies have limited resources and do not all have the functional responsibility to implement the necessary training programmes. The training programmes currently offered by some agencies are ‘user-pays’ schemes. Those that do not yet function this way are moving in this direction.

It is extraordinary to ask Indigenous Australian communities to pay to learn about their rights and the anti-discrimination laws and services to which we are entitled as Australian citizens. The compounded effects of generations of discrimination have reduced the Indigenous peoples in this country to, at once, the most vulnerable to on-going discrimination and the least able to use laws designed to remedy discrimination. With the highest rates of illiteracy and unemployment, it is simply unconscionable public policy to require Aboriginal and Torres Strait Islander peoples to pay to learn their rights.

There has been some rhetoric at various policy levels about the importance of community development training for Aboriginal and Torres Strait Islander people. The Ministerial Council on Education, Employment, Training and Youth Affairs endorsed 'A National Strategy for the Education of Aboriginal and Torres Strait Islander Peoples 1996-2002' which acknowledges several principles including self-determination and social justice.

Priority 7 acknowledges that:

...In today's world of Indigenous self-management and ownership of community services, the need for these skills and community development training has never been greater.

Once Indigenous Australians acquire knowledge and skills about our rights and options for addressing injustice we will be better able to engage in all aspects of Australian life. We will be better able to ensure that we receive appropriate health services, education services, essential services and housing services. Indigenous Australians will experience less of the litany of social injustices manifested in: high unemployment rates; appalling standards of health; mortality rates at least two and a half times national rates; life expectancies some 15 to 17 years less than non-Indigenous Australians; and, high attrition rates for our children in schools.

A spokesperson for Kaata-Wangkinyini Council, Western Australia stated:

Social Justice starts when Aboriginal people are allowed to fully share in the lifestyle of Australians.

When Aboriginal peoples and Torres Strait Islanders are able to protect and assert our rights, when we can be active participants rather than passive subjects in this country, then we can start to talk about social justice.

The experience of an equal quality of life by Indigenous Australians is ultimately an affirmation of the dignity of all Australians.

In the current climate of conspicuous racism, where some of this country's parliamentary representatives express or tolerate overtly racist attitudes we have found an increase in violence at all levels and in all forms. People from every State and Territory have told us that in the school playground our kids are striking out with violence because the teachers, principals, the system generally, does nothing to help them when they complain. They don't know what else to do. There must be a more constructive way to express this energy and our determination for change.

The NCEP is fundamentally about the family and the community. It is about holding them together. The consultations in Western Australia have demonstrated the depths of peoples' desire to live in country, have access to country and in so doing to be safe and comfortable. Our job is to develop a Resource that will facilitate safer lives and offer people the tools to create such an environment for themselves.

All we want is to keep our kids in the community with their families.

Community meeting, Tjirrkali

Issues

The issues that people raised with us are not new nor are they complex. The constant repetition of the issues, the fact that little has changed and the intensity with which people have raised these issues is an enduring blight on this nation.

The fact that a Royal Commission raised these issues and still we appear to be regressing, the fact that the same issues, the same human injustices are being reported is something the United Nations should surely act upon. Already the world, not only South East Asia, is looking with some concentration at this country.

If these same human injustices existed in the same degree and in the same proportions for wider groups within Australian society a disaster would have been declared. The world would have been combed for experts to advise on ways to overcome the disaster. Massive resources would have been allocated to ensure the success of new programmes to solve the problem. All of this would have been totally justifiable.²⁶⁰

Why is it so hard to get the message across to politicians and bureaucrats? At what juncture do we change what we are doing and the way we are doing it? The simple reality is that the quality of life for Indigenous Australians is not the same as for non-Indigenous Australians, by a long measure.

The following scenarios, composites of comments and thoughts people shared with us, clearly evidence the level of human injustice that exists for Aboriginal and Torres Strait Islander peoples. They are not the extreme cases or voices. They are not selective of any one region, town, State or Territory. They are simply the voices of the people that spoke with us.

Schooling

Indigenous children living in every State and Territory, battling varying degrees of racism within the classroom and the playground before having to deal with inappropriate, culturally offensive and often irrelevant curricula, where the language of the classroom may not be the first language spoken by the child. Then, Indigenous children facing higher rates of suspension and expulsion than other children.

Indigenous children reaching levels of literacy below grade 3 as evidenced in the latest 'Report on the Provision of School Education Services for Remote Aboriginal Communities in the NT, 1996'.

Indigenous children not having access to schooling in a vast area of the country, their parents forced to send them away to school from ages as young as four years and distances as far as 2000kms.

Health

Indigenous children, their mothers, fathers, uncles ... desperately in need of medical attention. Going to the health clinic or hospital and waiting, waiting, waiting some more, as non-Indigenous people walk in and are attended to straight away ... still waiting, and hearing their families or friends medical history openly discussed around the floor by medical staff not aware of peoples' rights to privacy and confidentiality ... waiting some more, until the receptionist or some other 'authority'

²⁶⁰ Minority Report, *Report*

tells them to go home and drink water. Nobody bothered to look at them or talk to them. Another Indigenous person is brought in clearly convulsing and is left waiting – he must be drunk, he is an Aboriginal man...

...a young Aboriginal girl was driven to the hospital with severe burns to her face. The sister on duty told the mother to wait because there was an emergency. The mother after a while frantically pushed the child in front of the sisters face and said this child is ill and must be seen now. The emergency referred to by the sister turned out to be putting stitches in a dog...

Mulga Queen

Housing

The local Aboriginal educator prepares lessons and work for the next day while living at home with the extended family of 10 in a 2 bedroom house built on a floodplain, with no power, toilet and shower detached and in the open, during the wet season... no prospect of maintenance being done to prevent the flood damage... faces eviction.

While the non-Indigenous educator, first year out graduate, recently recruited from the city, walks into a fully air conditioned, furnished, 2 bedroom house with a phone and no family, in a separate part of the community which is well drained.

I applied for a flat with three references as they wanted and I am in full-time work. I was refused the flat. When I asked for a reason, I was told that I didn't have to be given a reason. I believe I was refused the flat because I am black.

South Coast, New South Wales

Consumer rights

When an Aboriginal woman enters a local shop to buy some groceries, a security guard approaches and asks her what she is doing. She replies "I'm shopping" and goes about her business. She is aware she is being watched. She waits her turn to be served and finds that the shop attendant is serving non-Aboriginal people who arrived after her. She doesn't want to create a scene so she waits, and waits, and finally, she is served. She asks herself why she is being charged \$29.95 for something that cost the person before her \$22.95 ... oh, well, she rationalises, it must have been slightly different.

...the local shops and those in Kalgoorlie charge Aboriginal people more for goods than other people and in these towns things are already inflated ... we have to wait long periods to be served.

Laverton, Leonora

The nightclub has two separate entry lines: one for white and one for black.

Broome

Police and the justice system

An Aboriginal youth and two of his mates are walking to the station to catch the train home. Not far from the station the police stop them and ask where they are going. The police do a warrant check which reveals an outstanding parking ticket for one of the youths. The three Aboriginal kids are taken to the police station and held in custody for some hours. The police advise them to go home – separately ... they all live in the same house.

The Aboriginal person who implores: no more institutions or bureaucracies – this has been our way of living for too long.

...there is no safe place for kids to go to enjoy themselves without being harassed by police or security guards. In Broome there are 28 liquor outlets and not 1 youth centre... Broome

...rapists and murderers go into Kalgoorlie Remand and are bailed - they walk out - but we walk in on a drinking charge and have to stay in... Warburton

Racism

Aboriginal people stated very clearly throughout the consultations that we are not the people who should be being educated about racism.

We know all this, all these injustices – we know it, we live it all the time. White people need to change their attitudes. Kununurra

...why is the expectation on Aboriginal people changing and being educated... Kununurra

Framework

The National Aboriginal and Torres Strait Islander Community Education Project is designed to implement Royal Commission into Aboriginal Deaths in Custody Recommendation 211 which states:

That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it.

The specific objectives of the NCEP are to:

- divert Aboriginal and Torres Strait Islander peoples from custody;
- enable Aboriginal and Torres Strait Islander communities to establish and protect community standards for their human rights; and
- empower Aboriginal and Torres Strait Islander peoples to solve community relations problems at the local level through understanding and asserting their rights.

The project takes an innovative approach in teaching people about the range of options and strategies available to solve problems rather than simply disseminating information about the law and expecting people to apply it in a vacuum. The evidence of the Royal Commission and the National Inquiry into Racist Violence showed that this approach does not work and has never worked.

The essential concept is of Tools and Tracks. Tools are the things one needs to use to solve a problem. The law is a tool, so is evidence. Other tools could include information about a government department's operational policies.

Tracks are types of strategies. We describe personal tracks (handling it yourself), community tracks (using the media, boycotting the offending business) and legal tracks (accessing rights under general law as well as human rights and anti-discrimination law).

Developments

The NCEP comprises a number of components:

- national video and training manual
- regionally produced resource products and accompanying training manuals
- audio tapes on different models of mediation and alternate dispute resolution

Resource:

Consultants have been contracted to develop the Resource components in three regions:

- Western Australia
- South Australia and Northern Territory
- South Eastern States and the ACT

A 'Tracking Your Rights' resource was developed and produced in Queensland in 1992.

Western Australia

The community consultations in Western Australia have been extensive and thorough. WA is vast and clearly there are people and places we have not been able to visit. Our process has, however, been representative of the diverse circumstances and viewpoints of Aboriginal peoples in Western Australia.

During the first round of consultations over 70 meetings, designed to identify major issues, were held in Perth, Narrogin, Albany, Derby, Kalgoorlie, Northam, Port Hedland, Kununurra, Halls Creek, Fitzroy Crossing, Mandurah, Pinjarra, Bunbury, Collie, Roebourne, Mogumber, Moora, Kondinin, Brookton, Nullagine and Jigalong.

