

# **Ending family violence and abuse in Aboriginal and Torres Strait Islander communities**

## **Key issues**

**AN OVERVIEW PAPER OF RESEARCH AND FINDINGS  
BY THE HUMAN RIGHTS AND EQUAL  
OPPORTUNITY COMMISSION, 2001 – 2006**



**PREPARED BY THE ABORIGINAL AND TORRES STRAIT  
ISLANDER SOCIAL JUSTICE COMMISSIONER, JUNE 2006**



*Aboriginal and  
Torres Strait Islander  
Social Justice Commissioner*

*Human Rights and  
Equal Opportunity Commission*



## **Ending family violence and abuse in Aboriginal and Torres Strait Islander communities – Key issues**

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**Prepared by the:**

**Aboriginal and Torres Strait Islander  
Social Justice Commissioner**

**June 2006**

All documents extracted in this paper can be found on the HREOC website at:  
[www.humanrights.gov.au/social\\_justice/familyviolence/](http://www.humanrights.gov.au/social_justice/familyviolence/)

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## **Section 1: Introduction**

Family violence and abuse is causing untold damage to the cultures and fabric of Indigenous societies. It is damaging our communities, our families, our women, our children and our men.

All Indigenous people are entitled to live their lives in safety and full human dignity - without fear of intimidation, family violence or abuse. This is their cultural and their human right. Like all Australians, Indigenous peoples are also entitled to the full and equal protection of the law.

The Human Rights and Equal Opportunity Commission (HREOC) is committed to working towards ending family violence in Indigenous communities. We want to work with governments and Indigenous peoples to ensure that there are deliberate and determined steps taken to address this issue.

HREOC has statutory responsibilities under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to monitor the extent to which Indigenous peoples are able to enjoy their human rights. This is achieved through a variety of ways, including: the *Social Justice Report*, that is prepared by the Social Justice Commissioner and submitted to federal Parliament each year; submissions to various inquiries on law reform and legislative proposals; educational activities; participation in conferences, seminars and media debates; as well as conducting national inquiries and interventions in court cases to promote an understanding of human rights issues.

Over the past five years the Commission has used these functions extensively to comment on issues relating to family violence and abuse in Indigenous communities.

This paper summarises the main findings from HREOC research and consultations relating to family violence and abuse in Indigenous communities conducted from 2001-2006.

The paper includes extracts from various reports, submissions and other materials (organised thematically), which can be used as a reference tool for government officials, researchers and Indigenous communities. Full versions of all the materials in the paper, including footnotes and references, are available online at [www.humanrights.gov.au](http://www.humanrights.gov.au).

We have looked at the issue of family violence and abuse in Indigenous communities in many contexts, including:

- the relationship to substance abuse;
- the interaction of Aboriginal customary law, violence and human rights;
- the need for human rights education among Indigenous communities;
- the significant role of violence and abuse as a causative factor in Indigenous women entering and then re-entering prison at alarmingly high rates;
- international models for programs aimed at addressing inter-generational trauma and grief through healing;

- the impact of violence on Indigenous youth in developing cognitive disabilities, in under-performance in schools and entry into the juvenile and then adult criminal justice processes;
- its relationship to the high incidence of mental illness and youth suicide among Indigenous peoples; and
- it being both a reflection of, and a cause of, poor health among Indigenous peoples.

This paper seeks to ensure that any program responses to family violence in Indigenous communities are built on solid evidence and facts. It demonstrates how violence relates to almost every aspect of policy making and service delivery to Indigenous communities.

Because of this, we need to adopt a holistic approach to address the causes and the consequences of family violence in Indigenous communities. If we treat these issues as simply a law and order, legal compliance or health matter, we will not achieve lasting improvements to the lives of Indigenous peoples.

Much of the work presented in this paper is the result of consultation with Indigenous peoples - addressing family violence will also require partnerships with Indigenous peoples and communities. We need to ensure that the day-to-day realities that exist in Indigenous communities are recognised and addressed in any policy response to family violence.

HREOC wants to see a positive future for Indigenous Australians - free from family violence and abuse. We believe that this is an achievable and realistic goal.

I hope you find this paper a useful resource as we all strive to achieve this important and necessary outcome.



**Tom Calma**  
**Aboriginal and Torres Strait Islander**  
**Social Justice Commissioner**  
**20 June 2006**

## **Section 2: Summary of main findings and messages on ending family violence and abuse in Indigenous communities**

### **In this section:**

This section summarises the main findings from research and consultations conducted by the Human Rights and Equal Opportunity Commission between 2001 and 2006 that relates to family violence and abuse in Indigenous communities.

### **Family violence – key messages**

- Family violence is abhorrent and has no place in Aboriginal or Torres Strait Islander societies. It is a scourge that is causing untold damage and trauma among Indigenous communities, to our women and children, and to the fabric of Indigenous cultures.
- Indigenous, women, children and men are entitled to live their lives in safety and full human dignity. This means without fear of family violence or abuse. This is their cultural and their human right.
- Violence and abuse is a criminal matter. If an Indigenous person commits an offence they should be dealt with by the criminal justice system just as any other person would be. There should also be swift intervention from care and protection systems to ensure that the best interests of the child is the primary consideration.
- Government officials and community members should be fearless and bold in reporting suspected incidents of violence and abuse. This means addressing the code of silence that exists in many Indigenous communities about these issues. And it means government officers meeting their statutory obligations, meeting their duty of care and taking moral responsibility in the performance of their duties as public officials.
- Violence relates to almost every aspect of policy making and service delivery to Indigenous communities. The solutions to family violence and abuse in Indigenous communities are complex, multi-faceted and require long term focus and commitment to address. They require bi-partisan political will and leadership at the highest levels of government.
- Governments must work in partnership with Indigenous peoples and communities to identify and implement solutions to address family violence and abuse.
- We need to adopt a holistic approach to address the causes and the consequences of family violence in Indigenous communities.
- We can no longer accept the making of commitments to address Aboriginal and Torres Strait Islander inequality *without* putting into place processes and programs to match the stated commitments. Programs and service delivery

must be adequately resourced and supported so that they are capable of achieving the stated goals of governments.

- We can also not accept the failure of governments to commit to an urgent plan of action. It is not acceptable to continually state that the situation is tragic and ought to be treated with urgency, and then fail to put into place bold targets to focus policy making over the short, medium and longer term or to fund programs so they are capable of meeting these targets.

## Ten key challenges in addressing family violence and abuse

### **1. Turn government commitments into action:**

Governments have been making commitments to address family violence for some time already. What we need is concerted, long term action which meets these commitments.

### **2. Indigenous participation:**

This action must be based on genuine partnership with Indigenous peoples and with our full participation.

### **3. Support Indigenous community initiatives and networks:**

There are significant processes and networks already in place in Indigenous communities to progress these issues. We need to support them to lead efforts to stamp out violence, including by developing the educational tools to assist them to identify and respond to family violence.

### **4. Human rights education in Indigenous communities:**

There is a need for broad based education and awareness-raising among Indigenous communities. Working with communities to send strong messages that violence won't be tolerated, that there are legal obligations and protections, and that individuals have rights, are critical if we are to stamp out family violence.

### **5. Don't forget our men and don't stereotype them as abusers.**

Family violence is fundamentally an issue of gender equality. We need strong leadership from women, but we also need the support of Indigenous men if we are to make progress in stamping out violence. Indigenous men need to model appropriate behaviour, challenge violence and stand up against it, and support our women and nurture our children.

### **6. Look for the positives and celebrate the victories.**

There are good things happening in Indigenous communities, even if the national media is not interested in reporting them. We need to confront family violence, but also do so by reinforcing the inherent worth and dignity of Indigenous peoples, not by vilifying and demonising all Indigenous peoples.

### **7. Re-assert our cultural norms and regain respect in our communities.**

Family violence and abuse is about lack of respect for Indigenous culture. We need to fight it as Indigenous peoples, and rebuild our proud traditions and community structures so that there is no place for fear and intimidation.

## **8. Ensure robust accountability and monitoring mechanisms:**

There must be accountability measurements put into place to hold governments to their commitments. This requires the development of robust monitoring and evaluation mechanisms. These will also allow us to identify and celebrate successes.

## **9. Changing the mindset:**

We require a change in mindset of government from an approach which manages dysfunction to one that supports functional communities. Current approaches pay for the consequences of disadvantage and discrimination. It is a passive reactive system of feeding dysfunction, rather than taking positive steps to overcome it. We need a pro-active system of service delivery to Indigenous communities focused on building functional, healthy communities.

## **10. Targeting of need:**

Let us be bold in ensuring that program interventions are targeted to address need and overcome disadvantage. As it stands, government programs and services are not targeted to a level that will overcome Indigenous disadvantage. Hence, they are not targeted in a way that will meet the solemn commitments that have been made. They are targeted to maintain the status quo.

## **Defining family violence in Indigenous communities**

- Indigenous concepts of violence are much broader than usual mainstream definitions of domestic violence. For Indigenous peoples, the term *family violence* better reflects their experiences.
- Family violence involves any use of force, be it physical or non-physical, which is aimed at controlling another family or community member and which undermines that person's well-being. It can be directed towards an individual, family, community or particular group. Family violence is not limited to physical forms of abuse, and also includes cultural and spiritual abuse. There are interconnecting and trans-generational experiences of violence within Indigenous families and communities.
- There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in communities. What data exists suggests that Indigenous peoples suffer violence, including family violence, at significantly higher rates than other Australians do. This situation has existed for at least the past two decades with no identifiable improvement.
- Indigenous women's experience of discrimination and violence is bound up in the colour of their skin as well as their gender. The identity of many Indigenous women is bound to their experience as Indigenous people. Rather than sharing a common experience of sexism binding them with non-Indigenous women, this may bind them more to their community, including the men of the community.

- Strategies for addressing family violence in Indigenous communities need to acknowledge that a consequence of this is that an Indigenous woman ‘may be unable or unwilling to fragment their identity by leaving the community, kin, family or partners’ as a solution to the violence.

## Designing programs to address family violence

There are currently a patchwork of programs and approaches to addressing family violence in Indigenous communities among federal, state and territory governments, but there remains a lack of coordination and consistency in approaches to addressing these issues between governments and among different government agencies.

Significant gaps also exist.

There are three recurring strategic aspects that need to be present to address family violence in Indigenous communities, namely that:

- programs be community-driven (with leadership from men as well as women);
- community agencies establish partnerships with each other and with relevant government agencies; and
- composite violence programs are able to provide a more holistic approach to community violence.

An emphasis solely on criminal justice responses to family violence poses two main concerns for Indigenous women:

- The first is that the system is generally ineffective in addressing the behaviour of the perpetrator in the longer term. The effect of imprisonment is to remove them from the community and then, without any focus on rehabilitation or addressing the circumstances that led to the offending in the first place, to simply return them to the same environment.
- The second is that there are a range of barriers in the accessibility and cultural appropriateness of legal processes which discourage Indigenous women from using the criminal justice system in the first place.

Existing programs addressing Indigenous family violence programs can be categorised into the following broad areas of intervention:

- ***Support programs*** – Accessible and appropriate counselling is essential, not only for the victims and perpetrators of violence, but also for family and community members who not only deal with the issue of violence itself but to also provide post-violence counselling to family members.
- ***Identity programs*** – Identity programs are those that are aimed to develop within the individual, family or community, a secure sense of self-value or self-esteem. This can be achieved through diversionary programs and also through therapy based programs that focus on culturally specific psychological or spiritual healing. All these programs may be accessed prior to, and after involvement with violence, and offer a longer-term response through attempting to change the situational factors underlying violence.

- ***Behavioural change (men and women's groups)*** – as the majority of family violence is perpetrated by men, strong support for men's behavioural reform programs is required. Complementary groups and support services for Indigenous women should be run parallel to men's programs and complementary preventative/intervention programs for youth be an integral part of the whole strategy.
- ***Night patrols*** – have the potential to build cooperation and mutual respect and support with local police. Night patrols, particularly in remote areas, use and strengthen Indigenous mechanisms for social control, thereby ensuring that traditional methods are afforded a key role in the control of anti-social behaviour, minor criminal infractions and potentially serious criminal incidents in the Indigenous community.
- ***Refuges and Shelters*** – while an important part of any family violence intervention strategy, they are not a sufficient response to the difficulties produced by high levels of violence in Indigenous communities. They represent a reactive strategy in addressing the underlying causes, thereby creating no possibility of a change in the pattern of violent behaviour. Refuges and women's shelters need to be coupled with other proactive strategies targeted at the perpetrators of violence and other situational factors.
- ***Justice programs*** – the roles of justice programs, which are characteristically aimed at the perpetrators of violence, are to mediate between people in conflict, designate appropriately cultural punishments for victims, for example through circle sentencing and the prevention of recidivism.
- ***Dispute resolution*** – Anecdotal evidence suggests that success has been achieved where impartial members of the Indigenous community are used as facilitators and traditional dispute-resolution techniques are incorporated into mediation processes.
- ***Education and awareness raising*** – Education and training programs are vital to raise awareness about family violence prevention; as well as develop skills within communities to resolve conflicts and identify the need for interventions with perpetrators. There are (currently) no educational programs targeted at young children for use in Indigenous pre-schools and schools. With the knowledge we now have about the detrimental effects of violence on children, or witnessed by children and the generational cycles by which violence is transmitted, it is essential to provide violence prevention education programs within pre-schools and schools.
- ***Holistic composite programs*** – Programs which are comprised of elements of the above categories. These operate to target different forms of violence in the community, target different categories of offenders or victims, or employ different methods of combating or preventing violence.

The implementation of composite programs, particularly in communities displaying multiple forms of increasing violence, is shown to be an emerging and preferred approach that reflects a more systematic way of combating violence, combining both proactive and reactive methods which target different age and gender groups.

An issue for governments introducing services is how to best trigger such programs in communities where they are obviously needed while at the same time creating a climate whereby the programs are community-originating, motivated and controlled. The *Violence in Indigenous Communities report* (by Memmott, Stacy, Chambers and Keys, herein the Memmott report) recommends ‘that government agencies take a regional approach to supporting and coordinating local community initiatives, and assisting communities to prepare community action plans with respect to violence’.

## A human rights based approach to overcoming Indigenous disadvantage

- Australia has legal obligations in international human rights treaties to address the disadvantage experienced by Indigenous Australians, including in relation to family violence issues and the social and economic conditions which contribute to violence. Article 2 of the International Covenant on Economic, Social and Cultural Rights requires that the government ‘take steps to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of’ rights ‘*by all appropriate means*’ [emphasis added].
- This obligation means that governments must progressively achieve the full realisation of relevant rights and to do so without delay. Steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.
- This also requires that governments establish timeframes for the achievement of outcomes and identify appropriate indicators, in relation to which they should set ambitious but achievable benchmarks, so that the rate of progress can be monitored and, if progress is slow, corrective action taken. Setting benchmarks enables government and other parties to reach agreement about what rate of progress would be adequate.
- This is fundamentally an issue of government accountability for service delivery and outcomes. It requires governments’ actions to match the commitments that they make, and for governments to demonstrate that they have a plan for when outcomes will be achieved – ie, that programs are benchmarked with targets and goals.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives. Such participation should be based on the principle of free, prior and informed consent, which includes governments providing information that is accurate, accessible, and in a language the indigenous peoples can understand.
- Governments should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities. This should allow for the full and effective participation of indigenous men, women and young people in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.

## **Recognising Aboriginal customary law consistently with human rights**

- Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.
- Aboriginal customary law must be applied consistently with human rights standards. At no stage does customary law override the rights of women and children to be safe and to live free from violence.
- Any attempts to recognise Aboriginal customary law in a manner *inconsistent* with human rights standards would place Australia in breach of its obligations under international law and activate a duty on the part of the federal government to nullify or override such breaches.
- There will be many instances where there will be no conflict between individual and collective rights (as expressed through customary law), and where they will be able operate in an interdependent manner. The recognition of Aboriginal customary law and collective rights has the capacity to strengthen social structures within Aboriginal communities as well as the observance of law and order.

### ***Balancing customary law with human rights standards***

- There will, however, be other circumstances where individual and collective rights are in opposition and a balance must be struck. This does not mean that collective and individual rights are irreconcilable. Decisions made under the Optional Protocol to the ICCPR and General Comments interpreting the scope of the ICCPR by the United Nations Human Rights Committee in relation to Article 27 of the Covenant, for example, provide guidance on how this contest between collective and individual rights should be resolved.
- The Human Rights Committee has noted that Article 27 applies to indigenous peoples, and that it creates a positive obligation on States (governments) to protect such cultures.
- The Committee has, however, placed limits on those measures that can be recognised. So while it acknowledges that positive measures by States may be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, it also notes that such positive measures must respect the provisions of Articles 2.1 and 26 of the Covenant. These Articles relate to the principle of non-discrimination and how it applies in relation to the treatment between different minorities, as well as the treatment between the persons belonging to a minority group and the remainder of the population.