During the second round of consultations over 40 meetings, designed to feedback information from the first round of consultations and to discuss appropriate formats for the Resource, were conducted in Perth, Northam, Mandurah, Collie, Pinjarra, Bunbury, Moora, Mogumber, Mt Barker, Albany, Kalgoorlie, Cosmo Newberry, Kanpa, Tjirrkarli, Mulga Queen, Patjarr, Wanarn, Warburton, Laverton, Leonora, Kondinin, Derby, Fitzroy Crossing, Halls Creek, Kununurra, Balgo, Port Hedland, Nullagine and Jigalong.

The third round of consultations trialed the draft Resource and asked people to respond to both the content and format. Focus group workshops were conducted in four regions: Kimberley, Western Desert, Pilbara and Perth.

The consultations in WA produced very valuable information. People were generous with their time and with the information they shared. They told us their stories, they recounted incidents involving family and friends. ATSIC staff, Councillors and Commissioners were extremely helpful in guiding our choices of communities to visit and in accompanying staff and consultants to communities. In some places they offered invaluable assistance with language and translation during meetings.

Higgins, Wood & Associates, the consultancy team developing the Resource component in Western Australia, submitted a draft product. The WA Resource and accompanying Training Manual will be completed and ready for distribution by the end of 1996.

South Eastern States and the ACT

Rowitta Designs replaced Mukina Management Services as the consultants developing the south-eastern component of the NCEP. The change of consultants in the middle of developing the Resource and in the midst of consultations made it very difficult to maintain links with the people initially contacted in communities and created delays. The Co-ordinator and Rowitta met in December 1995 to refocus and redevelop an appropriate strategy.

Consultations in the south-east have included meetings in: Broken Hill, Deniliquin, Dubbo, Eden, Grafton, Griffith, Lismore, Moree, Narrandera, Newcastle, Taree, Wagga Wagga, Walgett, Wilcannia in NSW, Cape Barron Island, Burnie, Devonport, Hobart, Launceston, Penguin, Smithton in Tasmania and Bairnsdale, Cumeragunja, Geelong, Horsham, Melbourne, Mildura and Shepparton in Victoria. People were less responsive to the meetings arranged by both groups of consultants than was the experience in Western Australia. There is no clear reason for this though one could speculate.

Consultations will continue with a draft product being completed within the next reporting year.

South Australia and Northern Territory

The Aboriginal Research Institute, University of South Australia were finally appointed as the consultancy team responsible for the development of the Resource component of the NCEP for South Australia and the Northern Territory. You will recall from previous reports that we have faced many difficulties in funding the development of the NCEP nationally. I would like to acknowledge the consultants patience and commitment to the Resource and their willingness to put the project on hold until a few months ago.

The consultancy team have conducted meetings in Berri, Murray Bridge and Mt Gambier and have met with various umbrella organisations to co-ordinate further community visits in both South Australia and the Northern Territory. Consultations will continue with a draft product being completed within the next reporting year.

Video

A most important component of the NCEP materials has been the production of a video pitched for national coverage. Vision Splendid were appointed as the production company. The script was developed in consultation with the national Co-ordinator and members of the Race Discrimination Unit, Human Rights and Equal Opportunity Commission. It is a training video designed as a trigger for using the rest of the NCEP.

The story opens with an incident in a mixed business shop which involves breaches of the *Trade Practices Act* (Cth) and possible breaches of the *Race Discrimination Act 1975* (Cth) in the areas of access to goods and services and racial vilification. The incident involves an Aboriginal women going into the shop to exchange a shirt that she brought for her husband's birthday. The shirt had been mislabelled and was the wrong size.

Subsequent scenes follow the process of a community considering how to deal with the incident. The processes are described in terms of Tracks: alternative strategies, and Tools: information, knowledge of rights and the law, evidence, etc.

The video examines three types of tracks – legal, individual and community-based strategies. As the community group discuss the merits of each type of track, we see a visualisation of how they might work.

A rough cut of the video was shown at a number of community meetings in Tasmania, Melbourne and Shepparton and was very well received. People identified with the story and with the characters.

Liz de Rome (Project manager), Catherine Campbell (Director) and Peggy Todd (Producer) developed and steered the vision for the video. The Production Company sub-contracted a number of Aboriginal and Torres Strait Islander filmmakers including Warwick Thornton as the Director of Photography, Murray Lui as Camera Assistant, Catriona McKenzie as writer, Andrew Belletty as sound recordist, Pauline and Grace Clague in Wardrobe and of course a number of actors. The production approach was collaborative and involved the skills and talents of both Indigenous and non-Indigenous people.

The Training Manual for the video has been drafted by Liz de Rome & Associates.

Indigenous Dispute Resolution Project

The Indigenous Dispute Resolution Project, funded by the Council for Aboriginal Reconciliation, is a radio kit titled *Working it out Locally – Aboriginal Community Justice and Mediation*, which aims to promote an understanding of dispute resolution both within our communities and between Indigenous and non-Indigenous people.

The first radio documentary, *Bring 'em up Proper Way – Aboriginal Community Justice and Kids*, seeks to build bridges between Aboriginal Law and the non-Aboriginal criminal justice system. It shows what can be achieved when government agencies, such as the Queensland Corrective Services Commission listen to our people's aspirations and work alongside them to improve community relations and develop Community Justice Programs. By promoting a successful partnership, other communities and agencies may be encouraged to develop similar initiatives.

The second radio programme, *It's a Family Affair – Mediation and Community Conflict*, discusses how existing mediation models can be improved. Cultural differences are not readily accommodated by using the one definitive model of dispute resolution. Instead, Aboriginal mediators have adapted the Community Justice Program's model so that it may be used within their communities. It is hoped that some of the questions raised by this programme may lead to increased dialogue between Indigenous peoples, mediators and mediation service providers on the applicability of the one-model mediation system within our communities.

The radio kits will be distributed before the end of 1996 via the BRACS network.

I wish to reiterate my thanks to the Council for Aboriginal Reconciliation for funding, what I believe is, an informative and useful community resource.

Tracking Your Rights - Queensland

Unfortunately, funding has still not been forthcoming to implement training using Tracking Your Rights in Queensland. The Queensland Resource was well received and commented on by people in communities throughout Western Australia.

National Co-ordination

The Consultants met with many representatives from Indigenous community organisations, government departments and agencies during consultations. These consultations are integral to the successful development of the NCEP. Human Rights and Equal Opportunity Commission officers have continued to work with State and Territory anti-discrimination agencies to discuss the development, delivery and evaluation of the project. This has proved to be beneficial for the agencies concerned and illustrates the importance of co-ordination and working together. Indigenous Australians are the beneficiaries of such collaborative efforts. So is the public purse.

Reference Committee:

The National Reference Committee, comprising members from a range of backgrounds and offering diverse skills and perspectives, met twice during the year in August 1995 and April 1996. Government and non-government organisations/agencies represented include: ATSIC; Department of Employment, Education, Training and Youth Affairs; Council for Aboriginal Reconciliation; Northern Territory Anti-Discrimination Commission; Victorian Equal Opportunity Commission; South Australian Equal Opportunity Commission; New South Wales Anti-Discrimination Board; Western Australia Aboriginal Legal Service; Secretariat National Aboriginal and Islander Child Care; National Aboriginal and Islander Legal Services Secretariat; Tranby College; Native Title Unit Victoria; HREOC, Tasmania, Northern Territory and Sydney; South Australian Legal Rights Movement; Northern Australian Aboriginal Legal Aid Service; Central Australian Aboriginal Legal Aid Service; Katherine Regional Aboriginal Legal Service; Aboriginal Justice Advisory Committee, South Australia; National Federation of Aboriginal Education Consultative Groups; Aboriginal Disability Association; and, community representatives.

Members of this Reference Committee have met during the development phase of the NCEP to offer their perspectives on the issues identified and the format that the final product will take. Government departments have not participated in these meetings as effectively as they could have and were poorly represented at the last meeting.

I argue that the Department of Employment, Education, Training and Youth Affairs must involve themselves in human rights education. Though we have had representatives from DEET on our national Reference Committee we have been unable to secure any firm commitment from them to be involved in the delivery and implementation of the NCEP. They have however, admittedly under a different government, expressed their support for the NCEP. I hope to improve this situation within my next reporting cycle.

It is imperative that we have effective government representation and support to ensure the full and effective implementation of this recommendation. It is a matter of quality and efficiency.

Racial Vilification

I am working with the Race Discrimination Commissioner, Ms Zita Antonios, to develop education material for Aboriginal and Torres Strait Islander peoples on racial vilification. Not surprisingly, the issue of racial vilification has featured alarmingly in our recent consultations. Workshops and consultations in the Northern Territory, South Australia, Tasmania, Victoria and the ACT have specifically dealt with racial hatred law.

The Video and each of the Resource products will feature Racial Vilification as a significant component.

Project Outcomes

- Sponsorship proposals submitted to Qantas, Telecom and UNESCO were unsuccessful.
- Sponsorship was sought and received from ANSETT and the Law Foundation of NSW.
- Consultations with a variety of Aboriginal people and Torres Strait Islanders involved in conflict resolution and mediation programmes and the development of scripts for radio documentary audio-cassette tapes on mediation and conflict resolution.
- Production and distribution of an NCEP Newsletter as well as newsletters compiled by the individual consultancy teams.
- Development and production of the national video and accompanying training manual.
- Development, in consultation with the Race Discrimination Commissioner, of specific material on racial vilification.

Sponsorship was received from ANSETT and the Law Foundation of New South Wales. I applaud their commitment to social justice for Indigenous Australians.

Funding is a problem if the NCEP product is to be printed and implemented.

Outlook for 1996/97 and Beyond

The final round of consultations will continue in identified communities in New South Wales, ACT and Victoria throughout July, August and September 1996. These consultations ascertain the social justice issues that impact most on people's human rights as well as the type of resource that communities are best able to use. Some trialing of the draft will take place in communities later in the year. A draft Resource will be submitted early in 1997.

Consultations will continue throughout the Northern Territory and South Australia in 1996.

The Resource component of the NCEP will be completed within the next reporting period in New South Wales, Tasmania, Victoria and the ACT and the Northern Territory and South Australia. Training Manuals will be developed to accompany the Resource components of the NCEP.

Strategies dealing with the successful implementation of the NCEP in all States and Territories will be pursued. To this end, we will continue to lobby for additional funds and seek private sponsorship.

State and Territory Governments, with the exception of the Northern Territory, have not addressed their commitment to Recommendation 211 and are not assisting with the implementation of the final product. Remembering that the Queensland Tracking Your Rights resource was completed in 1993 and trials were conducted in 1994, the Resource has still not been implemented. In fact, we have distributed more copies of 'Tracking Your Rights – Queensland' outside of the State of Queensland, through our consultations in other States and Territories. The resource and its fundamental philosophy and structure have been well received and it is being used in material developed by other agencies and departments.

I am acutely aware that we have a responsibility to feedback our progress to those who so generously shared their thoughts and experiences. We have not been able to feedback information to Aboriginal and Torres Strait Islander peoples in Western Australia, in the form of the finished

resource, as soon as they would like. In reality it can take a year from when the consultant's draft is delivered for the product to actually reach communities because of bureaucratic procedures and other constraints. This is unreasonable and I will endeavour to improve the situation when the remaining regional products are delivered for comment and final production.

In earlier Reports, I talked about bureaucratic structures and processes that operate to frustrate rather than move products through its system:

The major difficulty in bringing such a project to fruition is the essential dichotomy which exists between Indigenous knowledge and the bureaucratic culture of the dominant system...

The deconstruction of the existing paradigms which underpin Indigenous affairs policy-making in this country and their replacement with bottom-up, locally based principles is not limited to any specific area of Aboriginal and Torres Strait Islander affairs. A fundamental shift in perspective should infuse our interaction as we all approach the twenty-first century.²⁶¹

<p><i>You need to stop asking us what we want, ask whitefellas what they want to make change, what are they prepared to do to create change.</i></p>	<p>Kununurra, 1996</p>
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212: National Indigenous Legal Curriculum Development

The Royal Commission into Aboriginal Deaths in Custody recommendation 212 states:

That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organizations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilize anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions.

The National Indigenous Legal Curriculum Development Project is structured on the following:

- that there is no national accredited legal training course for Aboriginal and Torres Strait Islander peoples focussing on the legal and human rights of Indigenous peoples;
- the empowerment of Aboriginal and Torres Strait Islander peoples is substantially dependent on our ability to understand and access government services and mechanisms for the protection of our human rights and legal rights, both nationally and internationally; and,
- that Field Officers in Aboriginal and Torres Strait Islander Legal Services possess the skills, experience and knowledge of their local community, essential to their work, but are severely restricted by the lack of culturally appropriate training courses, as well as the expense and difficulty of accessing accredited training courses.

The general objectives of the Project are to substantially upgrade the level of professional assistance that Field Officers are able to provide through the creation of higher quality education accessible throughout Australia.

The dual aims of the National Indigenous Curriculum Development Project are:

²⁶¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, p. 182.

1. to increase the level of legal and human rights education and training to Aboriginal and Torres Strait Islander peoples; and,
2. at a broader level, to increase access to information and resources, which address human and legal rights, for clientele of Aboriginal and Torres Strait Islander Legal Services.

It is proposed that the National Indigenous Para-Legal and Legal Courses designed to educate Field Officers will be run on a continuing basis through: community controlled education and training centres; Institutes of Training and Further Education (TAFE); Indigenous Tertiary Centres; and, universities. These courses will provide para-professional legal training with options to pursue further professional legal studies.

It is also proposed that the skills-based components of the curriculum will be delivered, in total or in part, by community-based Legal Services. This is in recognition of the express desire of Legal Field Officers to access as much of the proposed course as possible in their workplace. To this end, talks were held with education providers around the country to determine the viability of running the courses in particular regions. Location is crucial as it is thought that Field Officers entering a course or courses will do so through community and vocational education programmes.

More specifically, the project aims to provide:

- professional education and training to Aboriginal and Torres Strait Islander Field Officers and Para-legal workers in Commonwealth, State and Territory Law, including Commonwealth and State anti-discrimination law, customary and international law;
- an education forum for Aboriginal and Torres Strait Islander workers to discuss curriculum development in relation to Indigenous human rights issues in the international context and Australia's current obligations under international human rights instruments;
- a strategy to enable Aboriginal and Torres Strait Islander peoples to explore avenues for the recognition of Indigenous customary laws and customary law dispute resolution by the Australian legal system; and,
- in the long-term, a career path for Aboriginal and Torres Strait Islander Field Officers, through providing advancement to full law degree qualification and other tertiary education options.

Background of the project

As early as 1991, with the release of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission commenced discussions with the National Aboriginal and Torres Strait Islander Legal Services Secretariat (NAILSS) to put together a submission for funding to establish a programme in response to recommendation 212.

When the submission was successful and the responsibility for the administration of the funds and the implementation of recommendation 212 was given to the Human Rights and Equal Opportunity Commission in late 1993, NAILSS withdrew their support citing the proposed content of the programme as their chief concern and commenced an active, but to date ineffective, campaign to undermine the project. Due to this impasse with NAILSS, it was difficult to make significant progress during the earlier period of the project. In September 1994, I appointed an Indigenous National Co-ordinator and requested her to negotiate and consult directly with Aboriginal and Torres Strait Islander Legal Services and other relevant Indigenous community organisations.

The National Co-ordinator has worked vigorously to ensure Aboriginal and Torres Strait Islander Legal Services and Legal Field Officers are directly involved at all stages of the curriculum development.

As I mentioned in my last report, and wish to restate for the public record, we have endeavoured to involve NAILSS at every stage of this project but to date have only been successful in involving individual Aboriginal and Torres Strait Islander Legal Services.

We have sent NAILSS, all updates, reports and invitations to participate but, unfortunately, they appear set on a course of deliberate dissemination of misinformation and to a policy of hindrance and undermining of the implementation of Recommendation 212. It is with great disappointment, I must say that NAILSS appears to view the politics of funding placement as more important than the interests of Legal Field Officers and the clients of Aboriginal and Torres Strait Islander Legal Services. Their tactics have not deterred community people and members of Legal Services from making significant, worthwhile contributions to the project adding to the depth and rigour of the courses being developed.

To ensure that Indigenous Legal Field Officers and Legal Services are involved in the decision-making and development of this project, the National Indigenous Legal Curriculum Development Co-ordinator established the Curriculum Development Advisory Committee (CDAC) to discuss and identify the most pressing issues affecting Indigenous human rights issues and education.

To date, three national CDAC consultative meetings have been held: the first in Sydney 20 – 21 September 1995; the second in Cairns 13 – 16 November 1995; and, the third in Sydney 1996. The fourth and last national meeting will be held in Sydney on 17 and 18 October 1996, at which we expect the final draft curriculum will be tendered for general discussion, debate and final approval.

Co-ordination

Through the Curriculum Development Advisory Committee, the project design and review involves:

- Aboriginal and Torres Strait Islander Legal Services;
- the Aboriginal and Torres Strait Islander Commission;
- the Department of Employment, Education, Training and Youth Affairs;
- the Attorney-General's Department;
- the National Federation of Aboriginal Education Consultative Groups;
- the Torres Strait Islander Regional Education Committee; and,
- the Indigenous Higher Education Committee.

To streamline the curriculum development, Focus Groups were set up both for the community and vocational education and training sector as well as the university sector. The Focus Groups develop documents and materials when the larger CDAC cannot, due to time and monetary restraints.

Queensland TAFE Aboriginal and Torres Strait Islander Curriculum Development Consortium won the tender to develop the community and vocational education and training sector curriculum. Project meetings for this sector were held in Cairns.

Meetings for the university sector were held by the University of Technology, Sydney, the successful tenderer for curriculum development in this sector.

The curricula worked on by both TAFE and the UTS recognize prior learning and experience and, accordingly, allow for multiple entry points and for multiple exit levels, including:

- Certificate 3 in Indigenous Legal Studies
- Certificate 4 in Indigenous Legal Studies
- Diploma of Indigenous Legal Studies
- Bachelor of Arts/Bachelor of Laws in Australian Indigenous Law
- Graduate Diploma in Australian Indigenous Law
- Master of Indigenous Legal Studies in Australian Indigenous Law (leading to a Doctorate of Law)

There has also been a desire expressed by Legal Field Officers to link into other tertiary areas according to their interests, such areas may include Humanities and Social Sciences.

Linkages

A number of strategies have been developed to ensure that people following Vocational Educational and Training (VET) pathways into university study are provided with a smooth transition from one course to the other.

All courses are developed from a common philosophical base to ensure Indigenous knowledge and experience is valued:

- subjects/modules will be sequenced to encourage students to move beyond identity issues to cultural affirmation;
- the courses will be informed by an Indigenous cultural view; and,
- the subject modules will be characterised by the co-existence of both Indigenous and non-Indigenous cultural knowledge.

There are some modules/subjects that will incorporate the same content at approximately the same level of difficulty as 'introductory' university level courses. These introductory modules/subjects are being developed jointly with the Focus Group and the teams developing the curricula. The entry requirements for both the diploma and the degree course will be common.