- Similarly, the Committee notes that ‘none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant’. This includes, for example, Article 6 (the inherent right to life); Article 7 (torture or cruel, inhuman or degrading treatment); and Article 23 (requirement of free and informed consent for marriage).
- The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.
- The Committee has also stated that female genital mutilation is a practice that breaches Articles 6 and 7 of the Covenant, despite the cultural significance of the practice in some societies; and has expressed concern about domestic violence, including forced sexual intercourse, within the context of marriage.
- The provisions of the ICCPR are also to be read consistently with the interpretation of similar relevant rights under other conventions such as the *International Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC').
- The right to freedom from violence is accepted as implicit in the right to freedom from discrimination under CEDAW. The Convention also requires that all appropriate measures should be taken to ‘modify the social and cultural patterns of conduct of men and women’ so as to eliminate ‘prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.
- The Committee on the Elimination of Discrimination Against Women has noted that traditional practices by which women are regarded as subordinate to men or as having stereotyped roles, perpetuate widespread practices involving violence or coercion. These can include: family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.
- The particular vulnerability of children is recognised by the CRC. Similar to the ICCPR, the CRC specifically recognises the right of indigenous children to enjoy their own culture in community with other members of his or her own group. However, States Parties have obligations to protect children from all forms of sexual abuse and all other forms of exploitation prejudicial to any aspects of the child’s welfare.

### ***Resolving conflicts between human rights and Aboriginal customary law***

- Mainstream law should consider apparent conflicts between Aboriginal customary law and women's individual rights on a case by case basis. It is also important to recognise that custom and law can adapt to general societal change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid the recognition of Aboriginal customary law or by Aboriginal communities to condone breaches of human rights.
- In situations where women's human rights are at risk, Aboriginal communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women's human rights. While all attempts should be made to reconcile women's individual human rights with the rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. HREOC considers that the recognition of Aboriginal customary law must also take active steps to ensure women's right to individual safety and freedom from violence.
- HREOC considers that it is preferable for judicial decision makers to be required to balance Aboriginal customary law issues with human rights standards, rather than imposing a legislative uniform ban or refusing to recognise certain practices.
- It is also the view of HREOC that international human rights principles are relevant to the balance that must be achieved in sentencing decisions involving customary Aboriginal law. Further, a sentence which leads to impermissible discrimination against a woman or a child under international human rights principles is an error of law both in the balancing exercise under the provisions of Sentencing Acts and under the common law.
- The Court of Criminal Appeal of the Northern Territory in a recent decision (*The Queen v GJ*) has confirmed that where Aboriginal customary law conflicts with Territory law the latter must prevail, and stated that it has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory.
- The Court of Criminal Appeal of the Northern Territory also noted that to date 'consultation with Aboriginal communities about (these) principles has too often been perfunctory' and suggested that it may be an appropriate matter for HREOC 'to give consideration to the implementation of educational programs about (conflicts between customary law and criminal codes) in Aboriginal communities'.

### **Indigenous women, imprisonment and post-release support needs**

- Indigenous women are increasingly over-represented in criminal justice processes. This is occurring in the context of intolerably high levels of family

violence, over policing for selected offences, ill health, unemployment and poverty.

- There is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives. Indigenous women are also significantly over represented as victims of violent crime.
- A matter of great concern in relation to current debates about addressing family violence in Indigenous communities are issues of access to justice for Indigenous women. A matter of particular concern is the limited ability of funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS) to provide access to justice for Indigenous women through legal representation and family violence services.
- There is an urgent need to ensure appropriate funding levels for ATSILS, Family Violence Prevention Legal Services and Indigenous women's legal services, in order to provide a greater focus on the legal needs of Indigenous women as well as a greater focus on preventative action and community education.
- Links must be drawn and holistic models developed and supported which address the connections between culture, drug use, alcohol use, separation from family, violence, poverty, spiritual needs, housing, health, boredom, race discrimination and gender discrimination.
- Effective pre-and post-release programs should include community based, Indigenous specific programs to help women deal with the effects of violence and to help women develop alternative strategies for coping with violence in the future. People require protection from violent behaviour and alternative structures for prevention and punishment of violent behaviour which provide more than imprisonment with all its risks and consequences.
- Effective pre-and post-release programs need to recognise and treat the complexity of experience of the experience of Indigenous individuals who are both victims and perpetrators of violence. Programs will also need to provide support for Indigenous women to reintegrate back into the community. The types of support required by each woman will be determined by her location and other issues. For instance, for some women there may be issues of payback, and she may not be able to return to her community until those issues are resolved. Other women may need to return to small communities, where contact with the perpetrator of violence cannot be avoided.
- The issues of healing and wellness are critical issues for Indigenous women exiting prison. Processes for healing are seen as having the potential to increase the health and wellbeing of Indigenous women, with a possible outcome of this being reductions in rates of involvement of Indigenous women in criminal justice processes.
- Indigenous concepts of healing are based on addressing the relationship between the spiritual, emotional and physical in a holistic manner. An

essential element of Indigenous healing is recognising the interconnections between and effects of violence, social and economic disadvantage, racism and dispossession from land and culture on Indigenous people, families and communities.

- Healing can be contest specific – such as; addressing issues of grief and loss- or more general by assisting individuals deal with any trauma they may have experienced. The varying nature of healing demonstrates that it cannot be easily defined, with healing manifesting itself differently in different communities.
- Healing is not a program, rather it is a process. Healing is not something that should only be available at the post-release stage, rather it should be available at any point when a woman is ready – this may be before a woman comes into contact with the criminal justice system, or after they have been in and out of prison over a number of years. Further, healing in the context of criminal justice, attempts to help the individual deal with the reasons why they have offended in the first place. This element of healing is strongly linked to the notion of restorative justice. For this reason, healing has the potential to fit within a restorative justice framework.
- There are, however, relatively few programs and services for Indigenous women exiting prison that presently focus on healing processes in Australia. The conversion of concepts of healing into actual programs and services is very much in its infancy here. As the case study of the Yula Panaal Cultural and Spiritual Healing Program in New South Wales demonstrates, they also face difficulty in attracting operational funding.
- The traditional approach to distributing available funding for programs and services is dictated by an economy of scale. This impacts negatively on Indigenous women as it delivers minimum resources to a population within the community that has a high level of need. Given that Indigenous women are manifestly the smallest population in the Australian prison system, it is somewhat understandable that they are the group with the least amount of resources directed towards them. However it is precisely this lack of direct resources that goes someway to maintaining Indigenous women's distinct disadvantage in society.

## **Indigenous youth and criminal justice systems**

- The Aboriginal and Torres Strait Islander population is growing faster than the non-Indigenous population. The annual rate of growth for Indigenous peoples has been estimated at 2.3% compared with approximately 1.2% for non-Indigenous Australians. As a result, the challenges for service delivery to Indigenous youth will be exacerbated over the coming decades.
- Indigenous males comprise 46 percent of the total national male juvenile detention population and Indigenous females comprise 57 percent of the total national female juvenile detention population. Although overall there has been

a decline in rates of detention for both Indigenous and non-Indigenous juveniles, the ratio of over-representation continues in a stable trend with Indigenous young people 20 times more likely to be incarcerated than non-Indigenous young people.

- While there are limited statistics available, it is believed that a significant percentage of Indigenous juvenile detainees have a disability. Indigenous young people living in poor physical and social environments experience higher rates of cognitive / intellectual disabilities and poorer mental health.
- There are a range of developmental issues that impact on the cognitive functioning and mental health of Indigenous young people and their communities such as Foetal Alcohol Syndrome, petrol sniffing, physical and emotional violence and poor nutrition.
- The *Western Australian Aboriginal Child Health Survey (WAACHS)* revealed that Aboriginal children experience a high risk of clinically significant emotional or behavioural difficulties. It found that there are clear associations between family and household factors and risk of clinically significant emotional and behavioural difficulties experienced by Aboriginal children and young people. The factor most strongly associated with high risk of clinically significant emotional or behavioural difficulties in children was the number of major life stress events (e.g. illness, family break up, arrests or financial difficulties) experienced by the family in the 12 months prior to the survey.
- Similarly *Pathways to Prevention*, a report developed for the National Crime Prevention Strategy urges government to focus on early developmental phases of a child as a means to thwarting future contact with crime.
- Failures to address issues relating to mental health, child protection, disability and community service systems contribute to the increased risk of children entering the juvenile justice system. These failures include lack of support services, appropriate treatment and behaviour intervention programs, family based care services and accommodation options; the use of inappropriate and harmful service practices, such as physical restraint and medication; the risk or actual occurrence of physical and sexual assault; and the reliance on the police to resolve challenging behaviour. There is also evidence to suggest that the lack of support services for children and appropriate policies and practices to deal with challenging behaviour often leads services to rely on or view juvenile justice facilities as providing a stable and secure care environment and as a solution to a complex problem.

## **Restorative justice models**

- The past decade has seen an increased emphasis on restorative justice mechanisms for addressing criminal behaviour in Indigenous communities to address the needs of victims (including of family violence) as well as to make the system more meaningful to offenders.

- Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. As it is concerned with social equality, restorative justice inherently demands that one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships, restorative justice must be concerned with both the discrete wrong and its relevant context and causes.
- This does not necessarily seek to return a relationship to the position prior to the commission of some wrongdoing, but instead to address the underlying issues. Restorative justice can thus incorporate concepts of restitution and healing, while focusing on the transformation of relationships.
- There are numerous new initiatives in Australia developing community based justice mechanisms for Indigenous peoples which are based on restorative justice principles. Some of these processes, such as Law and Justice Committees in the Northern Territory and Community Justice Groups in Queensland incorporate a holistic response to family violence into strategies for addressing offending in communities.
- The last two years has also seen the development of community justice mechanisms for involvement of Indigenous peoples in sentencing. Examples include the Ngunga Court and Ngunga Youth Court in South Australia; the Murri Court in Queensland; the Koori Court in Victoria and circle sentencing in New South Wales. Generally, these processes seek to incorporate an Aboriginal traditional customary law approach to the sentencing of Aboriginal offenders within the framework of existing legislation. While there are variations between the various models, they all involve Aboriginal Elders sitting alongside the magistrate to advise on sentencing options, with members of the offender's family, the victim, the victim's family and other interested community members participating in the sentencing process.
- A NSW report on circle sentencing, reviewing the first twelve months of the operation of circle sentencing in Nowra, found that circle sentencing helps to break the cycle of recidivism, introduces more relevant and meaningful sentencing options for Aboriginal offenders with the help of respected community members, reduces the barriers that currently exist between the courts and Aboriginal people, leads to improvements in the level of support for Aboriginal offenders, incorporates support for victims, and promotes healing and reconciliation and increases the confidence and generally promotes the empowerment of Aboriginal people in the community.
- While these processes have been considered successful in their initial years, they are limited to dealing with particular non-violent offences. Accordingly, offences relating to violence and sexual offences cannot be addressed within these sentencing processes.
- The NSW Aboriginal Justice Advisory Committee has proposed the extension of community controlled justice mechanisms to deal with family violence.

This involves establishing localised justice mechanisms and healing centres combined with alternative sentencing processes for offenders which seek to establish formal links with local Aboriginal communities. In this approach, community justice and healing centres would be established as a single point of contact for victims of family violence.

- There are similarities in this proposal with the Northern Territory Law and Justice Committee and Queensland Community Justice Group approaches, as well as similarities with the roles of services established under ATSIC's Family Violence Prevention Legal Service Program. It also provides what the Memmott report, as discussed earlier, identified as a holistic composite set of programs for addressing family violence.
- It also has similarities to Canadian models for addressing sex offending by Indigenous peoples. The Canadian approach emphasises the need for restorative justice, community-based initiatives beyond the justice system such as victim-offender mediation, family group conferencing, sentencing circles and formal cautioning. It also highlights the gaps that exist in addressing Aboriginal sex offender needs and the need for Aboriginal control of appropriately cultural services. The report *Aboriginal Sexual Offending in Canada* identifies four areas where action is necessary to address Aboriginal sexual offending: community development; program development; research and human resources. The effectiveness of this model and whether aspects could be transferred to the Australian context, particularly in regard to community capacity-building and service coordination, is an avenue for further investigation.
- These models and proposals suggest that the full potential of community justice mechanisms for addressing family violence has not been explored sufficiently, and may provide an appropriate way forward for addressing some aspects of need.

## **Victims of crime**

- The criminal justice system is extremely poor at dealing with the underlying causes of criminal behaviour and makes a negligible contribution to addressing the consequences of crime in the community. One of the consequences of this, and a vital factor that is often overlooked, is that Indigenous victims of crime and communities are poorly served, if served at all, by the current system.
- Accordingly, the current system disadvantages Indigenous peoples from both ends – it has a deleterious effect on Indigenous communities through over-representation of Indigenous people in custody combined with the lack of attention it gives to the high rate of Indigenous victimisation, particularly through violence and abuse in communities. Reform to criminal justice processes, including through community justice initiatives, must be responsive to these factors.

- There are limited services which target Indigenous victims of crime. A number of existing victim support services and victims compensations services, in particular, also do not record Indigenous status of their clients. This makes it difficult to assess whether services are being accessed and are meeting the needs of Aboriginal and Torres Strait Islander peoples.

## Mental health

- Poor mental health contributes to the crisis of family violence, anti-social behaviour, substance misuse, confrontation with the legal system, low participation in schooling and employment that are seen in a significant number of Aboriginal and Torres Strait Islander communities.
- There is currently no national data collection process that is able to provide accurate information on the incidence of mental health disorders or treatment occurring among Indigenous peoples in Australia. All we know is that suicide, substance abuse and family and community violence are problems and there are services in place in some communities to address these. Most of the data we have about mental ill-health in Indigenous adults is that gleaned after crisis situations, when the mental health issue results in hospitalisation.
- The Western Australian Aboriginal Child Health Survey published in April 2005, with a survey sample of approximately 5,000 children. It reported that *one in four (1:4) Aboriginal children* are at high risk of developing clinically significant emotional or behavioural difficulties. This compares to about one in six or seven (1:6/7) of non-Indigenous children.
- Research has also indicated that children with poor mental health have a greater tendency to develop into adults with poor mental health.
  - ***Suicide and other forms of self-harm:*** In 1998, Indigenous males committed suicide at 2.6 times the rate in the non-Indigenous population; for females the rate is double that of females in the non-Indigenous population. In 2000-01, Indigenous males were hospitalised at 2.2 times the rate of males in the general population and females at 2.0 times the rate of females in the population for intentional self-injury. The National Health Survey in 2001 reported 10% of Indigenous peoples were likely to consume alcohol at risk or high-risk levels, compared with 11% of non-Indigenous people. However, this finding contrasts with other sources that report Indigenous peoples consuming alcohol at risk levels twice that of the non-Indigenous community. Apart from alcohol, substance abuse is reported to be higher in Indigenous communities.
  - ***Indicators for other forms of harm behaviours:*** Violence is symptomatic of poor mental health in perpetrators and is associated with substance abuse. It is also stressor to the mental health of victims. Violence kills Indigenous peoples at four times the rate of the non-Indigenous population. Reported physical, or threatened physical,

violence, appears to have doubled over 1994 – 2002: 12.9% of respondents in 1994 identifying as victims, compared to 24.3% of respondents in 2002 in Indigenous social surveys. In 2001, Indigenous females were 28.3 times more likely to be hospitalised for assault than non-Indigenous females; males at 8.4 times the non-Indigenous rate.

- Mental ill-health among Indigenous peoples must be understood in a holistic context – as the *National Aboriginal Health Strategy* put it ‘Health to Aboriginal peoples is a matter of determining all aspects of their life, including control over their physical environment, of dignity, of community self-esteem, and of justice. It is not merely a matter of the provision of doctors, hospitals, medicines or the absence of disease and incapacity’.
- The combination of problems suffered within Indigenous communities is *the* prime example of negative social determinants of health in Australia. Violence and addiction in communities undermines the resilience of members and erodes the capacity of communities to support the mental health of members. The impact of addiction on communities has been most closely observed in relation to alcoholism, although petrol sniffing and other substance abuse must be considered in relation to some communities.
- Social support and social cohesion are associated with good mental health. Studies show that people in long-term, familial relationships and close-knit communities are better able to deal with stress and will live longer than those who do not.
- Strengthening communities and culture clearly has potentially positive implications for the mental health of community members. Likewise, policies and programs that erode the strength and culture of communities can be considered as having negative impacts on community members.