Flexible delivery strategies should be provided by institutions offering the course to meet the needs of the potential student group. Although the course will be open to any person who is interested in legal studies, the primary client group is the Indigenous Legal Field Officers across Australia. When students come from very diverse places and circumstances, flexible delivery becomes crucial. In addition, given the Field Officer cohort is relatively small, in order to broaden and sustain the course, we wish to attract other Indigenous legal studies students, particularly potential students who are working with community-based legal issues.

Discussions have begun about credit towards the degree course for people who have successfully completed the diploma. A year's credit, or at least 'up to a year's credit' in an undergraduate degree is a common linking or articulation arrangement between the Vocational Education and Training sector and universities.

Vocational Education and Training Sector Report

The Aboriginal and Torres Strait Islander Curriculum Consortium based at the Far North Queensland Institute of TAFE has been developing the TAFE suite of courses since the beginning of the year. The industry needs analysis for the course was undertaken in Darwin for the CDAC. A

Focus Group made up of industry members, in line with best practices for curriculum development established by the accreditation body for Queensland, assisted in the development process.

The first meeting of the Consortium and the Focus Group identified the existing vocational outcomes in the Aboriginal and Torres Strait Islander Legal Services and the skills and competencies required by Field Officers.

Based on their findings, the course outline was developed in accordance with National Framework for the Recognition of Training (NFROT) Principles.

This course framework was presented to the CDAC meeting in April where it was approved in principle.

Because of the different skills and knowledge required by the ALSs and Community Legal Services, and because of location and/or State or Territory requirements, two Field Officer Strands are being developed: the ALS Field Officer Strand and the General Field Officer Strand. They will provide students with the flexibility to choose electives in line with the specific legal skills and knowledge they require.

At the second meeting, the Focus Group began to review the modules prepared by the Consortium. This process will continue in late August 1996 when the Focus Group next meet. The Group will then finalise the syllabus documents for the three courses in mid-October 1996, ready for presentation to the CDAC. It is anticipated that these documents will then go to the Queensland accreditation body. Once accredited in Queensland the course will be put on the National Register and be available for delivery by registered providers in 1997.

The potential for credit transfer into the UTS courses is illustrated on the following page.

It should be possible for a person to gain one year's credit towards an LLB/BA course through gaining credit for Indigenous subjects. Given the sequencing and structure of the LLB/BA, the credit could be for the first year of the degree course.

Credit towards the LLB is likely to be confined to the Indigenous law subjects. No credit can be given towards the 'Priestly'²⁶² core. It is probable that the Indigenous law elective subjects will be related to the Priestly core, so will be at a higher level than other Indigenous legal studies. If this is the case, credit transfer for modules studied at the Diploma level is unlikely. Therefore, the maximum credit may be limited to twenty-four points or one semester.

The actual negotiations between the VET sector and the UTS may set a precedent, thereby avoiding separate negotiations with each university that offers the course. However, given the independence of universities, separate negotiations may be necessary.

UTS Report

The Provision of degree awards in Australian Indigenous Law

The University of Technology, Sydney has designed undergraduate and postgraduate courses for professional study at tertiary level for Aboriginal and Torres Strait Islander Legal Field Officers.

²⁶² Priestly core refers to those subjects which are compulsory for a person seeking to go to the Bar and work as a barrister.

These courses compliment programmes developed by the VET sector and provide a national model of tertiary law studies, which may be adopted by law schools across Australia.

Graduates of the degree courses would have the opportunity to gain professional accreditation by the Legal Practitioners Admission Board in New South Wales, which will enable them to practice as solicitors or barristers.

The UTS has developed awards relevant to Legal Field Officers and other Indigenous people engaged in similar legal and para-legal roles:

- Bachelor of Laws in Australian Indigenous Law; and,
- Bachelor of Arts/Bachelor of Laws in Australian Indigenous Law.

A critical feature of these initiatives has been the commitment to optional input from the Indigenous community, facilitated through the University Centre for Australian Indigenous Studies, Education and Research (Jumbunna, CAISER) and by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

The awards evolved through a series of meetings that brought community members and representatives together with UTS staff responsible for curriculum development: Focus Group meeting, February 1996, Brisbane; CDAC Focus Group meetings in April, July and October 1996 in Sydney; and, a meeting with the Central Australian Aboriginal Legal Service in July 1996.

On the basis of this input the University has responded with:

1. A suite of six electives in the undergraduate law degrees from which students must take at least four:
 - Family Law and Women's Perspectives – Aboriginal and Torres Strait Islander People
 - Criminal and Civil Law – Indigenous Perspectives
 - Australian Indigenous Customary Law incorporating Indigenous Land Issues
 - Current Law Reform Proposals – Indigenous Perspectives
 - International Law and Treaty Obligations, State and Regional Protocols – Indigenous peoples
 - Indigenous Dispute Resolution
2. The adoption of the Aboriginal Studies major within the Bachelor of Arts of the combined Arts/Law degree as a compulsory component of study.
3. A major postgraduate strand of study incorporating a choice of subjects including:
 - Indigenous Context of Australian Law
 - Indigenous Dispute Resolution
 - Indigenous Land Rights – A Comparative and International Perspective.

All these initiatives will be available from 1997 at the UTS on a part-time or full-time basis. Possible block mode delivery is being considered, however, it would be subject to the number of people seeking to do the course, funding and University logistics.

Disability and Mental Health

It has always been the intention of the CDAC that issues concerning discrimination against Aboriginal and Torres Strait Islander people with disabilities would be covered within the curriculum. This has now been achieved. The Disability Commissioner, the Attorney-General's Department (Legal Aid and Family Services) and the Aboriginal and Torres Strait Islander Social Justice Commissioner have agreed to work together to ensure a substantial unit is developed which focuses specifically on disability discrimination.

In 1994-95, the Human Rights and Equal Opportunity Commission undertook a number of projects under the auspice of the *Disability Discrimination Act* (DDA) Resource Training Project with funding from Legal Aid and Family Services.

Following national consultation with stakeholders, one of the priority projects identified was providing community legal education on the DDA to legal and para-legal workers who work with Aboriginal and Torres Strait Islander peoples.

Initial approval for the use of funds from the DDA Resource and Training Project was given by the, then, Parliamentary Secretary to the Attorney-General for a project which would provide:

...a two day workshop on the DDA for legal, para-legal and other workers who provide advocacy services to Aboriginal and Torres Strait Islander people with a disability.

However, following further discussion with a number of Aboriginal Legal Services it was felt that the NILCDP provided a unique opportunity for the DDA Resource and Training Project to participate in developing a more effective and lasting tool for addressing the education and training needs of Aboriginal and Torres Strait Islander legal and para-legal workers.

The joint project will result in a number of wider outcomes. It will:

1. Ensure an ongoing resource is available through an accredited formal structure, as distinct to the completion of a 'one-off' training event.
2. Allow for the development and trialing of a much more substantial module (or modules) to address issues concerning disability discrimination and the experience of Aboriginal and Torres Strait Islander peoples.
3. Allow for the production and distribution of the module as a 'stand-alone' training package for use by people outside the original target group in the broader legal, para-legal, health, child-care and community development fields.

The unit which will be developed primarily for a target group at Certificate 3 and 4 levels in the TAFE system, will also be an accessible 'stand-alone' workplace training tool for workers in other fields providing support or services to Aboriginal and Torres Strait Islander peoples who do not necessarily want to continue in a formal course.

Process

Final details of the preparation and distribution of the curriculum material are under consideration. There is already reference and community education material concerning disability discrimination available in both the community legal sector and through the Human Rights and Equal Opportunity Commission, but little is specifically focused on, or accessible to Indigenous peoples.

The CDAC has, therefore, appointed a writing team with experience in disability discrimination matters, disability issues within the Indigenous community and educational development, to prepare draft material within the framework set by the CDAC. The writing team will consult with individuals and organisations with experience in the matter to be covered in the unit. A small Reference Group will provide advice and feedback on the resultant material.

We expect draft material to be submitted to the TAFE Focus Group by late August–early October 1996.

The future

1995 and early 1996 saw the development of curriculum modules. We considered trialing some of these products but ultimately determined it was unnecessary given the comprehensive consultations undertaken in developing the project. Time and money were another critical consideration.

The fourth and last national meeting of the CDAC will be convened in Sydney in October 1996. At this meeting, it is envisaged that final draft curricula will be tendered for general discussion, debate and approval. Course implementation and official commencement is anticipated in early 1997. In accordance with the views of Aboriginal and Torres Strait Islander Field Officers, expressed through the CDAC, the course will develop in discrete module format to allow each Field Officer to plan the course as an Individual Education Programme dictated by their circumstances and their communities' needs.

Negotiations have taken place with several educational centres to run the courses in the top end of the country, that is Queensland, the Northern Territory and the northern part of Western Australia. Discussions with a community college in Adelaide have been held to accommodate the southern States, that is South Australia, New South Wales, Victoria, Tasmania and the southern part of Western Australia.

Conclusion

The essential purpose I have pursued in this project has been the collaborative development of culturally appropriate curricula tailored to the needs of Aboriginal and Torres Strait Islander people working in their communities. Not only will the fullest import of Recommendation 212 be carried into effect, I believe the National Indigenous Legal Curriculum Project will provide a blueprint for future legal education programmes and courses.

Chapter 5: International issues

Given that Indigenous peoples total 300 million or 7.5% of the world's population, it is unlikely, with such a significant percentage of the world's population denied even the most fundamental human rights, that a peaceful and prosperous future for all humanity will become a reality.

It is the common experience of Indigenous peoples worldwide that a higher proportion of us live below the poverty line; we have the shortest life-expectancy and the highest infant mortality rates; the poorest school retention and graduation rates; the highest unemployment figures; most of us live in overcrowded poor quality housing and suffer endemic environmental health problems. The result: gross over-representation in prisons and in statistics of poverty and disadvantage. Behind these statistics are the lives of individuals, families and communities striving to protect their distinct identity and to enjoy the rights common to all human beings.

The international Indigenous human rights movement is growing in vigour. I have sought to convey in this chapter a sense of the momentum of this global phenomenon and to present a selection of issues which the world's Indigenous peoples are currently addressing. Accordingly, this chapter will cover a number of distinct matters, they include United Nations forums, Amnesty International, modern technologies, rights to education, culture and heritage. I consider Indigenous interests specifically articulated in the Convention on Biological Diversity and also the implications of proposed changes to Australia's treaty ratification process.

The Working Group on Indigenous Populations

It is in our disadvantage and our struggle for the recognition of our rights that we are united. The United Nations Working Group on Indigenous Populations (WGIP) is a forum where Indigenous peoples from around the world come together.²⁶³ It provides a structure for the articulation of our rights. It gives us the shared power of common positions. I have described the Working Group as a 'small revolution', a revolution which has seen the Earth's 300 million Indigenous people stand, not in isolation against often hostile Nation States, but together in dialogue with governments, many of which had their genesis in colonial power.

The Working Group is unique within the UN system. Its vitality and the continuing importance of its functions have led to calls for its maintenance as a forum for Indigenous peoples. The Working Group has two main roles: to review developments concerning Indigenous peoples human rights and to set standards in regard to the rights of Indigenous peoples.

The success of the Working Group lies in its flexibility and expansion of normal UN practices. Its sessions are open to interested parties, specifically, Indigenous peoples and their organisations. This is where the *Draft Declaration on the Rights of Indigenous Peoples* had its genesis. The *Draft Declaration* has now progressed to consideration by the Commission on Human Rights, however, the WGIP continues to be a vital forum for Indigenous aspirations and participation. The role it plays is different to and distinct from the proposed permanent forum for Indigenous Human Rights within the UN system. I discuss proposals for the permanent forum in my report on Session 13 of the Working Group.

Working Group on Indigenous Populations, Session 13, 24-28 July, 1995

Over 700 people attended this session of the Working Group. They included representatives of: 232 separate Indigenous peoples, nations or organisations; 38 Member States; 7 organisations of the United Nations system; and, a host of non-governmental organisations with UN consultative status and independent experts.

The major issues discussed at this meeting included: the right of self-determination; the definition of Indigenous; the future role of the Working Group; and, the creation of a Permanent Forum on Indigenous peoples within the UN structure.

In the course of the Working Group, I made a number of interventions addressing each of the above issues. In addition I spoke regarding the potential role of an Indigenous High Commissioner and reported on Australia's recognition of native title.

²⁶³ The United Nations Economic and Social Council established the Working Group on Indigenous Populations in 1982. The WGIP reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which in turn reports to the Human Rights Commission. For further detail see my First Report, 1993, Chapter 4.

Interventions Session 13

The Australian Government put forward a statement asserting a limitation on the right of self-determination as it applies to Indigenous peoples. It would confine the right to exercise within the bounds of the Australian state. I made the following intervention.

The Government's position on 'internal' self-determination is an infringement of the right of all peoples as enshrined in the United Nations Charter and in Article 1 of the *International Covenant on Civil and Political Rights*. Indigenous peoples' right of self-determination goes to the very heart of our fundamental rights as First Peoples and, as such, it is not for governments to bestow self-determination upon us, nor to seek to delegate or dictate the terms on which that right may be exercised.

Suggestions by Nation States that Indigenous peoples must be 'defined' is also inextricable from the self-determination debate. The integrity of the principle of self-determination rests on our right to self-definition. Again, it is not the domain of governments to define peoples. As Indigenous peoples we know who we are and have consistently rejected gammon groups who have sought to masquerade as Indigenous at this forum.

In relation to the consideration of a Permanent Forum, I have suggested to the Working Group that a Permanent Forum should:

- ensure full participation of Indigenous peoples in international decision-making affecting our interests;
- monitor the implementation of Indigenous peoples' rights;
- enforce treaties and other agreements with States;
- resolve disputes and provide remedies for violations of Indigenous peoples' rights; and,
- co-ordinate activities across the United Nations system on the basis of full consultation and collaboration with Indigenous peoples.

I also believe the creation of a post of High Commissioner for Indigenous Peoples is essential to ensure that Indigenous peoples' issues receive adequate policy prominence and resource endowment within the United Nations system. In particular, the High Commissioner could be given the capacity to act rapidly in response to emergencies. I note that the B'okob' Declaration (Chimaltenango) records the resolution of the First Summit of Indigenous Peoples to create such a post.

Technical Meeting on the Decade of the World's Indigenous People, 20-23 July, 1995.

The International Decade was launched at the 49th Session of the United Nations General Assembly on 9 December, 1994 and concludes on 31 December, 2004. Mr. José Carlos Morales was appointed to co-ordinate activities for the Decade within the Centre for Human Rights. The theme of the Decade is 'A new relationship: partnership in action'.

At the Technical Meeting, Indigenous peoples stressed that the objectives decided for the decade should be strategic, should set measurable targets and should address the fundamental issues of concern to Indigenous peoples. In Australia, the protection and advancement of our rights is the cornerstone for our Decade planning. We are focussing on reconciliation, social justice issues and the

implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

The passage of the *Draft Declaration on the Rights of Indigenous Peoples* through the United Nations system and its ultimate adoption by the General Assembly is the primary aspiration of the world's Indigenous peoples. Aboriginal and Torres Strait Islander peoples strongly encourage the unreserved adoption of the *Draft Declaration* by the Australian Government at the earliest possible opportunity and within the International Decade of the World's Indigenous Peoples.

The United Nations Voluntary Fund, established to assist in funding activities for the International Decade, however, is in poor condition. Domestically, there has been little Government commitment to sponsoring activities. If the Decade is to be successful, there is a need for commitment and sustained effort by Nation States at the international, regional and national level.

The Draft Declaration on the Rights of Indigenous Peoples

In previous reports, I have spoken at length about the evolution of the *Draft Declaration on the Rights of Indigenous Peoples*. It has been formulated over several years culminating in the *Draft* being completed at the eleventh session of the working group in 1993.²⁶⁴

The Draft Declaration on the Rights of Indigenous Peoples expresses the aspirations of Indigenous peoples in all aspects of our lives. According to Article 42 of the *Draft Declaration*, the rights defined within it shall constitute the minimum standard, for “*the survival, dignity and well-being of the Indigenous peoples of the world*”.

Until the current *Draft Declaration* is finally adopted it has no formal status in law. However, this document is the expression of a view on the position of Indigenous peoples which is gaining increasingly widespread acceptance in the international community. The document must now pass through the United Nations system before it can be endorsed by the General Assembly and adopted by Member States.

The *Draft Declaration* is now before the Commission on Human Rights (CHR)²⁶⁵ where governments will discuss and, potentially, modify it. We have already made considerable headway by gaining acceptance of Indigenous participation in the special working group convened by the CHR to consider the *Draft*. Along with ATSIC and other Indigenous Australian representatives, I participated in the first meeting of this working group in 1995 and will participate in the next meeting to be held in October, 1996, where it is likely to be moved that the first reading of the *Draft Declaration* occur.

International Conference of the World's Indigenous Peoples – Education

Other international gatherings of Indigenous peoples during this past year have focussed on specific interests. The International Conference of the World's Indigenous Peoples–Education, was convened in Albuquerque, New Mexico in June 1996. A delegation of two hundred Aboriginal and Torres Strait Islander peoples attended along with over twelve hundred delegates from Indigenous

²⁶⁴ *Draft Declaration on the Rights of Indigenous Peoples*, WGIP Session 11, 1993. The text of the *Draft Declaration* is included in web site: <http://www.halcyon.com/FWDP/un.html>.

²⁶⁵ The special working group of the Commission on Human Rights should not be confused with the Working Group on Indigenous Populations. They are two distinct entities. By resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided to establish an open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating the technical aspects of the *Draft Declaration on the Rights of Indigenous Peoples*.

communities around the world. 'The Coolangatta Statement', which began its life as a stimulus document drafted at the same conference convened in Wollongong in 1993, was adopted as the Working Document for the articulation of Indigenous Education Rights. The Conference delegates are now looking at possible ways the document can be introduced to the United Nations system to provide the basis of a draft international instrument on Indigenous peoples' education rights.

The Working Group on Indigenous Populations, Session 15, 1997, will focus on the theme of 'Land'. It is likely 'Education' will be the theme for the following year and provide the avenue Indigenous educators are seeking to develop the Coolangatta Statement.

Habitat II Conference

In June 1996, preparatory meetings were held for the United Nations World Conference on Human Settlements, Habitat II, which enabled Indigenous input and an Aboriginal delegate to attend the United Nations meeting in Turkey in July. High on the agenda was the 'Right to Housing'. It is a right of immense importance to Indigenous peoples throughout the world. The nature and extent of the right to housing is examined in chapter 3 of this report. A vital part of the debate at the preparatory meeting related to the importance of environmental health issues, including provision of infrastructure.

In July 1996, at Habitat II, in its statement against the agenda item *International Decade of the World's Indigenous People*, the Australian Government included a commitment to:

*Improving the well being of indigenous people and, in consultation with indigenous peoples, to raise housing and infrastructure standards and environmental health outcomes for indigenous Australians to at least the level equivalent to standards and outcomes available for non-indigenous Australians by the year 2006.*²⁶⁶

Despite the modest content of this commitment, a question arose as to its status as a confirmed articulation of the Australian Government's position. No rhetorical commitments, policies or action to date have been sufficient to shift the housing problem to any acceptable degree. A serious commitment backed up by multifaceted strategies and consistent action is required as a matter of the utmost urgency.