## Substance abuse issues

- There are significant links between substance abuse and violence. The links between substance and abuse and violence mean that strategies to prevent and mitigate substance abuse also need to address the impacts of substance abuse on communities.
- Potential responses to address the impacts of substance abuse need to address the those directly affected by substances, those potentially at risk of taking up substances at dangerous levels, and the impacts on those who come into contact with people affected by substances.
- Typically, responses to address substance abuse are based on three phase health frameworks that include prevention measures, intervention strategies, and measures to overcome the impacts of those disabled through substance abuse. They include:
  - Primary interventions – to reduce recruitment into substance abuse;
  - Secondary interventions – seeking to achieve abstinence and rehabilitation;

- Tertiary intervention – providing services to the permanently disabled.
- In relation to petrol sniffing, the social impacts of sniffing are as follows:  
 Petrol sniffing poses a range of problems to sniffers, their families, communities and to the wider society. Among the problems which have been associated with petrol sniffing are: serious health consequences including death or long-term brain damage, social alienation of sniffers, social disruption, vandalism and violence, increased inter-family conflict and reduced morale on communities, incarceration of sniffers and costs to the health system in terms of acute care and providing for the long-term disabled ...
- In introducing liquor licence conditions and restrictions in Indigenous communities on alcohol the *Racial Discrimination Act 1975* (Cth) must be considered.
- HREOC's *Alcohol Report*, published in 1995, considers the fact that while you might be detracting from the rights of the individual to alcohol by virtue of introducing restrictions, you may be in fact conferring rights on the group as a result (known as 'collective rights'). In the *Alcohol Report*, the Commission reasoned that alcohol restrictions *could* be conceived as conferring some benefits in terms of the 'collective rights' it might promote in Indigenous communities. Such benefits might be a reduction in the incidence of violent crime, a reduction in the rate of Indigenous incarceration, and an increase in money available for food.
- In order to not breach the RDA, alcohol restrictions would need be classified as a class of 'benefit conferral'. They must *also* meet all of the criteria for special measures, namely that:
  - It confers a benefit on some or all members of a class, and membership of this class is based on race, colour, descent or national or ethnic origin;
  - It is for the sole purpose of securing adequate advancement of the group so that they may enjoy and exercise equally with others, their human rights and fundamental freedoms; and
  - The protection given is necessary so the group may enjoy and exercise equally with others, their human rights and fundamental freedoms.
- While not determinative, in his decision in *Gerhardy v Brown*, Justice Brennan notes HREOC's Alcohol Report and states: "The wishes of the beneficiaries of the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. In the Alcohol Report, Commissioner Antonios concluded: alcohol restrictions imposed upon aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures."
- This highlights the importance of ensuring informed, real community consultation when considering alcohol restrictions in Indigenous communities.

- Evidence also suggests that alcohol restrictions *in isolation* of any mechanism to address *why* people are abusing alcohol actually entrench the problems that the restrictions were designed to stop.

## **Section 3: Addressing family violence in Aboriginal and Torres Strait Islander Communities – Key issues**

### **In this section:**

This section reproduces a speech by the Aboriginal and Torres Strait Islander Social Justice Commissioner identifying ten key challenges for ending family violence and abuse in Indigenous communities. The speech was given at a national forum convened in Parliament House in Canberra on 19 June 2006.<sup>1</sup>

I thank you for your attendance today. The presence of such a large and distinguished group of people, able to attend at short notice, indicates the seriousness with which we all see the issue of family violence in Indigenous communities.

Can I also thank Australians for Native Title and Reconciliation, who have taken the lead role in organising this event. The Human Rights and Equal Opportunity Commission has had no hesitation in joining ANTAR as a co-host of this important event. I'd also like to thank the many organisations that are also hosting or supporting this event, such as Reconciliation Australia, Oxfam Australia, the Australian Indigenous Doctors Association, the Australian Medical Association and the Australian Principals' Associations Professional Development Council.

I know that I speak for all these organisations when I say that we have created this event because we are committed to seeing an end to family violence in Indigenous communities. We want to work with governments to ensure that there are deliberate and determined steps taken to address this issue, which is a cause of such devastation to the cultures and fabric of Indigenous societies.

We also see the need for a space for dialogue with Indigenous peoples to discuss some of the complexities and the day to day realities that exist in communities in addressing the many facets to family violence. And we have a breadth of experience among our panellists today on the daily challenges that addressing family violence raises for Indigenous communities.

My role today is to provide some suggestions, from my national perspective as Aboriginal and Torres Strait Islander Social Justice Commissioner, on the issues that I consider we must face if we are to make progress in addressing family violence in Indigenous communities.

**But first, let me state upfront and unequivocally that family violence in Indigenous communities is abhorrent and has no place in Aboriginal society.**

Family violence is a scourge that is causing untold damage and trauma among Indigenous communities. It is damaging Indigenous cultures and it is causing untold damage to our women and children.

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<sup>1</sup> Forum on ending family violence in Indigenous communities, Parliament House, Canberra, 19 June 2006, speech available online at: [www.humanrights.gov.au/speeches/social\\_justice/violence20060619.html](http://www.humanrights.gov.au/speeches/social_justice/violence20060619.html).

Indigenous men, women and children are entitled to live their lives in safety and full human dignity. This means without fear of family violence or abuse. **This is their cultural and their human right.**

Violence and abuse is also in breach of criminal laws across the country. I am on record several times stating that if an Indigenous person commits these types of offences they should be dealt with by the criminal justice system just as any other person would be. There should also be swift intervention from care and protection systems to ensure that the best interests of the child are the primary consideration.

Government officials and community members should be fearless and bold in reporting suspected incidents of violence and abuse. This means addressing the code of silence that exists in many Indigenous communities about these issues. And it means government officers meeting their statutory obligations, meeting their duty of care and taking moral responsibility in the performance of their duties as public officials. Many do already. Regrettably, some do not.

**Let me also state upfront that Aboriginal customary law does not condone family violence.**

Family violence and abuse of women and children has no place in Aboriginal culture. Customary law cannot be relied upon to excuse such behaviour.

That is not the customary law that I know. Perpetrators of violence and abuse **do not respect customary law and are not behaving in accordance with it.**

HREOC has stated clearly in submissions to sentencing courts and to inquiries that customary law must be applied consistently with human rights standards. **In other words, at no stage does customary law override the rights of women and children to be safe and to live free from violence.**

What I intend to do today is to challenge you to broaden your thinking about the dimensions of the issue of family violence and abuse in Indigenous communities and to provide you with some possible ways forward.

For while we all readily agree that violence should not be tolerated, anyone who has worked even fleetingly on these issues knows that **the solutions are complex, multi-faceted and require long term focus and commitment to address.**

It is hard going. And governments and communities have by and large failed to solve the problem to date.

The Human Rights and Equal Opportunity Commission will shortly release a paper which provides an overview of the research, educational and advocacy work that we have done over recent years on issues relating to family violence in Indigenous communities.

We have looked at this issue in many contexts. We have considered:

- the relationship to substance abuse;

- the interaction of Aboriginal customary law, violence and human rights;
- the need for human rights education among Indigenous communities;
- the significant role of violence and abuse as a causative factor in Indigenous women entering and then re-entering prison at alarmingly high rates;
- international models for programs aimed at addressing inter-generational trauma and grief through healing;
- the impact of violence on Indigenous youth in developing cognitive disabilities, in under-performance in schools and entry into the juvenile and then adult criminal justice processes;
- its relationship to the high incidence of mental illness and youth suicide among Indigenous peoples; and
- it being both a reflection of, and a cause of, poor health among Indigenous peoples.

I think you will find this a useful document when it is released. I mention it here as this snapshot of issues captures how violence relates to almost every aspect of policy making and service delivery to Indigenous communities.

Because of this, **we need to adopt a holistic approach to address the causes and the consequences of family violence in Indigenous communities.** If we treat it as simply a law and order matter, a matter of legal compliance, or a health matter, we will not achieve lasting improvements to the lives of Indigenous peoples.

In saying this, I note that the forthcoming Ministerial Summit on family violence is narrowly focused on issues of law and order, customary law and school attendance. These are important issues and they can make a difference. But they are not the only issues.

We urge all governments to ensure that they do not forget the total picture and that the narrow focus of the Summit is used as a platform to create momentum to deal with **all** the relevant factors relating to family violence. I personally am viewing the Summit as Stage One of the broad-based approach that will be needed if we are to end violence in Indigenous communities.

In the time remaining to me, I want to identify **ten challenges** for addressing family violence in Indigenous communities. To me, these are some of the key factors that we need to address to achieve lasting change.

**First, we should acknowledge that governments have been making commitments to address this issue for some time already. What we need is concerted, long term action which meets these commitments.**

Let me remind you of one of the most significant commitments which has been made in recent years. The Council of Australian Government adopted the *National Framework for preventing family violence and child abuse in Indigenous communities* in June 2004. COAG set out six principles upon which action by governments would be based, namely:

- a focus on safety;

- adopting a partnership approach, including with Indigenous families, communities and community organisations;
- strong leadership from governments and indigenous community leaders and sustainable resourcing;
- acknowledging that successful strategies would empower Indigenous peoples by enabling them to take control of their lives, regain responsibility for their families and communities and to enhance individual and family wellbeing;
- developing flexible approaches which work across jurisdictional and administrative boundaries, and enable local indigenous communities to set priorities and work with governments to develop solutions and implement them; and
- addressing the underlying causes of violence and abuse, including alcohol and drug abuse, generational disadvantage, poverty and unemployment.<sup>2</sup>

It is a wide ranging acknowledgement of the relevant factors and necessary components of any response.

At the time, which is now two years ago, COAG stated that “The extent of family violence and child abuse among indigenous families continues to be a matter of grave concern for both governments and indigenous communities. All jurisdictions agree that preventing family violence and child abuse in indigenous families is **a priority for action** that requires a national effort.”<sup>3</sup>

Now rather than be discouraged at the lack of priority that has clearly been given to this issue since the making of this solemn commitment in 2004, I want to commend Minister Brough for putting this issue back on the agenda.

I don’t think that Minister Brough needs to seek the commitment of anyone to work on this issue – because you already have that ten times over. The time for **action** is long overdue.

### **Second, this action must be based on genuine partnership with Indigenous peoples and with our full participation.**

It is important for governments to walk with Indigenous peoples and not run ahead and expect that we will catch up.

In my latest *Social Justice Report* I also put the challenge to all Australian governments to ensure that appropriate support is provided to the establishment of regional Indigenous structures as a matter of urgency.

I don’t intend to say more about this issue here, other than that it is difficult to see how governments can adopt a partnership approach when there is limited capacity to engage with Indigenous peoples in a systematic way.

Put simply, my concern is that governments risk failure if they develop and implement policies about Indigenous issues without engaging with the intended

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<sup>2</sup> [http://www.coag.gov.au/meetings/250604/attachments\\_c.rtf](http://www.coag.gov.au/meetings/250604/attachments_c.rtf)

<sup>3</sup> <http://www.coag.gov.au/meetings/250604/communique250604.rtf>.

recipients of those services. Bureaucrats and governments can have the best intentions in the world, but if their ideas have not been subject to the ‘reality test’ of the life experience of the local Indigenous peoples who are intended to benefit from this, then government efforts are more likely to fail in the medium to long term.

**Third, and related to this, there are significant processes and networks already in place to progress these issues. We need to support them and build their capacity.**

As examples, I am talking about:

- the Aboriginal Community Controlled Health sector;
- Aboriginal and Islander Child Care services;
- Family Violence Prevention Legal Services;
- Aboriginal and Torres Strait Islander Legal Services;
- the peak bodies for these sectors;
- Community Justice Groups, women’s groups and Night Patrols;
- CDEP schemes;
- state and territory based Justice Forums and Aboriginal Justice Advisory Committees; and
- leadership programs and institutes, to name but a few.

We should be working with these significant resources within Indigenous communities and supporting them to lead efforts to stamp out violence, including by developing the educational tools to assist them to identify and respond to family violence.

As a further example of existing resources, last week the Aboriginal Health and Medical Research Council of NSW released a directory of Aboriginal men’s groups, the focus of which includes anger management, dealing with violence and grief and trauma counselling. It is a simple initiative, but a vital one in making existing services for help known among the Indigenous community.

My basis point is that we do have some structures and resources in communities that could be better supported and utilised. Let’s not reinvent the wheel and fracture existing services.

**Fourth, there is a need for broad based education and awareness-raising among Indigenous communities.**

There have been media reports recently about a report which is currently being considered by the NSW government. The report has been produced by the Aboriginal Child Sexual Assault Taskforce and is called ‘Breaking the silence – Creating our future’.

Media reports have stated that the review found that child sexual assault is not well understood in Aboriginal communities, resulting in it going undetected and in creating a culture of silence and inappropriate responses such as protecting perpetrators rather than children.

I await the report's release and its recommendations with interest. What is clear to me, however, is that it supports my concern that there is not a clear understanding or acceptance of the problem of family violence in many Indigenous communities. This means that community dynamics do not confront and challenge violent and abusive behaviour as much as they should.

In my view, raising awareness among communities, working with communities to send strong messages that violence won't be tolerated, that there are legal obligations and protections and individuals have rights, are critical if we are to stamp out this behaviour for good.

**Fifth, is a plea: don't forget our men and don't stereotype them as abusers.**

There are many Aboriginal men who find family violence and abuse abhorrent. I am one of them.

In the past two months I have addressed men's leadership groups and health professionals, and the concern has been put to me regularly that this debate is demonising Indigenous men and typecasting us **all** as violent and abusive and as perpetrators of abuse. Some remote communities have spoken out against this and rejected that they condone violence.

We need the support of Indigenous men if we are to make progress in stamping out violence. Indigenous men have a critical role to play in ending violence in communities. As Indigenous men, we need to model appropriate behaviour, challenge violence and stand up against it, and support our women and nurture our children.

Many Indigenous men already do – it would be a backward step if we did not acknowledge these strong men, and if we didn't direct some of our attention, through services and programs, to support their needs.

A recent study of men's health services on the Anangu Pitjantjatjara lands, titled *Building on our strengths*, by Dr Alex Brown states:

When searching the available literature, 'gender and health' tends to highlight responses virtually exclusively to the health and well-being of Indigenous women. When relating to men, it tends to highlight the negative consequences of male behaviour... Indigenous males are described and labelled as the worst of health and social statistics, rather than as the dynamic, essential elements of families, communities and societies. Perpetuating negative stereotypes of Indigenous males as 'problem males', has led to the development of health and social policy that continues to blame males for an array of issues, without providing the necessary support, infrastructure and political will to reverse male health and social disadvantage.<sup>4</sup>

We need to bear this in mind in any response so it addresses the issues as they relate to all members of Indigenous communities.

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<sup>4</sup> Brown, ADH, *Building on the strengths – A review of male health in the Anangu Pitjantjatjara lands*, Menzies School of Health Research 2004, p1.

**Sixth, and related to this, is a further plea: we need to look for the positives and celebrate the victories.**

There are good things happening in Indigenous communities, even if the national media is not interested in reporting them. In my view there are two impacts of the continual negative stereotypes about Indigenous peoples.

The first is that it contributes to a political environment in which these issues are not important to the Australian public, except when sensational allegations are made from time to time. What, for example, is different about the debate of the past two months to the debate around the time the Prime Minister convened a national summit in 2003? Why was there no sustained interest or pressure from the media or the non Indigenous community to address these issues in the three years since that Summit, and the time before that and so on... This is reconciliation in action – we need to work together and be in it for the long haul together.

The second impact of this constant stereotyping is that it can further disempower and contribute to negative self-image among Indigenous peoples. Let us confront the problem, but also do so by reinforcing the inherent worth and dignity of Indigenous peoples, not by vilifying and demonising all Indigenous peoples.

**Seventh, and this one is directed solely to Indigenous peoples and communities, we face a challenge among Indigenous society to re-assert our cultural norms and regain respect in our communities.**

Indigenous peoples proudly identify as being a distinct group within society. We do so based on our cultures, our identity and our systems of law.

These systems are built on respect. This respect begins with respect for our elders and continues on to respect for our mothers and women, our men and for our children – our future generations.