Overwhelmingly, the diseases suffered by Indigenous peoples are diseases of poverty, resulting in large part from appalling living conditions – that is inadequate housing, unclean or insufficient water supplies, non-existent or poor sewerage and washing facilities.

Mortality and morbidity data indicates that the low life expectancy and illnesses suffered by Aboriginal and Torres Strait Islander peoples are in many instances due to infectious and parasitic diseases. These diseases, associated with poor environmental living conditions and poor water quality, contribute significantly to health inequity.

Even in the face of overwhelming evidence, the link between poor housing, infrastructure conditions and chronic ill health is rarely carried into effective policy development or funding priorities.

It remains the case that non-Indigenous governments and policy-makers frequently equate health care with the provision of medical services, and organise programmes and services around the treatment of specific diseases rather than their root causes.

²⁶⁶ Australian Government Statement to the United Nations World Conference on Human Settlements, Habitat II, Turkey, July 1996.

Indigenous peoples should be able to fully and equally access medical services but current disease treatment models ignore the crux of the problem, which lies at a far more basic level of infrastructure and the building of environmental health.

While urging governments to attend to the full range of urgent health related issues, I would press upon them, first and foremost, their obligation to remedy the basic problems in living conditions which afflict our communities. Not until our peoples are guaranteed standards of living which meet basic requirements and cultural appropriateness will we see any significant, sustained shift in our health status.

The Vampire Project

Indigenous peoples have developed protocols in response to what we call 'the Vampire Project', which is otherwise known as the Human Genome Diversity Project, and the urgent need to protect Indigenous Cultural and Intellectual property. The 'Treaty for a Lifeforms Patent-free Pacific' arose from the 'Indigenous Peoples and Intellectual Property Rights' meeting held in Fiji in April, 1995.

The Human Genome Diversity Project (HDGP or Vampire Project) is a programme of mass sampling of Indigenous peoples and other isolated populations, presently being conducted by teams of molecular biologists around the world and is due for completion early next century. It is a process for the collection, exchange and potential commercialization of the human gene. It operates within Australia.

The Vampire Project not only jeopardises the rights and safety of the peoples targeted, but could also lead to the cultural, political and social complexity of Indigenous identity and Aboriginal rights being reduced to an arbitrary genetic test. It is not unreasonable to speculate that such research could be used for biological warfare in some form, given exchanges have already taken place between medical researchers and the United States military establishment.

Recently, the world has witnessed attempts by a United States institution to patent human genetic materials taken from a Papuan man and a Solomon Islander woman, without their informed consent. Such practices underline the lack of specific national and international law on human genetic material, which allows for the commercialization of human genes and the development of gene therapy at the expense of the human owners.

Indigenous peoples and others need to be protected from such exploitation through adequate legal safeguards, including contractual arrangements and protocol statements, to guarantee privacy rights and entitlements to any medical or financial benefits arising from this research. Establishing Indigenous Ethics Committees to monitor and approve medical research projects may be useful in protecting Indigenous communities from exploitation. Continued sampling of targeted populations without the informed and express consent of the peoples concerned will lead to the continuing disrepute of this project.

Modern Technologies and Indigenous Peoples

The World Wide Web and the Internet are a major resource for members of the international Indigenous world. Web sites allow for rapid dissemination of information and networking between Indigenous peoples, supporting our active participation in the global struggle for human rights. It is becoming the practice for Indigenous conferences to deliver papers and reports through the World Wide Web. Video-conferencing is now an alternative for meetings which would normally require

extensive international travel. Our dependence on limited resources, to communicate and to access information and research, is eased by the immediacy and scope of this powerful medium.

As well as networking with our Indigenous brothers and sisters around the world, Aboriginal and Torres Strait Islander peoples have formed strong links with international bodies keen to lend their support. It is critically important to note that confirmation and objective support of the perspectives of Aboriginal and Torres Strait Islander peoples is provided by organizations dedicated to the impartial monitoring of human rights.

Amnesty International

Earlier this year an Amnesty International delegation drawn from the organization's London headquarters, Botswana and Germany made an extensive tour of Australia to inquire into the operation of the criminal justice system, focusing on Aboriginal deaths in custody and juvenile justice.²⁶⁷

The reports of Amnesty International hold high credibility because of their meticulous methodology and dispassionate appraisal of evidence. Amnesty will not permit locally-based representatives to inquire into claims of human rights abuses. All reports are compiled by representatives from other countries.

The Amnesty delegation noted the continuing disproportionately high rate of Aboriginal deaths in custody and expressed great concern over the detention and ill-treatment of Indigenous peoples in Australia. They found that many deaths in custody, which have occurred since the recommendations of the Royal Commission into Aboriginal Deaths in Custody were handed down, were a result of the failure of Australian governments to adequately implement the recommendations. Amnesty will continue to monitor and report Indigenous human rights abuses in this country. It is an issue which will not escape international censure until it is effectively addressed.

I note in this context that the Coalition Government came into power with a commitment to hold a national summit on the implementation of the recommendations made by the Royal Commission into Aboriginal Deaths in Custody. It is sincerely hoped that the summit will result in a renewal of Commonwealth, State and Territory Government commitment in this fraught area and will produce tangible shifts in laws, policies and practices which remain entrenched five years after the Royal Commission delivered its National Report in 1991. It is critical that any national summit is structured to enable Indigenous Australians to express our views directly to governments and that commitments to specific outcomes are made.

The Convention on Biological Diversity

References to Indigenous interests in international instruments are, in effect, no more than gestures of etiquette while the pie of the world's bio-riches is sliced into Nation State servings. These servings are passed around the table amongst those who have been invited and can afford to sit there.

The Convention begins with the definition of Biological Diversity:

²⁶⁷ See Appendix 2, *Amnesty International Report 1996*, extract.

*The variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.*²⁶⁸

There is a growing sense that the ecosystems of the earth are under so much stress they may collapse. Gross pollution, deforestation and the disturbance of the earth's atmosphere may no longer be considered as merely collateral damage. They are rapidly being reassessed as potentially central damage to the life support systems of the earth.

The earth summit in Rio was a collective human expression of this concern. Strategies for sustainable development and the preservation of bio-diversity are the intellectual instruments being designed to staunch the flow of damage and, in this context, the knowledge of Indigenous peoples is increasingly referred to and valued.

No longer are our peoples and our stories merely the subject of bemused patronage and glossy photographs in national geographic magazines. We are being shrewdly reassessed. Our knowledge of the lifeforms of our traditional lands, even our very bodies, is now seen to have more than decorative value: it is seen as a fresh resource to be exploited.

The Convention on Biological Diversity is not founded on respect for the human rights of Indigenous peoples.

Essentially the same political and economic forces are at work that have shaped many other international agreements. The law and science are the instruments of that work. The first wave of physical colonialism over-rode our laws and seized our lands. Now the danger is they will seize our biological and human resources of knowledge. They will be converted into 'more clever' ways of handling and exploiting nature. The game has not changed, merely its form and its pace.

Jean Christie has described this process in terms of the north/south divide:

For about five hundred years, the colonial powers of the northern hemisphere extracted wealth from the botanical treasure troves of Africa, Asia and Latin America. Trade in exotic plant products (like spices) and then plantation agriculture, established the mechanisms to convert bountiful lands, resources and people's labour from the south, into handsome profits for merchants in the north.

That history, of course, is well known; it documents how colonialism and slavery fuelled the industrialization of Europe and later North America.

*Not so well-documented is a new industrial revolution, now poised to re-colonize the peoples of the south with laws that will assert a new form of northern control over their biological resources, and even their age-old knowledge. This modern-day industrial revolution is driven by the new "biotechnologies". The new colonialism is expressed in intellectual property rights – laws which grant legal monopolies to corporations in the north over the living resources and knowledge of the peoples of the south.*²⁶⁹

²⁶⁸ A Guide to the Convention on Biological Diversity, IUCN, CLAND, Switzerland and Cambridge, UK, p. 16.

²⁶⁹ Ecopolitics IX: *Perspectives on the South Indigenous Peoples Management of Environmental Resources*, Conference Papers and Resolutions, Northern Territory University, Darwin, 1-3 September, 1995, p. 45.

Like Indigenous peoples of the political/economic south, Indigenous peoples in Australia risk having our knowledge appropriated and exploited by northern industrial interests, including from within Australia.

The mandate for increased Indigenous participation in environment and conservation activities has been established internationally through existing and emerging standard setting instruments. *The Convention on Biological Diversity, the Rio Declaration, the Forest Principles and Agenda 21*, support Indigenous participation based on recognised Indigenous interests and values. In June 1992, in Rio de Janeiro, the Convention on Biological Diversity was signed by a record 150 countries, including Australia. It came into effect in December, 1993.

Indigenous peoples themselves have developed standard setting documents in recent years, such documents as the Mataatua Declaration on Cultural and Intellectual Property Rights and the Julayinbul Statement and the Declaration on Cultural and Intellectual Property Rights.

Hence at the international level, there are broad acknowledgements of the place and of the importance of Indigenous peoples. The Brundtland Report clearly recognized the important role of Indigenous peoples in sustainable development. It stated that our particular requirements must be met in developing participatory and equitable sustainable development strategies. The recognition of the crucial role of women in Indigenous and traditional communities is also emphasised in both the Brundtland Report and Agenda 21. Principle 22 of the Rio Declaration on environment and development states:

Indigenous people and their communities and other local communities have a vital role in environmental management and traditional practices.