One of the most insidious and damaging effects of **our colonisation as peoples**, has been the breaking down of our systems of respect. Poverty, disadvantage and discrimination have bred dysfunction and have led to a lack of respect among sectors of our communities.

We face a major challenge, as Indigenous societies, to focus on rebuilding or re-asserting our cultural values which have been eroded through lack of respect.

Family violence and abuse is about lack of respect for Indigenous culture. We need to fight it as Indigenous peoples, and rebuild our proud traditions and community structures so that there is no place for fear and intimidation.

**Eighth, and this is the main challenge for governments working in partnership with Indigenous peoples, we need a long term, bi-partisan commitment to do whatever it takes, for as long as it takes, to end family violence in Indigenous communities.**

**This is not the same as calling for a commitment to address this issue. It is calling for government accountability on this issue.**

By this I mean accountability where governments' actions match the commitments they make. Where governments' actions show that they have decided:

- a) that they are committed to a particular course of action – such as overcoming Indigenous disadvantage;
- b) that they have considered what needs to be done to actually achieve this outcome;
- c) that they have a plan for when the outcome will be achieved – ie, it is benchmarked with targets and goals for when it will happen;
- d) that they have put all resources possible and made every effort possible to achieve this, and;
- e) have done so for as long as is necessary to reach the end goal – even if this is longer than the electoral cycle. This requires bi-partisan support, and if the policy intervention is sound and it has been developed with the active participation of Indigenous peoples, such support should be forthcoming.

When you have been downtrodden for all of your life and governments have been promising to do something to address this for all of your life, and they haven't – why would you hold out any hope for change? We can't forget how disempowering, dispiriting and destructive empty promises have been on Indigenous society over such a long period of time.

What this means is that this Summit on violence **must** focus on the accountability measurements that will be put in place to hold governments to their commitments. I strongly encourage the development of robust monitoring and evaluation mechanisms. These will also allow us to identify and celebrate successes.

**Ninth, and related to this, it requires a change in mindset of government from an approach which manages dysfunction to one that supports functional communities.**

At present, the record expenditure on Indigenous affairs is paying for the consequences of disadvantage and discrimination. It is paying for ill-health, for unemployment, violence and substance abuse. It is a passive reactive system of feeding dysfunction, rather than taking positive steps to overcome it.

I want to see, we want to see a pro-active system of service delivery to Indigenous communities – in other words, a focus on building functional, healthy communities.

It should be obvious that supporting good health and supporting functional communities is good policy. It doesn't take much to see that it makes sound financial sense in the longer term. And of course, it is socially and morally preferable.

This objective should be the dominant thought in the mind of all policymakers and governments.

**And tenth, and finally, let us be bold in ensuring that program interventions are targeted to address need and overcome disadvantage.**

**As it stands**, government programs and services **are not targeted to a level that will overcome Indigenous disadvantage**. Hence, **they are not targeted in a way that will meet the solemn commitments that have been made**. They are **targeted to maintain the status quo**.

In my latest *Social Justice Report* to federal Parliament, I have proposed a campaign for achieving Aboriginal and Torres Strait Islander health equality within a generation. That is how long it will take, if we treat this as a crisis issue now.

What I have stated in the Report is that the factor that is most striking in its absence from the current health framework is **the lack of a timeframe** for achieving Aboriginal and Torres Strait Islander health equality. **There remains a need** for governments to take adequate measures (including through the allocation of adequate resources) within set timeframes to overcome the disparity in rights experienced by Aboriginal and Torres Strait Islander peoples.

My office is working with a number of organisations to progress thinking about what is needed to achieve health equality within a generation – this includes thinking on violence. We will be jointly convening a national summit on Indigenous health equality in the latter part of this year. We see this summit on violence as an important process which will inform that Summit.

So to conclude, in the latest *Social Justice Report* I identify two things that Aboriginal and Torres Strait Islander peoples and the general community can no longer accept from governments. These apply equally to responses to family violence issues as they do to health issues.

First, we can no longer accept the making of commitments to address Aboriginal and Torres Strait Islander inequality *without* putting into place processes and programs to match the stated commitments. Programs and service delivery must be adequately resourced and supported so that they are capable of achieving the stated goals of governments.

Second, and conversely, we can not accept the failure of governments to commit to an urgent plan of action. It is not acceptable to continually state that the situation is tragic and ought to be treated with urgency, and then fail to put into place bold targets to focus policy making over the short, medium and longer term or to fund programs so they are capable of meeting these targets.

*A plan that is not adequately funded to meet its outcomes **cannot be considered an effective plan**.*

We don't want to see any more unfunded commitments from governments.

Commitments, such as those at the COAG level, must be benchmarked and matched against need. They must be funded to achieve their goals and there must be equality between the investment in government bureaucratic processes and program funding that reaches Indigenous peoples.

Let me be provocative and ask you: Is a commitment to equality which is not accompanied by the effort needed to realise it any better than a system that actively discriminates against Indigenous peoples?

Indigenous peoples get no joy from commitments of governments which have not resulted in noticeable improvements.

The status quo is not acceptable.

We want to see a positive future, where the rhetoric of government turns to true reconciliation, as measured in tangible outcomes.

This is achievable and it is realistic. **And it is overdue.**

Let me conclude by reiterating one of my comments at the beginning. We are at one on this issue. Government, non-government and communities want to work together to end family violence in Indigenous communities. On behalf of the workshop organisers, we offer you our support in this effort.

## **Section 4: Extracts of materials on family violence and abuse in Indigenous communities**

### **In this section:**

This section contains extracts of reports, submissions, court interventions, speeches and other materials prepared by the Human Rights and Equal Opportunity Commission on issues relating to family violence and abuse in Indigenous communities over the past five years (2001 – 2006).

The materials are organised according to the following themes:

- a) Review of progress in addressing family violence;
- b) Recognising Aboriginal customary law consistently with human rights;
- c) A human rights based approach to overcoming Indigenous disadvantage;
- d) Mental health issues;
- e) Indigenous women, imprisonment and post-release programs;
- f) Indigenous youth and criminal justice processes;
- g) Indigenous victims of crime; and
- h) Substance abuse issues.

Please note that there is some crossover between themes, and materials extracted in one section also relate to issues discussed in other sections of the publication.

Footnotes and references have been removed from the extracted materials, unless providing important clarification, for ease of reference. The full versions of all the materials extracted, including references, are available on the HREOC website at the website addresses listed at the beginning of each extract.

All documents are linked from the following webpage:  
[www.humanrights.gov.au/social\\_justice/family\\_violence/](http://www.humanrights.gov.au/social_justice/family_violence/)

## a) Review of progress in addressing family violence

### Document extracted in this section:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Addressing family violence in Indigenous communities, Chapter 5, Social Justice Report 2003*<sup>5</sup>

### **Aboriginal and Torres Strait Islander Social Justice Commissioner, *Addressing family violence in Indigenous communities, Chapter 5, Social Justice Report 2003***

There is no issue currently causing more destruction to the fabric of Indigenous communities than family violence. This has been acknowledged by all levels of government in recent years, with a number of significant inquiries and initiatives undertaken or commenced at the federal, state and territory level to address its impact.

- *Indigenous concepts of family violence*

Indigenous concepts of violence are much broader than usual mainstream definitions of domestic violence. For Indigenous peoples, the term *family violence* better reflects their experiences.

Family violence involves any use of force, be it physical or non-physical, which is aimed at controlling another family or community member and which undermines that person's well-being. It can be directed towards an individual, family, community or particular group. In *Tjunparni: Family Violence in Indigenous Australia* family violence is defined as behaviours and experiences including:

beating of a wife or other family members, homicide, suicide and other self-inflicted injury, rape, child abuse and child sexual abuse. When we talk of family violence we need to remember that we are not talking about serious physical injury alone but also verbal harassment, psychological and emotional abuse, and economic deprivation, which although as devastating are even more difficult to quantify than physical abuse.

Family violence is not limited to physical forms of abuse. It also includes cultural and spiritual abuse:

People get hurt physically - you can see the bruises and black eyes. A person gets hurt emotionally - you can see the tears and the distressed face - but when you've been hurt spiritually like that - it's a real deep hurt and nobody, unless you're a victim yourself, could ever understand because you've been hurt by someone that you hold in trust.

Family violence in Indigenous communities also takes place in the broader context of violence committed at a systemic level:

<sup>5</sup> Available online at: [www.humanrights.gov.au/social\\_justice/sjreport03/data/chap5.html](http://www.humanrights.gov.au/social_justice/sjreport03/data/chap5.html).

It is violence to move people forcibly from their place of birth and to dump them in strange places... It is violence to separate family members by policy or by designed economic hardship and necessity. It is violence to classify people by race in order to deny privileges to some and heap privileges on others. It is violence to systematically deny the most basic human rights in the service of such a system. The obvious physical violence that reaches wide attention is the merest tip of the iceberg of such ignored, routinized, structural violence.

Hence, it is crucial to acknowledge the impact of broader systemic violence when considering the impact of family violence in Indigenous communities. It is vital that definitions of violence incorporate not only physical dimensions, but also emotional, social, economic, spiritual and institutional dimensions. The expansive framework of family violence is imperative in developing and implementing broad, holistic, prevention/intervention strategies at various levels of critical need.

Such a frame of reference brings into focus the interconnecting and trans-generational experiences of violence within Indigenous families and communities.

- ***Aboriginal world views in relation to Family Violence***

A critical aspect of this broader conception of what constitutes family violence is that it recognises the centrality of Indigenous culture in framing the experiences, choices and ultimately the responses to violence, of Indigenous women:

In understanding Aboriginal world views in relation to Family Violence, it has to be understood that an Aboriginal woman cannot be considered in isolation, or even as part of a nuclear family, but as a member of a wider kinship group or community that has traditionally exercised responsibility for her wellbeing as she exercises her rights within the group.

This factor is often overlooked by current policies and other intervention strategies aimed at addressing violence against women which are primarily guided and directed by a liberal feminist framework. The major criticism of western feminist based intervention strategies for dealing with violence against Indigenous women is that they have evolved from the very structures that served to subordinate and oppress Indigenous peoples. Moreover they embody white middle class women's experiences. Indigenous women, however:

do not have a purely gendered experience of violence that renders them powerless. They, along with their men, experienced and continue to experience, the racist violence of the State. Aboriginal women do not share a common experience of sexism and patriarchal oppression, which binds them with non-Aboriginal women in a unified struggle...

The notion of patriarchy is foreign to traditional Aboriginal communities, which were relatively separate but equal in terms of male/female roles. While Aboriginal societies were gendered, women were not victims of men's power, but assertively affirmed their place and role in the community. According to

Berndt & Berndt (1964) this provided both independence yet an essential interdependence between gender groups.

Accordingly, Indigenous women's experience of discrimination and violence is bound up in the colour of their skin as well as their gender. Strategies for addressing family violence in Indigenous communities need to acknowledge that a consequence of this is that an Indigenous woman 'may be unable or unwilling to fragment their identity by leaving the community, kin, family or partners' as a solution to the violence.

Many current approaches to family violence derive from a model of 'domestic violence' - violence against women, underpinned by western models of female oppression. These do not 'fit' Indigenous experience. The identity of many Indigenous women is bound to their experience as Indigenous people. Rather than sharing a common experience of sexism binding them with non-Indigenous women, this may bind them more to their community, including the men of the community. Indigenous people may also have a negative perception of police and welfare authorities.

An emphasis on criminal justice responses to family violence poses two main concerns for Indigenous women. The first is that the system is generally ineffective in addressing the behaviour of the perpetrator in the longer term. The effect of imprisonment is to remove them from the community and then, without any focus on rehabilitation or addressing the circumstances that led to the offending in the first place, to simply return them to the same environment. The second is that there are a range of barriers in the accessibility and cultural appropriateness of legal processes which discourage Indigenous women from using the criminal justice system in the first place.

These barriers highlight a failure to acknowledge that the unique characteristics of Indigenous family violence has the potential to render approaches for dealing with this violence ineffective, with the consequence that Indigenous women ultimately do not enjoy the protection of the law.

- *Statistics on family violence*

There are significant deficiencies in the availability of statistics and research on the extent and nature of family violence in communities. An overview of recent statistics and research into the extent and nature of Indigenous family violence is provided in the report. What data exists suggests that Indigenous people suffer violence, including family violence, at significantly higher rates than other Australians do. This situation has existed for at least the past two decades with no identifiable improvement.

- *Responding to family violence*

Addressing family violence is a shared responsibility between all levels of government with prime responsibility resting with health and community service agencies in federal, state and territory governments.

There are a patchwork of programs and approaches to addressing family violence in Indigenous communities among federal, state and territory governments, but there

remains a lack of coordination and consistency in approaches to addressing these issues between governments and among different government agencies. Significant gaps also exist.

Existing family violence programs that are available to Indigenous peoples are limited in number, *ad hoc* and often of limited duration. Due to the inter-connections between family violence and other issues faced by Indigenous peoples, work being done at a grass roots level may also be overlooked and programs may not necessarily be identified or identify themselves as violence prevention programs. Proposed programs may also have difficulty obtaining funding, on either a pilot or ongoing basis, due to the overlap in jurisdictional and departmental responsibilities.

In *Violence in Indigenous Communities*, Memmott, Stacy, Chambers and Keys identified 130 Indigenous family violence programs that had been implemented or were planned for implementation in Indigenous communities, in the 1990s. They categorised these programs into the following broad areas of intervention:

- *Support programs* - including one-on-one counselling and advice services, Aboriginal and Torres Strait Islander Legal Aid Services and strategic advice for actual or potential victims to prevent or avoid violence, including referrals to other programs and centres.

Accessible and appropriate counselling is essential, not only for the victims and perpetrators of violence, but also for family and community members who not only deal with the issue of violence itself but to also provide post-violence counselling to family members who have lost someone as a result of violence, suicide, and more particularly for issues of female and male rape and child sexual assault.
- *Identity programs* – Identity programs are those that are aimed to develop within the individual, family or community, a secure sense of self-value or self-esteem. This can be achieved through diversionary programs such as, sporting, social and cultural activities, education and skills training aimed at youth and young adults and also through therapy based programs that focus on culturally specific psychological or spiritual healing. Examples of this approach include the Muramali project as well as the Social and Emotional Well Being Centres being established in the Northern Territory. All these programs may be accessed prior to, and after involvement with violence, and offer a longer-term response through attempting to change the situational factors underlying violence.
- *Behavioural change (men and women's groups)* – as the majority of family violence is perpetrated by men, strong support for men's behavioural reform programs is required. These programs are described as Men's Healing Programs. The Ending Domestic Violence Programs for Perpetrators study, undertaken by Keys Young, found that collaborative projects must be adopted that link Indigenous people and agencies with domestic violence services, to develop services appropriate to the community. It is also important that complementary groups and support services for Indigenous women be run parallel to men's programs and complementary preventative/intervention

programs for youth be an integral part of the whole strategy. An example of this is the *Rekindling the Spirit* Program in Northern New South Wales which works with men, their partners, youth and children.

- *Night patrols* - which have the potential to build cooperation and mutual respect and support with local police. As reported by the Australian Institute of Criminology, the Tangentyere Night Patrol (TNP) in the Northern Territory is a best practice example of a properly managed program that builds on the cooperation and mutual respect of local police. TNP patrolled the Aboriginal town camps on a regular basis to help minimise violence using non-violent methods. TNP uses and strengthens Aboriginal mechanisms for social control, thereby ensuring that traditional methods are afforded a key role in the control of anti-social behaviour, minor criminal infractions and potentially serious criminal incidents in the Aboriginal community;
- *Refuges and Shelters* - while an important part of any family violence intervention strategy, are not a sufficient response to the difficulties produced by high levels of violence in Indigenous communities. They represent a reactive strategy in addressing the underlying causes, thereby creating no possibility of a change in the pattern of violent behaviour. Refuges and women's shelters need to be coupled with other proactive strategies targeted at the perpetrators of violence and other situational factors. Indigenous specific shelters are essential. At the very least, Indigenous workers at shelters are vital.
- *Justice programs* – the roles of justice programs, which are characteristically aimed at the perpetrators of violence, are to mediate between people in conflict, designate appropriately cultural punishments for victims, for example through circle sentencing and the prevention of recidivism.

The NSW Aboriginal Justice Advisory Council and the NSW Judicial Commission have recently released a joint report *Circle Sentencing in New South Wales a Review and Evaluation*. The report reviewed the first twelve months of the operation of circle sentencing in Nowra in South East New South Wales. The report found among other things that circle sentencing helps to break the cycle of recidivism, introduces more relevant and meaningful sentencing options for Aboriginal offenders with the help of respected community members, reduces the barriers that currently exist between the courts and Aboriginal people, leads to improvements in the level of support for Aboriginal offenders, incorporates support for victims, and promotes healing and reconciliation and increases the confidence and generally promotes the empowerment of Aboriginal people in the community.

- *Dispute resolution* – Anecdotal evidence suggests that flexibility within NSW Community Justice Centres, although not aimed at Aboriginal people specifically, has proven to be successful in certain Indigenous communities in NSW. Specifically, success has been achieved where impartial members of the Indigenous community are used as facilitators and traditional dispute-resolution techniques are incorporated into the overall mediation process.

- *Education and awareness raising* – Education and training programs are vital to raise awareness about family violence prevention; as well as develop the skills within communities to resolve conflicts and identify the need for interventions with perpetrators. The National Indigenous Legal Advocacy Courses, which are aimed at Indigenous peoples working in justice related fields including legal services and on community justice mechanisms, include competencies addressing awareness of family violence and conflict resolution.

Gnibi, the College of Indigenous Australian Peoples at the Southern Cross University, has also developed undergraduate and postgraduate degrees that are specifically designed to address the educational needs of Indigenous Australians from an Indigenous theory and educational practice dealing with issues of violence, trauma and healing.

*Violence in Indigenous Communities* reported that there were no educational programs targeted at young children for use in Indigenous pre-schools and schools. With the knowledge we now have about the detrimental effects of violence on children, or witnessed by children and the generational cycles by which violence is transmitted, it is essential to provide violence prevention education programs within pre-schools and schools.

- *Holistic composite programs* – Programs which are comprised of elements of the above categories. These operate to target different forms of violence in the community, target different categories of offenders or victims, or employ different methods of combating or preventing violence.

There is also increasing recognition of the links between family violence and substance abuse, particularly alcohol. A number of recent initiatives, particularly in Queensland, have focused on restricting the availability of alcohol and introducing changes to canteen management to promote reduced alcohol consumption.

These programs function at different stages. Some are implemented during or immediately after the occurrence of a violent incident (early reactive programs); some are implemented some time after the incident and are aimed at resolving the negative impact of the violence (late reactive programs); some aim to counter any likelihood of violence at an early stage (early proactive strategies); and others are implemented prior to violence occurring but triggered by signs that violence may be imminent (late proactive strategies). This additional form of classification of programs highlights the need for a holistic composite set of programs to be made available for communities to address the various dimensions of family violence.

Overall, Memmott observes in relation to existing programs and approaches that:

The classification and review of violence programs indicated that there is a scarcity or under-representation of programs in certain key areas of violence, and that there is clearly a need to focus support resources into developing such programs for wider application.

A number of omissions in the available literature on Indigenous violence and violence programs were detected, including (i) a failure of program designers

to clearly define the forms of violence they were targeting, (ii) a lack of program evaluation studies, and (iii) a lack of objective studies on the nature of program failures. The review of violence programs was also accompanied by a general finding that there was a general lack of programs in many Indigenous communities.

Memmott also states that a review of existing programs and approaches reveals three recurring strategic aspects that need to be present to address family violence in Indigenous communities, namely that programs be community-driven; that community agencies establish partnerships with each other and with relevant government agencies; and that composite violence programs are able to provide a more holistic approach to community violence.

The report notes the importance of programs that adopt an holistic or broad approach to violence. These:

often do not focus directly on any particular kind of violent behaviour, rather their efforts are aimed at either preventing at-risk people from falling prey to their vulnerability, or they attempt to heal the emotional and spiritual injury that is causing them to behave violently. Therefore, while the possibility of self-harming behaviour is reduced, rates of other forms of violence such as physical assault leading to homicide, spousal assault, rape and sexual assault and child violence might also be influenced...

The implementation of composite programs, particularly in communities displaying multiple forms of increasing violence, is shown to be an emerging and preferred approach that reflects a more systematic way of combating violence, combining both proactive and reactive methods which target different age and gender groups.

The report notes that a sensitive aspect of governments introducing services is how to best trigger such programs in communities where they are obviously needed while at the same time creating a climate whereby the programs are community-originating, motivated and controlled. Memmott recommends ‘that government agencies take a regional approach to supporting and coordinating local community initiatives, and assisting communities to prepare community action plans with respect to violence’.

- ***Ensuring access to justice for Indigenous women***

A matter of great concern in relation to current debates about addressing family violence in Indigenous communities is the lack of attention paid to issues of access to justice for Indigenous women.

ATSIC have noted that ‘Indigenous women have been identified as the most legally disadvantaged group in Australia’. A matter of particular concern is the limited ability of funding of Aboriginal and Torres Strait Islander Legal Services (ATSILS) to provide access to justice for Indigenous women through legal representation and family violence services.

ATSIS note that:

ATSILS are required to prioritise provision of services in accordance with ATSIS' National Program Policy Framework for ATSILS ("The ATSILS Policy Framework") affording priority assistance to those clients who potentially face custodial sentences. Accordingly, in face of sheer demand for assistance, ATSILS predominantly provide legal aid services for criminal matters (89% of case and duty matters in 2001-02; compared with only 2% family matters and 2% violence protection matters).

This trend has, ATSIS state, 'discouraged Indigenous women from approaching ATSILS for assistance initially, particularly given the likelihood of ATSILS defending the perpetrator'.

The Family Violence Prevention Legal Service Program (FVPLS) has been introduced as a response to Indigenous women's lack of access to Legal Aid services. However with only 13 services across Australia, they do not provide coverage to all regions. ATSIS notes that 'This relatively small and under-resourced program is unable to address the barriers Indigenous women face in accessing Indigenous Legal Aid services, nor to provide the range of legal services available through ATSILS'. They express concern that:

There is an urgently growing demand for ATSILS to provide child protection, civil and family related, (including family violence) services. However, providing these services as well as continuing assistance in criminal matters will require additional resources or, alternatively a change in the priorities set for provision of legal aid services. If priorities are reset then this will simply postpone unmet demand that will be unlikely to be satisfied through referrals and alternative services.

ATSIC/ATSIS note further that while they and the ATSILS that it funds are committed to stamping out family violence, the prioritising of scarce resources to criminal matters means that 'in practice, victims are not assisted while those responsible, are'. Accordingly, constraints of existing resources for legal support limits the capacity of ATSIC/ATSIS 'to give its own policies concrete substance. This contradiction will be overcome only through additional resourcing of ATSILS and Indigenous women specific legal service providers'.

There is an urgent need to ensure appropriate funding levels for ATSILS in order to provide a greater focus on the legal needs of Indigenous women as well as a greater focus on preventative action and community education. At the very least, there is also an urgent need for the federal government to allocate additional, quarantined, funding to expand the Family Violence Prevention Legal Service Program. Such funding needs to be new money as there is clearly no capacity for ATSIS/ATSIC, through its support for ATSILS, to re-allocate existing resources.

- ***Community justice responses to family violence***

The criminal justice system is extremely poor at dealing with the underlying causes of criminal behaviour and makes a negligible contribution to addressing the consequences of crime in the community. One of the consequences of this, and a vital

factor that is often overlooked, is that Indigenous victims of crime and communities are poorly served by the current system.

Accordingly, the current system disadvantages Indigenous people from both ends - it has a deleterious effect on Indigenous communities through over-representation of Indigenous people in custody combined with the lack of attention it gives to the high rate of Indigenous victimisation, particularly through violence and abuse in communities. Reform to criminal justice processes, including through community justice initiatives, must be responsive to these factors.

The past decade has seen an increased emphasis on restorative justice mechanisms for addressing criminal behaviour in Indigenous communities to address the needs of victims (including of family violence) as well as to make the system more meaningful to offenders.

The most accepted definition of restorative justice is that of Tony Marshall which states that it is 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'. The Law Commission of Canada provides a useful commentary on restorative justice as:

fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person's rights to equal dignity, concern and respect are satisfied... As it is concerned with social equality, restorative justice inherently demands that one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve restoration of relationships, restorative justice must be concerned with both the discrete wrong and its relevant context and causes.

This does not necessarily seek to return a relationship to the position prior to the commission of some wrongdoing, but instead to address the underlying issues. Restorative justice can thus incorporate concepts of restitution and healing, while focusing on the transformation of relationships.

There are numerous new initiatives in Australia developing community based justice mechanisms for Indigenous people which are based on restorative justice principles. Some of these processes, such as Law and Justice Committees in the Northern Territory and Community Justice Groups in Queensland incorporate an holistic response to family violence into strategies for addressing offending in communities.

The last two years has also seen the development of community justice mechanisms for involvement of Indigenous peoples in sentencing. Examples include the Ngunga Court and Ngunga Youth Court in South Australia; the Murri Court in Queensland; the Koori Court in Victoria and circle sentencing in New South Wales. Generally, these processes seek to incorporate an Aboriginal traditional customary law approach to the sentencing of Aboriginal offenders within the framework of existing legislation. While there are variations between the various models, they all involve Aboriginal Elders sitting alongside the magistrate to advise on sentencing options, with members

of the offender's family, the victim, the victim's family and other interested community members participating in the sentencing process.

These processes have been extremely successful in their initial years. Currently, however, they are limited to dealing with particular non-violent offences.

Accordingly, offences relating to violence and sexual offences cannot be addressed within these sentencing processes.

In a discussion paper titled *Holistic community justice*, the NSW Aboriginal Justice Advisory Council proposes that restorative justice approaches such as these sentencing options *should* be available for dealing with family violence.

Specifically, they have proposed the establishment of localised community controlled justice and healing centres combined with alternative sentencing processes for offenders which seek to establish formal links with local Aboriginal communities. In this approach, community justice and healing centres would be established as a single point of contact for victims of family violence. They would assess their needs (such as emergency accommodation, financial assistance, health care, counselling or healing) and negotiate with appropriate service delivery agencies on their behalf. Should the victim wish to pursue their matter through the criminal justice system, the centre would also provide assistance with this. The centre would also be community controlled, and actively engage the local Aboriginal community with the consequence that it could assist the victim and provide 'a direct community sanction on the offender's behaviour and demonstrate the community's intolerance of family violence'. Alternative sentencing processes, such as circle sentencing, would also be available 'to ensure that the causes and consequences of the offence are dealt with holistically'.

AJAC argues that this approach:

Provides an alternative model to address the serious matter of family violence in Aboriginal communities. The urgency of actually making an on the ground impact where communities can actually be involved directly in programs ensures a level of community re-empowerment. This approach also exposes family violence as an unacceptable crime in Aboriginal communities, but to actively ensure a service for victims whilst offenders take responsibility and deal with the underlying causes of their offending behaviours.

It is argued that long term effects will be an overall reduction of family violence, and that communities can be positioned to actively heal the wounds of family violence according to their unique and local needs.

There are similarities in this proposal with the Northern Territory Law and Justice Committee and Queensland Community Justice Group approaches, as well as similarities with the roles of services established under ATSIC's Family Violence Prevention Legal Service Program. It also provides what the Memmott report, as discussed earlier, identified as an holistic composite set of programs for addressing family violence.

It also has similarities to Canadian models for addressing sex offending by Indigenous people. The Canadian approach emphasises the need for restorative justice, community-based initiatives beyond the justice system such as victim-offender mediation, family group conferencing, sentencing circles and formal cautioning. It also highlights the gaps that exist in addressing Aboriginal sex offender needs and the need for Aboriginal control of appropriately cultural services. The report *Aboriginal Sexual Offending in Canada* identifies four areas where action is necessary to address Aboriginal sexual offending: community development; program development; research and human resources. The effectiveness of this model and whether aspects could be transferred to the Australian context, particularly in regard to community capacity-building and service coordination, is an avenue for further investigation.

These models and proposals suggest that the full potential of community justice mechanisms for addressing family violence has not been explored sufficiently, and may provide an appropriate way forward for addressing some aspects of need.

## b) Recognising Aboriginal customary law consistently with human rights

### Documents extracted in this section:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory*, May 2003
- Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory*, May 2003
- Submissions of HREOC in The Queen v GJ, Court of Criminal Appeal of the Northern Territory of Australia, 3 November 2005

### Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory, May 2003*<sup>6</sup>

All proposals for the recognition of Aboriginal customary law in Australia have taken as their starting point that any such recognition must be consistent with human rights standards. The Social Justice Commissioner endorses this requirement as essential to any recognition of Aboriginal customary law.

There are three main requirements in this regard. First, the government must turn its mind to the justifications for introducing specific forms of recognition (to ensure that they do not breach section 9 of the *Racial Discrimination Act 1975* (Cth)) to ensure that they are appropriate and justifiable measures (either as a special measure or a legitimate differentiation of treatment). Second, such recognition must not place unjustified restrictions on the individual human rights of Aboriginal peoples, including Aboriginal women. Third, schemes for recognising and protecting Aboriginal customary law must be developed and implemented in full consultation and with the participation of Aboriginal peoples.

- *The consistent application of Aboriginal customary law with human rights*

By ratifying a range of human rights treaties, the federal Government has undertaken to ensure that all levels of government and private individuals conduct themselves in a manner that respects human rights as well as to take action to prevent human rights breaches wherever and whenever they may occur. So for example, under Article 50 of the International Covenant on Civil and Political Rights, the federal Government has undertaken to apply the provisions of the Covenant to all parts of the federation without any limitations or exceptions.

Accordingly, any attempts to recognise Aboriginal customary law in a manner *inconsistent* with human rights standards would place Australia in breach of its

<sup>6</sup> Available online at: [www.humanrights.gov.au/social\\_justice/customary\\_law/nt\\_lawreform.html](http://www.humanrights.gov.au/social_justice/customary_law/nt_lawreform.html)

obligations under international law and activate a duty on the part of the federal government to nullify or override such breaches.

It should be recognised that in many instances there will be no conflict between these sets of rights and they will be able operate in an interdependent manner. As the Race Discrimination Commissioner noted in 1995:

The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights. The apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the community. This is particularly the case in indigenous communities...

It is often the case that the protection and promotion of collective rights is a pre-requisite for the exercise and enjoyment of individual rights. The right of an Aboriginal or Torres Strait Islander person to protect and enjoy his or her culture, for example, cannot be exercised if an indigenous culture is struggling to survive within the majority culture and the Indigenous community has no right to protect and develop its culture. If rights are not granted collectively to Indigenous peoples which enable them to defend their culture, the practice of their religion and the use of their languages, the result is unequal and unjust treatment.

This reflects a vital point about the recognition of Aboriginal customary law - namely, the recognition of Aboriginal peoples' minority group rights and collective rights have the capacity to strengthen social structures within Aboriginal communities as well as the observance of law and order.

**Recommendation 1:** That the Northern Territory Government acknowledge the importance of recognising, protecting and strengthening Aboriginal customary law in order to develop and maintain functional, self-determining Aboriginal communities across the Northern Territory. The Committee should also acknowledge that the existence of such communities would have considerable benefits for all Territorians by creating safer communities.

- ***Resolving conflicts between Aboriginal customary law and human rights***

There will, however, be other circumstances where individual and collective rights are in opposition and a balance must be struck. This does not mean that collective and individual rights are irreconcilable. Decisions made under the Optional Protocol to the ICCPR and General Comments interpreting the scope of the ICCPR by the United Nations Human Rights Committee in relation to Article 27 of the Covenant, for example, provide guidance on how this contest between collective and individual rights should be resolved.

Article 27 of the ICCPR provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Human Rights Committee has noted that this provision applies to Indigenous peoples, and that it creates a positive obligation on States to protect such cultures:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

The Committee has placed limits on those measures that can be recognised. So while it acknowledges that positive measures by States may be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, it also notes that:

such positive measures *must respect the provisions of articles 2.1 and 26 of the Covenant (relating to non-discrimination)* both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

Similarly, the Committee notes that 'none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant'. This includes, for example, Article 6 (the inherent right to life); Article 7 (torture or cruel, inhuman or degrading treatment); and Article 23 (requirement of free and informed consent for marriage).

- ***Applying Aboriginal customary law consistent with the rights of women***

In relation to Article 3 of the Covenant (equality between men and women), the Committee has observed that:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights...

The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

The Committee has also stated that female genital mutilation is a practice that breaches article 6 and 7 of the Covenant, despite the cultural significance of the practice in some societies; and has expressed concern about domestic violence, including forced sexual intercourse, within the context of marriage.