The preamble of the 1992 Convention on Biological Diversity recognizes:

the close and traditional dependence of many Indigenous and local communities embodying traditional life styles on biological resources and the desirability of sharing equitably arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Article 8(j) of the Convention, which is concerned with Indigenous peoples and *in situ* conservation, states that:

8. *Each contracting party shall, as far as possible and as appropriate:*
- (j) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and such practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

These are fine words. But inspect them more closely. They speak, not of the rights of Indigenous peoples, but our “*close and traditional dependence ... on biological resources*”.

They do not speak of the obligations of states to respect our rights to control access to our lands and biological resources, or to respect our cultures and our knowledge. States are called on to “*promote*” and “*encourage*” “*equitable sharing*” because it is “*desirable*”.

These arrangements unambiguously assert the sovereign power of nation states to deal with us and our knowledge on their terms: our rights are “*subject to...national legislation*”.

The Convention on Biological Diversity rests squarely on the principle of national sovereignty. Each individual State is responsible for the conservation and sustainable use of all resources within its territory.

This point is set down in Article 3, which is a repetition of Principal 21 of the Stockholm Convention:

3. *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*

Further, the terminology in 8(j) “*embodying traditional lifestyles*” and in 10(c) “*customary use*” is of concern to Indigenous peoples. It may preclude or qualify the participation of Indigenous peoples who, while clearly influenced by ‘traditional’ notions, live predominately in urban or non-traditional areas with lifestyles which do not conform with the stereotypes projected over us by others.

There is the danger that “*customary use*” may be equated with ‘past’ lifestyles, to the detriment of Indigenous involvement. Non-indigenous peoples and governments must understand that our cultures are not frozen in time but are dynamic and responsive to our changing circumstances. Dialogue that does not reflect the vital nature of our cultures will not be useful in addressing Indigenous human rights issues.

The Guide to the Convention on Biological Diversity establishes a clear connection between biological diversity and cultural diversity: the loss of cultural diversity is directly connected to the loss of biological diversity. The full articulation of Biological Diversity principles in domestic legislation will require careful consideration of Indigenous peoples communal, or collective rights, to land, culture and cultural property, and intellectual property. The implementation of 8(j) must consider Indigenous perspectives on how the components of our cultures – land, sacred sites, property, biological resources and cultural expressions interconnect.

It is essential that the domestic implementation of the Convention protects Indigenous intellectual property. Existing laws, that is copyright, trademark, patent, design, do not protect the unique forms of Australian Indigenous intellectual property and collective rights to knowledge, yet there is considerable resistance by the Government to consider Indigenous knowledge other than through the established frameworks of ‘intellectual property’.

Possible methods of domestic implementation run the gamut from codes of conduct, local and regional agreements, co-management arrangements, the amendment of existing legislation — right through to the development of new *sui generis* legislation based on the recognition of our collective rights over knowledge, innovations and practices.

In my view, *sui generis* legislation based on the recognition of Indigenous collective rights is the only adequate way to implement articles 8(j) and 10(c).

Unfortunately, I do not anticipate the passage of any Australian legislation based on such full recognition. The phobic response to the recognition of native title stands as evidence on this point.

What is missing, both within Australia and at the international level, is genuine protection of Indigenous rights, **as they are understood by our peoples.**

Our first and seminal right is the right to self-determination, followed by the right to our lands and to control access to those lands. The *Draft Declaration on the Rights of Indigenous Peoples* elaborates several other rights more specific to bio-diversity:

- the right to full ownership, control and protection of our cultural and Indigenous property (article 29);
- the right to restitution of cultural and intellectual property taken without our free and informed consent (article 12);
- the right to the protection of vital medicinal plants, animals and minerals (article 24);
- the right to own, develop and control traditionally owned or used resources (article 26);
- the right to determine and develop priorities for our resources (article 28); and
- the right to compensation to mitigate adverse environmental, economic, social, cultural or spiritual impact (article 30).

These are our core rights. Equitable sharing will not occur if such sharing depends on the kindness and grace of the Nation States which have surrounded the Indigenous peoples of the world. History is explicit on this point. We must seek the foundation of express legislative recognition of these rights.

It should be understood that our rights are *different from but equal to* the rights of non-Indigenous people. This is not a claim for 'special rights' but rather a call for laws which accurately reflect the real nature of the interests sought to be protected.

In reality, our rights have been reduced to those recognized within the established framework. Intellectual property rights such as patents and copyrights are expressive of certain values and are inept to protect Indigenous interests.

As the Bellagio Declaration states:

*contemporary intellectual property law is constructed around a notion of the author as an individual, solitary and original creator and it is for this figure that its protections are reserved. Those that do not fit this model – custodians of tribal cultural and medical knowledge, collectives practising traditional artistic and musical forms, or peasant cultivation of valuable seed varieties, for example, are denied intellectual property protections.*²⁷⁰

It is not merely that Indigenous knowledge may be denied protection under this model, there is a shaper edge to it.

The promotion of access to genetic resources, and the potential to patent genes, could eventually deny Indigenous peoples the biological resources they have managed for thousands of years.

²⁷⁰ Bellagio Declaration taken from Ecopolitics IX, *op. cit.*

Ultimately, the process is not a passive failure to recognize entitlement, it establishes a system for acquisition and control of access to knowledge. Just as now we are able to buy our land back, so, in the future we may be able to buy the fruits of our Indigenous knowledge. There is no recognition of our original rights.

The Trade-Related aspects of Intellectual Property Rights ('TRIPS') section of the GATT treaty is intended to homogenize national intellectual property regimes and create 'a level playing field' defined by reference, essentially, to the regime of the United States. This playing field will, of course, be highly useful to those who have designed the rules of the game and own the expensive equipment to play it.

From an Indigenous perspective 'TRIPS' is just another device resulting in our further marginalization.

References to Indigenous interests in international instruments are, in effect, no more than gestures of etiquette while the pie of the worlds bio-riches is sliced into Nation State servings. These servings are passed around the table amongst those who have been invited and can afford to sit there.

It is ultimately up to the conscience of individual States as to whether there is any sharing with the Indigenous progenitors of knowledge and, if so, what constitutes 'equitable sharing'.

Aboriginal and Torres Strait Islander peoples have no illusions as to what this means. It has taken us over 200 years to fight our way back from the legal obliteration of *terra nullius*.

Within Australia there could be no clearer indication of the attitude to recognizing Indigenous rights to ownership and control of natural resources than the response to the overthrow of *terra nullius* and the recognition of Indigenous rights to land.

Following the passage of the Commonwealth *Native Title Act* in 1993 every State and Territory passed legislation re-asserting crown ownership of all natural resources within their boundaries.

The current, primary method for Australia to fulfil its obligations under the Convention is through the National Strategy for the Conservation of Australia's Biological Diversity, which is still in the Inter-Departmental Committee (IDC) stage.

As I noted in my Third Report 1995,²⁷¹ the Attorney-General's Copyright Law Review Committee, another IDC, is developing a response to '*Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*', the 1994 Issues Paper released by the previous government. A large proportion of the 49 submissions received, recognized the inadequacies of the current *Copyright Act 1968* (Cth) and allied intellectual property laws in protecting Indigenous collective rights to intellectual property. New legislation was advocated to specifically protect Indigenous intellectual property.

However, the Attorney-General's IDC is apparently confined by the 1994 Issues Paper which limits "*intellectual property*" to "*arts and cultural expressions*", defined as encompassing "*all forms of artistic expression which are based on custom and tradition derived from communities that are continually evolving*".

The paper states that it is only concerned with those "*aspects of the protection of arts and cultural expression that have a close connection with copyright law*". It therefore excludes "*other areas*

²⁷¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, p. 171.

*such as biological diversity and indigenous knowledge [which] are sometimes considered to be protected by intellectual property laws”, on the basis that “these areas often touch on aspects of intellectual property protection without involving property rights”.*²⁷²

A more appropriate approach would be to amend the definitions and parameters of ‘*Stopping the Rip-Offs*’, to include biological diversity-related Indigenous knowledge as aspects of ‘intellectual property’. The paper should then be endorsed by the present government, to ensure that this government ‘owns’ the process initiated by its predecessor.

Bureaucratic compartmentalisation and fragmentation is problematic: one bureaucratic body claims that Indigenous knowledge is outside its brief and refers it to another body, which considers it can only deal with one aspect of it. This frustrating obstacle course is created by the structure of government departments. The division of life into established portfolios makes it extremely difficult to adequately comprehend and manage issues that are of a complex and multifaceted nature and which require fresh, creative approaches.

This issue is about reconciling rights embedded in different cultures structured around fundamental concepts. The imperative is to develop a more creative legislative system, which compliments existing laws while establishing a new set of property rights, based on collective rights and interests.

There are a host of other initiatives which can be considered to advance implementation of Articles 8(j) and 10(c) of the Convention, including developing codes of conduct, agreements and protocols. The development of such mechanisms should be undertaken with the full and equitable participation of Indigenous peoples.

The Government could also examine overseas approaches to the recognition and protection of Indigenous knowledge, innovations and practices.²⁷³ Dr. Darrell Posey is an acknowledged leader in this field based at Oxford University. He advocates an approach based on ‘traditional resource rights’. This concept is constructed by reference to the full range of human rights, intellectual property rights and environmental rights instruments in order to achieve social justice and equity.²⁷⁴ The Rural Advancement Foundation International (RAFI), suggests establishing an Intellectual Property Rights Ombudsman, to investigate complaints from Indigenous communities regarding infringement of their intellectual property rights. The work of the RAFI should be supported and extended to include claims to intellectual property rights in biological materials and products. RAFI’s approach also includes tribunals, *sui generis* intellectual property rights, bilateral contracts and an ‘intellectual integrity framework’.²⁷⁵

In the lead-up to the review of Agenda 21 at the UN in New York in June, 1997, Indigenous Groups are preparing submissions outlining their concerns over the lack of Indigenous involvement in the implementation of Agenda 21, specifically in relation to ‘in-situ conservation’.