The provisions of the ICCPR are also to be read consistently with the interpretation of similar relevant rights under other conventions. So, for example, Article 27 alongside the guarantees of non-discrimination, equality of men and women, and equality before the law in Articles 2, 3 and 26 of the Covenant should be read consistently with related provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Committee on the Elimination of Discrimination Against Women has noted that Gender-based violence is a form of discrimination within the meaning of CEDAW and notes that violence in relation to the following rights and freedoms will constitute discrimination in Article 1 of CEDAW:

- The right to life;
- The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- The right to liberty and security of person;
- The right to equal protection under the law; and
- The right to equality in the family.

The Committee on the Elimination of Discrimination Against Women has also noted that Articles 2,5,11,12 and 16 of CEDAW require States to act to protect women against violence of any kind occurring within the family, workplace or any other area of social life and that traditional attitudes which subordinate women, including forced marriages, will breach Articles 2(f), 5 and 10(c) of CEDAW. The CEDAW Committee has also stated that practices of female circumcision breach the Convention and thereby reject arguments based on cultural sanctity. The committee does, however, recommend the introduction of educative measures to be taken to combat the continued practice of female circumcision rather than the immediate implementation of coercive laws to punish perpetrators.

The inclusion of these matters within the definition of discrimination against women is a relevant consideration in consistently applying Article 27 with the non-discrimination provisions of the ICCPR (especially Article 3).

The Human Rights Committee has also stated that the purpose of protection of minorities under Article 27 must be justifiable as being 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned'. In an Individual Communication under the First Optional Protocol to the Covenant the Committee has also indicated that:

The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities... that the authors may have adapted their methods... and practice it with the

help of modern technology does not prevent them from invoking article 27 of the Covenant.

Decisions under the Optional Protocol to the ICCPR demonstrate how the Committee seeks to weigh up these considerations with the recognition of minority rights in Article 27. The specific rights of minorities and indigenous peoples that have been recognised under Article 27 have been qualified by the requirement that their enjoyment shall not prejudice the enjoyment by all persons, including individuals from within the group, of the universally recognised human rights and fundamental freedoms.

In the Individual Communication of *Kitok v Sweden* the Committee stated that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.

In *Lovelace v Canada* the Committee had to consider the effect of a legislative provision that denied an Indigenous women who married a non-Indigenous man her status as an on-reserve Indian (and therefore her right to reside on her peoples' reservation). The relevant legislation did not provide that an Indigenous man would lose his on-reserve status should he marry a non-Indigenous women. The Committee stated that Article 27 had to be read consistently with other provisions of the Covenant, read as a whole (in this case, particularly in light of Articles 2, 3, 12, 17, 23 and 26) and found that these restrictions could not be justified reasonably or objectively, or be seen as being directed towards ensuring the survival and continued development of the group as a whole.

An example where a restriction on an individual may be found to be reasonable and objectively justifiable under Article 27 has been provided by the Race Discrimination Commissioner in the 1995 *Alcohol Report*. In this, the Commissioner argued that restrictions on the availability of alcohol to Aboriginal communities (which have been consented to by the Indigenous community as a whole) may constitute a legitimate restriction on the rights of an individual within that community.

The commentaries of the international treaty committees, particularly the Human Rights Committee, demonstrate that human rights standards are capable of being applied in a manner that appropriately balances the rights of individuals within Aboriginal communities - such as women and children - with those of the community as a whole.

The Commission notes that it has not provided definitive pronouncements of whether particular practices which may be relied upon in criminal matters, for example, will be capable of being recognised consistent with human rights on the basis that this will require a consideration of the factual situation at issue in the particular case.

As a further example of this, the Commission notes the prohibition of torture or cruel, inhuman or degrading treatment under Article 7 of the ICCPR and under Articles 1 and 16 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This may be relevant to some forms of tribal punishment, such as spearings and other ritual punishments. The Commission notes,

however, that an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must satisfy a high threshold which includes being intended to inflict a degree of cruelty and humiliation on the victim. There may be circumstances in which some tribal punishments, which are alleged to have taken place in accordance with Aboriginal customary law, do not evince the necessary standard or meet the necessary threshold to be characterised in this way whereas in other circumstances they will.

The determination of whether it breaches such provisions remains context-specific. Accordingly, rather than imposing a uniform ban or refuse to recognise certain practices, the Commission notes that it is preferable for judicial organs to be required to balance Aboriginal customary law issues with human rights standards.

Indigenous women in the Northern Territory face structural barriers to the equal protection of their rights through the legal system. Caution must be exercised to ensure that processes for recognising Aboriginal customary law do not entrench discrimination against Indigenous women or create additional barriers to the protection of Indigenous women's rights.

Mainstream law should consider apparent conflicts between Aboriginal customary law and women's individual rights on a case by case basis. It is also important to recognise that custom and law can adapt to general social change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid the recognition of Aboriginal customary law or by Aboriginal communities to condone breaches of human rights.

HREOC considers that it is preferable for judicial decision makers to be required to balance Aboriginal customary law issues with human rights standards, rather than imposing a legislative uniform ban or refusing to recognise certain practices.

### ***Recommendations to Northern Territory Law Reform Commission on Aboriginal customary law***

**Recommendation 1:** That the Northern Territory Government acknowledge the importance of recognising, protecting and strengthening Aboriginal customary law in order to develop and maintain functional, self-determining Aboriginal communities across the Northern Territory. The Committee should also acknowledge that the existence of such communities would have considerable benefits for all Territorians by creating safer communities.

**Recommendation 3:** That the Government provide formal legislative recognition of Aboriginal customary law in the *Sentencing Act* by inserting a new section into the Act which requires magistrates and judges to determine in all matters whether Aboriginal customary law is a relevant consideration and if so, to provide appropriate weight to customary law in sentencing decisions and to apply it consistently with human rights standards (as defined in the six human rights treaties to which Australia is a party and through the instruments of the United Nations and under international law).

**Recommendation 5:** That the Government negotiate with Aboriginal peoples regarding community justice procedures and the use of alternative dispute resolution mechanisms and processes that recognise the diversity of Aboriginal and Torres Strait Islander laws that are consistent with all international human rights instruments. Such negotiations should include the appropriateness of extending the application of restorative justice principles in criminal justice issues for Aboriginal offenders with a view to improving outcomes for them within the criminal justice system. Consideration should be given, for example, to extending the applicability of Aboriginal customary law to existing juvenile diversionary programs and to adapting models in both the national and international contexts such as the Tribal Court system in the United States and circle sentencing in New South Wales and Canada. Legislative approaches to facilitate community justice mechanisms based in the recognition of customary law should not, however, be pursued without appropriate Aboriginal participation and negotiation and without adequate modelling and support at a policy level.

**Recommendation 6:** That the Government ensure that existing community justice mechanisms are provided greater support at a policy level, including through:

- A greater commitment of human and financial resources over an extended time-frame, including more intensive consultation and participation by Aboriginal peoples;
- Research into comprehensive governance and capacity-building initiatives, including the variety of forms of modelling and agreement-making that could be pursued in regard to community justice and other areas of self-governance; and
- The coordination of interagency support and consideration of outstanding issues regarding the duplication of services to Aboriginal communities.

**Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory, May 2003 – Extract 1*<sup>7</sup>**

The federal Government has an obligation to ensure both Aboriginal women's individual human rights and their minority rights as Indigenous peoples. In many instances, there will be no conflict between these sets of rights and they will both be able to operate in an interdependent and mutually reinforcing manner.

The difficulty arises where these rights appear to be in conflict. An issue is how to address situations where the recognition of Aboriginal customary law appears to conflict with the maintenance of women's individual human rights.

The potential for conflict between customary practices and women's rights has been recognised at the international level. For example, the Office of the High Commissioner for Human Rights has stated that:

Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are

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<sup>7</sup> Available online at: [www.humanrights.gov.au/sex\\_discrimination/customary\\_law/submission.html](http://www.humanrights.gov.au/sex_discrimination/customary_law/submission.html).

harmful to a specific group, such as women. These harmful traditional practices include female genital mutilation (FGM); forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preferences and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.

- ***Reconciling apparent conflict***

HREOC considers that it is possible to reconcile conflict between women's individual human rights and Aboriginal customary law. As set out below, mainstream law should consider apparent conflicts between the systems, where required to do so, on a case by case basis. It is also important to recognise that custom and law can adapt to general social change, thus allowing resolution of apparent conflict. The potential for conflict should not be used by government as an excuse to avoid recognition of Aboriginal customary law.

The test established by the Human Rights Committee to determine whether the individual or minority right should prevail has been whether the restriction upon the right of the individual member of a minority could be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.

While it is clear that there are cases internationally where women's individual human rights and minority rights are in conflict, international human rights law has yet to consider this issue in relation to Aboriginal customary law. Aboriginal customary law may be as diverse as Aboriginal communities and there can be disagreement as to what constitutes Aboriginal customary law. In these circumstances, a contextual approach to resolving apparent conflict that acknowledges the individual circumstances involved is more likely to resolve potential conflicts.

HREOC considers that it is preferable for judicial decision makers to be required to balance Aboriginal customary law issues with human rights standards, rather than imposing a legislative uniform ban or refusing to recognise certain practices. For example, as recommended in the accompanying submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner, there could be a provision in the Northern Territory *Sentencing Act 1995* requiring magistrates to take account of Aboriginal customary law where relevant, and in accordance with human rights.

- ***Allowing for culture to change***

CEDAW requires States Parties to take measures to modify cultural practices in order to ensure that women's human rights are protected:

States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This need not involve the immediate outlawing of such practices, but rather can involve measures to encourage cultural change by those people practising the particular culture. For example, in General Recommendation 14 the CEDAW Committee condemned the practice of female circumcision. However, the CEDAW Committee recommended that educative measures be taken to combat the continued practice of female circumcision, rather than the immediate implementation of coercive laws to punish perpetrators. In doing so, the CEDAW Committee recognised that it necessarily takes time to eradicate abusive practices that have a cultural base. The United Nations Development Fund for Women (UNIFEM) has emphasised the need to "... replace harmful customs with new practices that respond to current needs".

Advocates of gender equity must recognize and challenge the social acceptance and perpetuation of harmful traditional practices in all cultures. Historically, religion and culture have proven extraordinarily adaptive; most belief systems have been revised over time to accommodate new understandings and new values that emerge in human society. As an African observer recently wrote, "Traditions are highly sacrosanct and untouchable where women are concerned. Still, I have seen traditions change during my lifetime. The change was so easy and smooth when the men took the initiative. Change, however, requires a lot of pain and hard work when it is initiated by women." Numerous cultures offer examples of traditions, including customs harmful to women, that have changed or died out. For generations, women (and some men) in Sudan endured mutilation to acquire face marks, a traditional sign of beauty as well as an indicator of tribal affiliation. In recent years, this tradition has rapidly disappeared. The binding of women's feet in China is another example of a nearly universal custom that is no longer practiced.

Measures to recognise Aboriginal customary law are often hybrid models that have been adapted to meet the needs of Aboriginal people and the mainstream law. The emphasis in these models is to put Aboriginal customary law principles into practice and to increase Aboriginal communities' access to self-determination. HREOC considers that in situations where women's human rights are at risk, Aboriginal communities should be encouraged to develop their own solutions to these problems and to adapt traditional practices to ensure women's human rights.

- ***Non-negotiable women's human rights***

The International Convention on the Elimination of All Forms of Discrimination Against Women proceeds from the assumption that all practices that harm women, no matter how deeply they are imbedded in culture, must be eradicated.

In considering the relationship between protecting minority rights and the rights of women to equality, the Human Rights Committee has confirmed the importance of upholding women's rights.

Similarly, International Labour Organization (ILO) Convention 169 and the Draft Declaration on the Rights of Indigenous Peoples, while not binding on Australia, establish the right for Indigenous peoples to retain their customs and traditions and to deal with offences subject to the requirement that this is not incompatible with

fundamental rights defined by the national legal system and with internationally recognised human rights.

While all attempts should be made to reconcile women's individual human rights with the minority rights of Indigenous peoples to retain and enjoy their culture, HREOC considers that women's individual human rights must ultimately prevail. HREOC considers that the recognition of Aboriginal customary law must also take active steps to ensure women's right to individual safety and freedom from violence.

### **Submissions of HREOC in The Queen v GJ, Court of Criminal Appeal of the Northern Territory of Australia, 3 November 2005<sup>8</sup>**

#### **Context**

This was a case in which an Aboriginal man stood trial for unlawful assault involving the circumstances of aggravation and that the person assaulted was a female under the age of 16. The maximum penalty was imprisonment for five years; and also with a further charge that the respondent had sexual intercourse with SS, a child under the age of 16 years, contrary to s 127(1)(a) of the Criminal Code, for which the maximum penalty was 16 years imprisonment.

The sentence handed down at trial was five months imprisonment on Count 1 and 19 months imprisonment on Count 2 to be served cumulatively upon the sentence of five months imposed on Count 1, making a total period to be served of 24 months, but ordered that those sentences be suspended after the respondent had served one month upon the respondent entering upon his own recognisance of \$250 to be of good behaviour for a period of two years.

The Commission sought leave of the Court to intervene in the appeal of the decision to ensure that human rights considerations were appropriately weighted in sentencing.

25. The resolution of the complex issues that this case raises will be assisted by a consideration of international human rights law principles and jurisprudence. The Court may have regard to this source of jurisprudence as an aid to statutory interpretation and as a legitimate influence on the development of the common law...
26. It can also be observed that while treaty obligations are entered into by the Commonwealth, Article 50 of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that its provisions 'extend to all parts of federal States without any limitations or exceptions'. Compliance by Australia with its human rights obligations depends in large part upon the application of State and Territory laws and the interpretation and application of those laws should therefore ensure and promote compliance with human rights obligations arising under the ICCPR.
27. As will be developed in the Submissions, the provisions of the *Sentencing Act 1995 (NT)* ('Sentencing Act') ought to be interpreted in the context of and

<sup>8</sup> Available online at: [www.humanrights.gov.au/legal/intervention/queen\\_gj.html](http://www.humanrights.gov.au/legal/intervention/queen_gj.html).

consistent with human rights principles that are recognised in the international treaties to which Australia is a party. Such international human rights principles are also relevant to the balance that must be achieved in sentencing decisions involving customary Aboriginal law. Further, a sentence which leads to impermissible discrimination against a woman or a child under international human rights principles is an error of law both in the balancing exercise under the provisions of the Sentencing Act and under the common law.

28. It is a long-established presumption that a statute is to be interpreted and applied, as far as its language admits, so as not to be inconsistent with the comity of nations and established rules of international law. The High Court has expressed the presumption as operating in cases of ambiguity. Where there is ambiguity, the Court has held, courts should favour a construction of a statute which accords with the obligations of Australia under an international treaty. This is because common sense indicates that Parliament intended to legislate in accordance with Australia's international obligations.
30. In the present case, the Notice of Appeal filed on 31 August 2005 sets out the grounds upon which the Appellant contends the sentencing judge erred in sentencing the Respondent. Section 5(2) of the Sentencing Act sets out the matters a court must have regard to in the sentencing of an offender. It is the balancing of each of those matters in the circumstances of a particular case where the relevant ambiguity can be said to arise and, in doing so, international human rights law is available as a source of jurisprudence that the Court can legitimately draw on to assist it in its consideration of whether the appropriate balance was achieved by the sentencing judge.
31. The common law also continues to be an important source of guidance in sentencing decisions. In particular, the Hansard debates relevant to the passage of the Sentencing Act indicate that it was the view of the legislators that Aboriginal customary law issues should continue to be dealt with by the courts 'using their discretion at common law to take the exercise of customary law into account as part of the sentencing process.'
32. The operation of common law principles is also susceptible to the influence of international customary law and treaty obligations...
33. It has also been said that where the common law is uncertain, the Court should prefer an answer in conformity with international norms. It would be incongruous that Australia should adhere to international human rights treaties such as the ICCPR if Australian courts did not, in some fashion, recognise the entitlements contained therein. In particular, Australia's accession in 1991 to the First Optional Protocol to the ICCPR has brought to bear upon the development of the common law, the powerful influence of the Covenant and the international standards it imports.
34. To adopt such an approach is merely to recognise that values of justice and human rights (especially equality before the law) are just as much aspirations of the contemporary Australian legal system as they are of the international legal regime.

35. An important feature of the common law lies in the ability of the courts to mould the law to correspond with the contemporary values of society... The development of sentencing principles in the criminal law in conformity with Australia's international human rights obligations would both achieve the objective of keeping the law in logical order and form, and accord with the contemporary values of the Australian people, particularly in circumstances where in issue is the appropriate weight to be accorded between, amongst other factors, an offender's understanding of his rights and obligations under Aboriginal customary law and the seriousness of a sexual offence committed against a child.
36. The Commission submits that any consideration given to Aboriginal customary law in the sentencing process in a case such as the present should be carried out consistently with human rights principles that are recognised in the international treaties to which Australia is a party. As will be outlined in the following paragraphs, under these treaties, the recognition and protection given to the cultures of minority groups or the collective rights of indigenous peoples, however those cultural or collective rights are described\*, must be balanced against the rights of individuals, including those of indigenous women and children, and cannot prevail over the individual human rights to be free from violence and discrimination.

\* It is noted that customary law systems are not frozen in time and should be interpreted in a dynamic way. The nature or observance of customary law can change as a result of interaction with new influences, such as the western law and the application of human rights standards. This includes addressing contemporary issues relating to violence against women and children. In successive cases, the Supreme Court of Canada has noted that aboriginal rights must be interpreted flexibly so as to allow for their evolution over time and has stressed that an approach that freezes these rights must be rejected: *R v Sparrow* [1990] 1 SCR 1025; *R v Van der Peet* [1996] 2 SCR 507; *Delgamuukw v British Columbia* [1997] 3 SCR 1010. In the Navajo Supreme Court case, *In re Estate of Bigthumb* (No. WR-CV-28-87 (Navajo 01/20/1989), the Navajo Supreme Court case found that one Navajo custom, described as the 'expected compensation for sexual favors' had been overridden, not by legislative action but instead because 'of the ever changing Navajo common law through the introduction of Anglo-American customs and traditions (common law)'. Because of the often dynamic nature of tribal custom, difficulties may arise when it comes time to identifying and applying the relevant custom. The prescription for this difficulty, according to the Navajo Supreme Court in *Lente v. Notah*, 3 Nav. R. 72 (Navajo 05/25/1982), is close attention to context and experience: 'The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place throughout the Navajo Nation; Old customs and practices may be followed by the individuals involved in a case or not; There may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have so fallen out of use that it cannot any longer be considered a "custom".' See also *Smith v.*

*Colville Confederated Tribes*, 25 ILR 6156, 2 CTCR 67, 4 CCAR 58  
(Colville Confederated 05/07/1998).

37. Article 27 of the ICCPR establishes the rights of minority groups...
38. The United Nations Human Rights Committee has noted that this provision applies to indigenous peoples and that it creates a positive obligation on States to protect such cultures. However, the same Committee also notes that ‘none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant’.
39. These other provisions include Article 7 (prohibition of torture or other cruel, inhuman or degrading treatment) and Article 3 (equality between men and women). In considering the relationship between protecting minority rights and the rights of women to equality under Article 3 of the ICCPR, the Committee has confirmed the importance of upholding women’s rights:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights... The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

41. The provisions of the ICCPR are also to be read consistently with the interpretation of similar relevant rights under other conventions such as the *International Convention on the Elimination of All Forms of Discrimination Against Women* (‘CEDAW’) and the *Convention on the Rights of the Child* (‘CRC’).
42. The rights enshrined in CEDAW broadly cover all aspects of women’s lives including political participation, health, education, employment, marriage, family relations, equality before the law and freedom from discrimination. The right to freedom from violence is accepted as implicit in the right to freedom from discrimination under CEDAW. The Convention also requires that all appropriate measures should be taken to ‘modify the social and cultural patterns of conduct of men and women’ so as to eliminate ‘prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’. In this regard, the Committee on the Elimination of Discrimination Against Women has noted that:

Traditional practices by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse,

forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms... the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

43. It is noted that in the present case, the grounds of appeal address the weight given to the respondent's traditional beliefs and not the validity, or otherwise, of the correctness of the accused's understanding of those customary laws. The Commission therefore does not seek to make any submission about the content of the customary law relied on by the accused in this case, other than to note that the content cannot be given such weight as to detract from the principle of equality of women or the protection of vulnerable children.
44. The particular vulnerability of children is recognised by the CRC. Similar to the ICCPR, the CRC specifically recognises the right of Indigenous children to enjoy their own culture in community with other members of his or her own group. However, States Parties have obligations to protect children from all forms of sexual abuse and all other forms of exploitation prejudicial to any aspects of the child's welfare.
45. As the High Court observed in *Veen v The Queen (No.2)*:

[S]entencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.
46. His Honour Justice Mildren has observed, extra-curially, that equally difficult in the sentencing process is 'balancing matters going to mitigation against the seriousness of the offending.' While noting that how this achieved in practice is not easy, his Honour states that there 'are limits beyond which traditional customary law or other factors which have been recognised as mitigating in the sentencing of Aboriginal (*sic*) can have any significant weight, as for instance in the case of repeat offenders or offenders who are a danger to the public.'
47. The sentencing exercise to be undertaken in a case such as the present one is no less difficult, and is one that has been considered in other matters. As a general principle, the Court of Criminal Appeal of the Northern Territory has noted that:

The courts have been concerned to send what has been described as ‘the correct message’ to all concerned, that is, that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.

A similar view was expressed in an earlier case in which the Court stated:

Women, including Aboriginal women, stand equal to men in the law of the Northern Territory and, if Aboriginal traditional laws do come to receive recognition in whatever form by the general law of the Territory, I think it is highly unlikely, in view of international treaties that Australia has signed, if a law such as has been explained to me will have any standing because it is – I regret to have to say this to you in the presence of Elders, but it is, in my view, of such a nature that people in many countries would hold it to be discriminatory and I believe the Discrimination Boards of this country and missions and whatever would call it discriminatory.

48. Considerations of customary law in the context of the criminal sentencing process have also been considered in an international context. For example, in *S v Mvamu*, a decision of the Supreme Court of Appeal of South Africa, the Court heard an appeal by the State against the sentence imposed on the accused for the multiple rape, abduction and assault of the accused’s customary law wife. In considering the accused’s personal circumstances, the Court stated:

It is clear from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some ‘right’ to conjugal benefits. His actions, though totally unacceptable in law, might well be (albeit only to a limited extent) explicable given his background. He grew up and lived in a world of his own, of tradition and Black medicine – which was not completely strange to the complainant (they grew up together and come from the same area). His actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life. Though the rapes were accompanied by some acts or threats of violence, it does not appear that the prime objective was to do the complainant harm. The key aim, it seems, was to subjugate the complainant to his will and to persuade her to return to him – a consequence of male chauvinism, perhaps associated with traditional customary practices. That these traits or habits are difficult to discard appears to have been true of the accused. The complainant’s rights to bodily integrity and dignity and her entitlement to have these rights respected and protected were not foremost amongst his concerns. These ingrained traits and habits of the accused cannot be ignored when considering an appropriate sentence. He wanted the complainant back home, as his wife - in one piece. The threats he made were empty, albeit designed to frighten her.

49. The Court of Appeal ultimately granted the appeal, and increased the sentence of imprisonment, having balanced the personal circumstances of the accused against the community's demand for the imposition of heavy sentences on perpetrators of sexual offences against women, the seriousness of the offences, and the benchmark provided by the legislature for the offences of rape.
50. In issue in the present case is the appropriate weight to be accorded between, amongst other factors, an offender's understanding of his rights and obligations under Aboriginal customary law and the seriousness of a violent sexual offence committed against a child. It is submitted that such a case steps beyond the limit referred to by His Honour Justice Mildren (paragraph 46 above), and is one in which the accused's understanding of traditional customary law is relevant to the sentencing process, but its relevance must be outweighed by the relevance of the rights of the child where the offence committed against the child is as serious as the offence in this case.
51. This accords with the position in international human rights law that, while all attempts should be made to reconcile the rights of individuals with the rights of Indigenous peoples to retain and enjoy their culture, the individual human rights, particularly those of children recognised by the CRC, must ultimately prevail and, it is submitted, must be accorded due weight in any sentencing process. The Commission submits that in this case, the correct balance was not achieved between the accused's traditional beliefs and the rights of the child.
52. With great respect to the Chief Justice who was confronted with a very difficult situation and sentencing task, his sentencing remarks do not set out the details of any consideration that he gave to relevant international human rights principles. Unfortunately, counsel for the parties did not address the learned Chief Justice in any significant way on these issues and he, therefore, did not have the assistance by way of submissions on this aspect that he was entitled to have.

**Note: The decision of the Court of Criminal Appeal in the Northern Territory was delivered on 22 December 2005 (*The Queen v GJ* [2005] NTCCA 20).**

**The decision and reasoning of the Court was as follows:**

Mildren J (Riley J concurring):

[30] ...It is not in contention that where Aboriginal customary law conflicts with Territory law the latter must prevail. Similarly, there is no doubt that an Aboriginal person who commits a crime because he is acting in accordance with traditional Aboriginal law is less morally culpable because of that fact: see *Hales v Jamalmira* (2003) 13 NTLR 14. But the question must be asked, less morally culpable than what? Mr Pauling QC submitted that the respondent had already received the benefit of his traditional beliefs because he had not been charged with sexual intercourse without consent contrary to s 192(3) of the Code. Was it right to give him much further leniency? The answer to that question in this case depends on the view which the learned sentencing judge took that the respondent believed that he was entitled to act as he had done because the child had turned 14. There was evidence before the

learned sentencing judge which enabled him to take this into account and it is not contended that he was wrong to do so. What is contended is that in this case the respondent, although he was entitled to act as he had done according to traditional law, was not obliged to do so, and was not under any pressure to do so. There is a positive finding by his Honour as to the lack of obligation and no finding that he was under any pressure. In those circumstances, I consider that less weight should be afforded to this factor.

[31] In *Hales v Jamalmira* (*supra*), this Court considered a similar case where an Aboriginal person was convicted of the offence of carnal knowledge in circumstances where the victim was the promised wife of the defendant. In that case, there was evidence that the offender knew that what he was doing was against Northern Territory law, but there was also a finding that he was under pressure as well as some level of obligation under his culture to act as he did. The members of the Court accepted that these were mitigating factors, although the weight to be attributed to them was not such as to warrant significant leniency. As was pointed out by Riley J at [88]:

“Whilst proper recognition of claims to mitigation of sentence must be accorded, and such claims will include relevant aspects of customary law, the Court must be influenced by the need to protect women and children, from behaviour which the wider community regards as inappropriate.”

[34] There were some mitigating factors other than the matter involving customary law. The respondent was in effect a first offender. He had pleaded guilty and thereby saved the child from having to give evidence. The respondent is a respected leader in his community who is responsible for teaching young men traditional ways. He is not a sexual predator. He was ignorant of Territory law. He is of positive good character and, as the learned sentencing judge found, unlikely to re-offend. To that extent, personal deterrence was of less significance.

[35] On the other hand, the offending was objectively very serious. The respondent, because he believed he was justified in doing what he did, was not remorseful. There was a significant age difference between SS and the respondent. There was no evidence in this case, as there was in *Hales v Jamalmira* (*supra*) that the age difference was not a material sentencing matter. Obviously the younger the victim, the more serious the offending is likely to be and in this case, the victim was, on the evidence, about 14 years of age.

[36] One purpose of s 127(1)(a) of the Code is to protect young persons from entering into sexual relations before they are mature enough to do so and to have weighed up the possible consequences. Another is to deter older persons, especially men, from taking advantage of the immaturity of the young in order to satisfy their lust or in order to exercise control over their victims. In the context of a case such as this, where a promised marriage is involved, whilst the law has stopped short of making such marriages illegal, such marriages cannot be consummated until the promised wife has turned 16. Plainly the purpose of s 127(1)(a) in that context is to give Aboriginal girls some freedom of choice as to whether or not they want to enter into such a marriage and to thereby empower them to pursue equally with young Aboriginal men employment opportunities or further education rather than be pushed into pregnancy

and traditional domesticity prematurely.

[37] In all the circumstances, I consider that a head sentence of 19 months is manifestly inadequate, as was the decision to suspend all but one month of the sentences. In *R v Wurramara* (1999) 105 A Crim R 512 this Court said at [26]:

“The courts have been concerned to send what has been described as “the correct message” to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.”

[38] The sentences imposed failed to punish the respondent adequately for the crimes he committed and failed to act as a deterrent to others who might feel inclined to follow their traditional laws.

[39] Although there is a residual discretion in the case of a Crown appeal not to interfere with a sentence imposed even though the sentence imposed is inadequate, that discretion must be exercised judicially. The kind of circumstances recognised by the authorities which might justify the exercise of this discretion was discussed in *R v Morton* (2001) 11 NTLR 97 at [11]-[12], viz, a failure by the prosecutor to assist the sentencing judge or a failure by the Crown to lodge a prompt appeal. Neither of those circumstances is present here and no other reason for exercising the discretion was suggested. In my opinion, the circumstances of this case called for a head sentence of approximately 5 years imprisonment, of which a considerable proportion should have been served before the respondent became eligible for release. However, as is well recognised, the principle of “double jeopardy” usually results in a lesser sentence being imposed where the Court of Criminal Appeal decides to intervene on a successful Crown appeal. In this case, bearing in mind all of the circumstances and the application of that principle, I consider that the Court should now impose a head sentence of 3 years 6 months, cumulative upon the sentence of 5 months for count 1, making a total sentence of 3 years, 11 months.

[40] In view of the findings concerning the respondent’s prospects of rehabilitation and the reduced need for special deterrence, this is a case where this Court is able to assess when it is appropriate that the respondent be released rather than leaving that question to the Parole Board: c.f. *R v Shrestha* (1991) 100 ALR 757 at 771. I consider that, having regard to all of the circumstances, the respondent should serve 18 months imprisonment before he is released. I would order that the balance of the sentences be suspended after having served 18 months, upon the condition that the respondent is not to communicate directly or indirectly with SS. I would fix a period of 2 years 5 months, commencing from the date of his release from prison and after having served the balance of the period of 18 months still to be served, as the period during which the respondent is not to commit another offence if he is to avoid the consequences of s 43 of the Sentencing Act and order that the sentence imposed in respect of count 1 be backdated to commence from one month prior to the date he is again taken into custody to serve the balance of the 18 months still to be served in order to take into account time already served.

[41] Accordingly, I would allow the appeal, set aside the sentencing orders imposed by the learned sentencing judge and impose the sentencing orders referred to above.

Southwood J:

[67] I have read a draft of the judgment prepared by Mildren J. I agree with the conclusions which his Honour has reached. However, there are two matters about which I wish to make some comments.

[68] The Commission for Human Rights and Equal Opportunities made three main points during its application to intervene. First, that unauthorised, unjustified and inexcusable violence used to enforce a promised marriage is extremely serious criminal conduct because of the effect that such violence has on the mental and physical integrity and dignity of women. Such violence deprives women of the equal enjoyment and exercise of their positive human rights and freedoms. The underlying consequence of such violence maintains women in subordinate roles and contributes to their low level of education, skills and work opportunities and political participation. Secondly, principles of international human rights law and international charters and covenants recognise that women should be able to equally enjoy and exercise their positive human rights and freedoms. Thirdly, Australian law in appropriate circumstances recognises the principles of international law. While each of these propositions are important propositions their voluminous assertion is of no assistance when it comes to the complex and difficult task of sentencing Aboriginal offenders who have acted in accordance with Aboriginal customary law.

[69] Australian law recognises women's right to freedom from violence and to equal enjoyment of positive human rights such as the right to education and to seek employment. The criminal law of Australia including the Criminal Code in the Northern Territory protects women from unauthorised, unjustified and inexcusable violence. The courts of the Northern Territory have said on numerous occasions that they are, "concerned to send what has been described as the correct message to all concerned, that is, that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so.": R v Wurramara (*supra*). Implicit in such pronouncements of the courts of the Northern Territory is a recognition that such violence has an extremely deleterious effect on the mental and physical integrity and dignity of women. That it may well have the consequence, if women are not protected, of maintaining them in subordinate roles and preventing them from the equal enjoyment and exercise of their positive human rights and freedoms. In this case the Supreme Court sat in a remote Aboriginal community and the respondent was sentenced in his own community to imprisonment so that the people in his community would better understand these important principles.

[70] Unfortunately, the consultation with Aboriginal communities about such principles has too often been perfunctory. The Commission may wish to give consideration to the implementation of educational programs about these matters in Aboriginal communities pursuant to s 11(1)(g) and s 11(1)(h) of the Human Rights and Equal Opportunity Act (Cth).

[71] It has never been the case that the courts of the Northern Territory have given precedence to Aboriginal customary law when it conflicts with the written law of the Northern Territory. Nonetheless the law of sentencing involves important principles

including that a person should not be punished twice for a crime and that the punishment should fit the crime. The assessment of the culpability of the offender is an important element in the application of the latter principle. Subsection 5(2)(c) of the Sentencing Act directs a court to have regard to the extent to which an offender is to blame for an offence when sentencing an offender. The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders: *Hales v Jamalmira* (*supra*). It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities.