²⁷² *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Business Law Division, Commonwealth Attorney-Generals Department, 1995.

²⁷³ These Indigenous statements are well summarised in a recent paper ‘Biodiversity Stewardship and the Rights of Indigenous Peoples’, prepared by Cultural Survival Canada.

²⁷⁴ Most recently discussed in Posey, D., *Beyond Intellectual Property Rights*, 1996.

²⁷⁵ Rural Advancement Foundation International, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation*, Ottawa, 1994.

Collateral Protection

A vital strategy for the protection of Indigenous rights is the inclusion of human rights clauses in international trade agreements. I note that it is standard practice for Scandinavian countries to ensure that provisions are also included in agreements relating to foreign aid packages.

I am aware that Australia has expressed reservations concerning standard human rights clauses contained in the Draft Framework Agreement for Trade and Co-operation between the European Community and Australia and the Joint Political Declaration between the European Union and Australia. I understand that negotiations over these provisions are continuing.

The Australian Government is apprehensive that:

- the human rights clauses could be applied unilaterally, meaning, the European Union may unilaterally judge Australia to be in breach of the human rights.
- the measures taken by the European Union, with respect to breaches of the human rights clauses, are not made clear.

These human rights conditions are regarded by the European Community as standard. The refusal of the Australian Government to enter these agreements, and their contention that these human rights provisions are more appropriate to 'other' countries, will only promote the view of Australia as condescending and hypercritical. One could be forgiven for thinking that it is only the anticipation that an adverse judgement may be made by the European Union that animates the Australian Government's endeavour to have these standard terms exorcised.

The Future

The Coalition's Foreign Affairs Policy states it will:

- *develop national interest analyses prior to the ratification of treaties;*
- *legislate to require treaties to be tabled in the Commonwealth Parliament with provision for significant debate prior to ratification;*
- *establish a Treaties Council as part of the Council of Australian Governments;*
- *work with the States to ensure that domestic legislation is in place prior to ratification of treaties;*
- *establish a Joint House Treaties Committee; and,*
- *refer consideration of the amendment to the external affairs power to the People's Convention.*²⁷⁶

I have a number of concerns with these proposals in the context of treaties dealing with human rights.

It is the Executive of the Commonwealth Government that enters into and binds Australia to treaty obligations. It does so by the adoption and ratification of a treaty. Prior to doing so, it has been the practice to consult with State and Territory Governments and to review Law and Practice reports which assess the degree to which the domestic law of Australia, jurisdiction by jurisdiction, already conforms with the articles of the treaty under consideration. Ad hoc consultations with interest groups potentially affected by Australia's obligations under the treaty are also held.

²⁷⁶ *A Confident Australia: Coalition Foreign Affairs Policy*, 1996. Pp 26-27.

The policy of co-operative federalism has been followed by successive Commonwealth Governments. Only once the Commonwealth Executive is satisfied that the law and practise within Australian jurisdictions broadly conform with treaty obligations does Australia ratify a treaty. Ratification may be subject to express reservations.

Accordingly, it is not sensible to characterise the ratification of international treaties as some kind of freelance exercise of executive power by the Commonwealth Government of the day. Nor is it sensible to construe the ratification of a treaty as an arbitrary mechanism through which the Commonwealth can acquire fresh powers over the States through section 51, paragraph (xxix) of the Constitution: the external affairs power.

The proposal to table treaties in the Commonwealth Parliament, with provision for significant debate, prior to ratification is proper. Parliamentary debate and the open discussion of human rights treaties is clearly in the public interest. However, I have deep concern as to the impact of the other procedures proposed.

Consultation with State and Territory Governments already precedes ratification, as does a consideration of domestic legislation. They are necessary steps. However, I apprehend that the novel arrangements are designed to ensure that no treaty will be ratified until all States and Territories represented on the Treaties Council are in agreement, and that all domestic legislation perfectly conforms with treaty obligations.

The power of the Australian Government to ratify treaties will be, in effect, devolved to State and Territory Governments. The lowest common denominator of domestic respect for human rights will become the arbiter of standards for the country as a whole. In the face of overwhelming public support for uniform gun legislation and a strong stance against sectional interests, holding political implications for State and Territory Governments, the final achievement of agreement was an extremely close-run thing. What are the odds for the ratification of a human rights instrument which, whatever its particular contents, will have vocal opponents to which State and Territory politicians will be sensitive.

The development of national interest analyses prior to ratification have similar implications. In fact they may be the formal channel through which sectional interests will argue their case. Pre-eminently, resource development industries have an almost purely balance sheet vision of human rights.

In the first NGO consultation convened by the Department of Foreign Affairs and Trade following the election of the Coalition Government, a spokesperson for the Minerals Council of Australia made it clear that the *Draft Declaration on the Rights of Indigenous Peoples* and the Convention on Biological Diversity were both considered antithetical to the interests of the mining industry.

The views of the resources industry are, of course, relevant but it is necessary that any assessment of the 'national interest' casts its net wider than purely economic considerations. The quality of human existence and respect for human rights cannot be reduced to balance sheets and trade figures. Although it is becoming increasingly clear that the disregard of fundamental human rights can have direct economic consequences.

The fall-out from the race 'debate', which has run out of control in this country since the change of government in March, has resulted in much lost face for this country. This loss is most acute in Asia and the Pacific but it has worldwide repercussions. The controversy has been picked up by the international media, including CNN, and broadcast around the globe. The Government's handling of this debate has resulted in even closer scrutiny of Australia's human rights agenda both

internationally and domestically. The conservative and dated view of Australia as a European enclave in South East Asia has an ever ready potential to re-emerge. It is not only an ugly image, it has attendant trade penalties and direct implications for the tourist industry.

Just as in the race debate, so in the area of human rights in general, the Commonwealth – the Australian – Government has an obligation to lead, to set standards, to articulate the aspirations of this nation.

The procedures proposed to be undertaken prior to the ratification of human rights treaties have the potential to so inhibit the discretion of the Executive of the Australian Government that Australia may never sign another human rights treaty.

If complete consensus is the outcome required of the full range of procedures proposed, then the record of future ratifications will resemble the past record of referenda passed in Australia. The ‘no’ vote has been overwhelming. Leadership is required in the setting of human rights standards in this country.

Appendix: Amnesty International Report 1996

AUSTRALIA

A highly disproportionate rate of Aboriginal deaths in custody heightened concern about the detention and ill-treatment of indigenous people. At least three people were shot dead by police officers in disputed circumstances. Federal legislation on the detention of asylum-seekers who entered the country without immigration documents failed to meet international human rights standards.

Extract:

Despite federal and state government commitments to implement the vast majority of recommendations made in 1991 by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (see *Amnesty International Report 1993*), 21 Aboriginal people were reported to have died in custody or during police operations – the highest number in any single year since records were first collected in 1980. Between the end of the period investigated by the RCIADIC and the end of 1995, at least 87 indigenous people died in custody. Although indigenous people make up only 1.3 per cent of the total adult population over 14 years of age, they accounted for at least 24 per cent of all custody-related deaths and more than 14 per cent of the prison population. The majority of deaths occurred in prison, with the highest increase reported in South Australia.

In December Maurice Roland Fisher, a 17-year-old Aboriginal prisoner in Brisbane, was found hanging from a bedsheet tied to a cell window during a routine cell check. It reportedly took guards more than 15 minutes to get the master key to the cell door. Although a cellmate who believed Maurice Fisher might still have been alive offered to cut him down, prison guards allegedly refused to hand him a knife.

In October the Queensland Criminal Justice Commission started an investigation into new evidence concerning the death of Daniel Yock, an 18-year-old Aboriginal who died in a police van in 1993 (see *Amnesty International Reports 1994 and 1995*). The Commission rejected calls to hold hearings in public and banned publication of the evidence. By the end of the year no police officer had been disciplined or charged in connection with Daniel Yock’s death.

In September damages were awarded to the family of Mark Anthony Quayle, a young Aboriginal man who was found hanged in the remote police lock-up of Wilcannia, NSW, in 1987. This was the first such award granted for a death in custody. Mark Quayle was taken by his family to the Wilcannia hospital in June 1987. He was accepted as a patient but did not receive medical care. Subsequently hospital staff arranged with police for Mark Quayle to be kept in the police station overnight for “safe custody” as they believed he was disorientated and might wander off. He was arrested without charge and left alone in a cell. He was found hanged in his cell the following morning. Police then blamed the family for his death.

Police reportedly continued to intimidate and harass friends and relatives of victims of deaths in custody who would not accept official explanations and called for further investigations into the deaths. In September the family home of Stephen Wardle, who died in the East Perth police lock-up, Western Australia, within hours of his arrest in 1988, was searched by police officers for the fourth time since 1993. In the same period, the office of the family’s lawyer and the home of an aunt of Stephen Wardle were each searched twice. Some searches were allegedly carried out in the family’s absence and later denied, but the latest search was captured on security video and the recording screened on television. After the screening, a family with a similar surname, whom the police apparently believed were relatives of Stephen Wardle, reported that they had been harassed and intimidated by police officers. After an internal police investigation of the reports, various charges against the family were dropped.

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In October Amnesty International called on the South Australian State Government to investigate the marked increase in the number of Aboriginals who died in custody in this state. In a written reply in December, the State Minister for Aboriginal Affairs did not comment on this request or on the increase in Aboriginal prison deaths. He listed a number of steps taken in response to the issue and said he believed the South Australian State Government had been “extremely vigilant in undertaking its responsibilities towards implementing the recommendations of the Royal Commission”. In November Amnesty International welcomed the NSW State Government’s proposed review of the state’s criminal legislation. The organisation also reiterated its concern about fatal police shootings in Victoria.