***Sex Discrimination Commissioner, Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal customary law in the Northern Territory, May 2003 – Extract 2<sup>9</sup>***

***Principles for recognising Aboriginal customary law***

HREOC has set out the following principles to inform the development of any proposal to recognise Aboriginal customary law. These principles consistently emerged in HREOC's consultations in the Northern Territory as a means of working with Aboriginal communities to recognise Aboriginal customary law. While some of the principles seem common sense, they are often overlooked. They may also be used to assess the appropriateness of any proposal for recognising Aboriginal customary law.

These principles were raised in the context of discussing Aboriginal customary law and women's issues. They provide a means for ensuring that gender is central to policy and program development. These principles ensure women's involvement from the outset of policy and program development, with women's issues and concerns incorporated into proposals rather than added as an afterthought.

However, this does not mean that they are only relevant to women. The principles have much broader application for ensuring a partnership approach between governments and Aboriginal communities. They are consistent with a focus on building capacity and effective governance within Indigenous communities.

**Principle one: A community based approach**

The significant differences between Aboriginal communities mean that measures to recognise Aboriginal customary law need to be tailored to meet the needs of the particular community.

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<sup>9</sup> Available online at: [www.humanrights.gov.au/sex\\_discrimination/customary\\_law/submission.html](http://www.humanrights.gov.au/sex_discrimination/customary_law/submission.html).

In HREOC's view, the best way to ensure recognition of diversity is for proposals to be developed at the community level, rather than imposed from above. The community should be involved in the development and management of any measures, policies or programs introduced to recognise Aboriginal customary law, without the imposition of burdensome and inflexible arrangements or over-regulation by government.

### **Principle two: Ensuring women's involvement**

Any recognition of Aboriginal customary law must ensure women's involvement. This must include a role for women in the development and implementation of any measures:

The mode of recognition of customary law ... must recognize women as having a role in the maintenance of customary law, in the socialization of children into the value system, in dispute settlement procedures and in the performance of religious rituals, which maintain harmony and resolve conflict.

It is not sufficient to establish structures following discussions with Aboriginal men and hope that Aboriginal women will become involved at a later stage. This fails to recognise the role of women within their communities, the different needs and approaches of men and women, and existing barriers to their participation in formal structures.

Measures to involve women should reflect the diversity of Aboriginal women's experiences across the Northern Territory and the difference in women's positions within different communities. This may require different arrangements in each community. An externally imposed structure, that dictates the nature of women's involvement in that structure, is likely to have limited success. In some communities there will be strong women who are able to ensure that women's voices are heard. In other communities, where women lack this power, women may be unlikely and unwilling to take positions in formal structures that are dominated by men.

Options for involving women must be developed at the local level and include women at all stages of development and implementation. Such options could include using representative bodies to allow women to speak under a collective banner, ensuring women hold key positions in the community, using male/female teams to work with the community and establishing parallel structures for men and women.

### **Principle three: Recognising the importance of individuals**

Where Aboriginal customary law is strong, it often relies on key individuals who are overworked, overburdened and under resourced. Any proposal to recognise Aboriginal customary law needs to identify and involve key individuals in a community and, in particular, support them in their role.

This should include access to appropriate resourcing and remuneration for ongoing positions. Failure to support individuals in these roles can lead to the withdrawal or loss of these individuals, impacting on the success of programs and policies.

In particular, women within communities need to be encouraged to take leadership roles and supported when they do.

#### **Principle four: Adequate resourcing**

For any model or system of recognising Aboriginal customary law to be successful, it will require adequate resourcing. There seems to be a presumption that Aboriginal people will take on voluntary and onerous community work and unpaid overtime to an extent that is not expected of non-Aborigines. In some communities, individuals are expected to take on advisory positions and other roles without remuneration of any kind, while their colleagues hold full-time paid positions.

In addition, programs that have proved to be successful often have minimal impact across the Northern Territory as adequate resourcing has not been made available to extend these programs to other communities.

The *Social Justice Report 2001* identifies the need for a long term financial commitment from governments as necessary to increasing Indigenous participation and control over decision making processes at the community level. The need for appropriate support from Government, including technical support to build capacity and long-term funding arrangements is included as a principle for implementing Indigenous governance and ensuring effective Indigenous participation in the *Social Justice Report 2000*.

#### **Principle five: Consultation**

Ensuring proper consultations prior to the introduction of mechanisms to recognise Aboriginal customary law should be a priority. These consultations will assist in ensuring that any measures developed to recognise Aboriginal customary law reflect the views and aspirations of Aboriginal communities. Local input, support and control of such measures will be crucial to their success.

#### **Principle six: A staged approach**

The implementation of measures to recognise Aboriginal customary law must reflect the capacity of individual communities. In some communities, Aboriginal customary law may be operating well and there may be strong community leaders. In other communities, this capacity will need to be developed.

Concern was expressed during HREOC's consultations that there has not to date been an ongoing and long term commitment made by Governments in working with Aboriginal communities.

A staged approach to recognising Aboriginal customary law, including a focus on capacity building within communities, is important to the success of any new measures.

#### **Principle seven: Mainstream law as a safety net**

HREOC considers that the need to ensure women's safety and freedom from violence must be a priority for any system of recognition of Aboriginal customary law. Aboriginal women must be able to access mainstream law in cases involving violence, including where an Aboriginal customary law approach has failed. However, this should not be used as an excuse by governments to avoid recognising Aboriginal customary law.

One possible approach is to limit the cases in which Aboriginal customary law will apply. For example, mainstream law could apply to crimes such as rape, sexual assault and domestic violence. This approach acknowledges that women may be in a relatively powerless position within their community, particularly in relation to these crimes, and require the external support of mainstream law.

Another possible approach would be to structure measures so that Aboriginal customary law is applied in the first instance, with access to mainstream law used as a last resort. This would give communities the opportunity to resolve issues using Aboriginal customary law, while providing women with a safeguard. It would require clear guidelines and protection against intimidation, so that women are not forced to accept the Aboriginal customary law solution if it is inadequate.

## c) A human rights based approach to overcoming Indigenous disadvantage

### Documents extracted in this section:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Achieving Aboriginal and Torres Strait Islander health equality within a generation - A human rights based approach*, Chapter 2, *Social Justice Report 2005*
- Human Rights and Equal Opportunity Commission and Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalized: Partnerships between Indigenous Peoples, governments and civil society*, Workshop Report 2005

### See further:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Benchmarking reconciliation and human rights*, Seminar, Materials available online at: [www.humanrights.gov.au/social\\_justice/benchmarking/report.html](http://www.humanrights.gov.au/social_justice/benchmarking/report.html).

**Aboriginal and Torres Strait Islander Social Justice Commissioner, *Achieving Aboriginal and Torres Strait Islander health equality within a generation - A human rights based approach*, Chapter 2, *Social Justice Report 2005*<sup>10</sup>**

Note: The *Social Justice Report 2005* evaluates current approaches to Indigenous health against human right standards. Extracted here is an explanation of the ‘progressive realisation principle’ and information about the setting of benchmarks and targets to achieve equality.

As set out in section 3 above, the Social Justice Commissioner stated the following about accountability for addressing family violence in Indigenous communities:

Accountability (requires) governments’ actions (to) match the commitments they make. Where governments’ actions show that they have decided:

- a) that they are committed to a particular course of action – such as overcoming Indigenous disadvantage;
- b) that they have considered what needs to be done to actually achieve this outcome;
- c) that they have a plan for when the outcome will be achieved – ie, it is benchmarked with targets and goals for when it will happen;
- d) that they have put all resources possible and made every effort possible to achieve this, and;
- e) have done so for as long as is necessary to reach the end goal – even if this is longer than the electoral cycle. This requires bi-partisan support, and if the policy intervention is sound and it has been developed with the active participation of Indigenous peoples, such

<sup>10</sup> Available online at: [www.humanrights.gov.au/social\\_justice/sjreport05/chap2.html#a-non-discrimination](http://www.humanrights.gov.au/social_justice/sjreport05/chap2.html#a-non-discrimination).

support should be forthcoming.

This extract sets out why this is a matter of compliance with international legal obligations, rather than merely something that is desirable.

Article 2 of the International Covenant on Economic, Social and Cultural Rights states that:

1. Each State Party to the present Covenant undertakes to take steps... to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by *all appropriate* means, including particularly the adoption of legislative measures. (*emphasis added*).
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The non-discrimination principle outlined above (in Article 2(2)) applies to all human rights. It establishes a baseline position that all people are entitled to be treated equally and to be given equal opportunities. The progressive realisation principle (as outlined in Article 2(1)) gives meaning to this principle where such equality does not exist for a particular group defined by race, sex or range of other characteristics.

There are two key features to the obligation 'to take steps' in Article 2(1). First, it allows governments to introduce specific measures to addressing the lack of equality experienced by a particular group within society. This includes a group defined by race, such as Aboriginal and Torres Strait Islander peoples.

Each of the main human rights treaties contains a provision which encourages (and indeed requires) governments to redress inequality in the enjoyment of economic, social, cultural or civil and political rights. These provisions are sometimes referred to as 'special measures' provisions. They are a form of differential treatment that is considered non-discriminatory. This is because they are aimed at achieving substantive equality *or* equality 'in fact' *or* outcome.

The rationale for such measures is that 'historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality'. Special measures are time limited, in that they can only be justified for so long as there is a situation of inequality which they are aimed at redressing. They cannot, therefore, lead to the maintenance of separate rights for different racial groups and are not to be continued after the objectives for which they were taken have been achieved.

Second, the obligation 'to take steps' in Article 2(1) also means that governments must progressively achieve the full realisation of relevant rights and to do so without delay. Steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

The High Commissioner for Human Rights has described this principle and its relevance to policy-making as follows:

Since the realization of most human rights is at least partly constrained by the availability of scarce resources, and since this constraint cannot be eliminated overnight, the international human rights law explicitly allows for progressive realization of rights... While the idea of progressive achievement is common to all approaches to policy-making, the distinctiveness of the human rights approach is that it imposes certain conditions on the behaviour of the State so that it cannot use progressive realization as an excuse for deferring or relaxing its efforts.

First, the State must take immediate action to fulfill any rights that are not seriously dependent on resource availability. Second, it must prioritize its fiscal operations so that resources can be diverted from relatively non-essential uses to those that are essential for the fulfillment of rights that are important for poverty reduction. Third, to the extent that fulfillment of certain rights will have to be deferred, the State must develop, in a participatory manner, a time-bound plan of action for their progressive realization. The plan will include a set of intermediate as well as long-term targets, based on appropriate indicators, so that it is possible to monitor the success or failure of progressive realization. Finally, the State will be called to account if the monitoring process reveals less than full commitment on its part to realize the targets.

Accordingly, the idea of progressive realization has two major strategic implications.

First, it allows for a time dimension in the strategy for human rights fulfillment by recognizing that the full realization of human rights may have to occur in a progressive manner over a period of time. Second, it allows for setting priorities among different rights at any point in time since the constraint of resources may not permit a strategy to pursue all rights simultaneously with equal vigour.

This approach requires that governments identify appropriate indicators, in relation to which they should set ambitious but achievable benchmarks, so that the rate of progress can be monitored and, if progress is slow, corrective action taken. Setting benchmarks enables government and other parties to reach agreement about what rate of progress would be adequate. Such benchmarks should be:

- Specific, time bound and verifiable;
- Set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and to prevent the target from being set too low; and
- Reassessed independently at their target date, with accountability for performance.

My predecessor as Social Justice Commissioner elaborated on this rights-based approach in the context of addressing Aboriginal and Torres Strait Islander disadvantage. In particular, he identified five integrated requirements that need to be met to incorporate a human rights approach into redressing Aboriginal and Torres

Strait Islander disadvantage and to provide sufficient government accountability. Namely:

- Making an unqualified national commitment to redressing Indigenous disadvantage;
- Facilitating the collection of sufficient data to support decision-making and reporting, and developing appropriate mechanisms for the independent monitoring and evaluation of progress towards redressing Indigenous disadvantage;
- Adopting appropriate benchmarks to redress Indigenous disadvantage, negotiated with Indigenous peoples, state and territory governments and other service delivery agencies, with clear timeframes for achievement of both longer term and short-term goals;
- Providing national leadership to facilitate increased coordination between governments, reduced duplication and overlap between services; and
- Ensuring the full participation of Indigenous organisations and communities in the design and delivery of services.

**Human Rights and Equal Opportunity Commission and Secretariat of the United Nations Permanent Forum on Indigenous Issues,  
*Engaging the marginalized: Partnerships between Indigenous Peoples, governments and civil society, Workshop Report 2005***

***Introduction***

This workshop was held on 15 August 2005 and co-sponsored by the Secretariat of the United Nations Permanent Forum on Indigenous Issues and the Human Rights and Equal Opportunity Commission of Australia. Approximately 160 people participated in the workshop.

The workshop noted that indigenous peoples face common experiences of marginalization and exclusion in the states in which they live. This is reflected in significantly lower standards of living and often, feelings of dislocation and disempowerment.

The workshop identified the need to significantly increase efforts to build *effective partnerships* between governments, the private sector, civil society and indigenous peoples. This requires respect for the rights of indigenous peoples.

The workshop noted the key elements of a human rights based approach to engaging with indigenous people and communities. This approach is informed by international law, the normative framework of the international human rights system, the interdependence and inter-relatedness of all human rights, civil, political, economic, social and cultural, and the policies and practices of the United Nations. It includes the Common Understanding of the Human Rights Based Approach to Development and the principle of free, prior and informed consent.

The workshop centred on the challenges and opportunities of recognizing cultural diversity; developing policies and programs that are non-discriminatory, inclusive,

targeted and effective; providing an enabling environment for participation and the empowerment of Indigenous peoples at all levels; and adopting approaches that are (indigenous) people centred.

### ***Experiences and challenges in engaging with indigenous communities***

The workshop noted some positive experiences but articulated a number of concerns in the interaction of governments, the private sector and civil society with indigenous peoples and communities.

The workshop noted that partnerships with indigenous peoples in some countries variously involve constitutional recognition, are underpinned by formal agreements or protocols for engagement, or involve legislative requirements for governments to consult with indigenous peoples' organizations on matters that directly or indirectly affect indigenous communities. Participants noted that a consistent problem is the failure of governments to comply with the policies and processes that they have established or to act in accordance with their international obligations under international treaties.

The workshop noted that existing relationships between governments and indigenous peoples are often inequitable. This is because the relationship is negotiated with unequal bargaining power. The underlying basis for these relationships are often set by government, are conditional, place limitations on the recognition of Indigenous rights and/or pay insufficient attention to the ongoing impact of the history of dispossession and discrimination experienced by indigenous peoples.

The workshop identified the need to build partnerships on an equitable footing, which are flexible and responsive to the diverse needs and circumstances of Indigenous peoples. Such partnerships require: the full and effective participation of indigenous peoples; the opportunity for indigenous peoples to identify concerns, prioritize them and propose solutions that are community driven; and respect, and support, for indigenous peoples' chosen form/s of representation, including traditional or customary authority structures.

The workshop also identified the need for government, the private sector and civil society to recognize the cultural diversity that exists *within* indigenous peoples and between communities. Accordingly, partnerships must be tailored to the specific characteristics of indigenous communities. Government programs must also be responsive to the specific needs of individual communities, be coordinated and avoid duplication.

The workshop also noted the challenge of developing *sustainable* partnerships with indigenous communities, which are targeted to achieving long term objectives negotiated with the full and effective participation of indigenous peoples. Partnerships should also acknowledge the existing social capital and strengths within indigenous communities, and look to build and support these.

### ***Checklist to guide engagement with indigenous peoples***

The workshop developed a checklist of principles for governments, private sector and civil society to engage indigenous peoples in relation to the following contexts:

- Indigenous systems of governance and law;
- Indigenous lands and territories, including sacred sites;
- Treaties, agreements and other constructive arrangements between states and indigenous peoples, tribes and resources;
- In relation, but not limited to extractive industries, conservation, hydro-development, other developments and tourism activities in indigenous areas leading to possible exploration, development and use of indigenous territories and/or resources;
- Access to natural resources including biological resources, genetic resources and/or traditional knowledge of indigenous peoples, leading to possible exploration, development or use thereof.
- Development projects encompassing the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure – whether the projects be addressed to indigenous communities or, while not addressed to them, may affect or impact upon them.
- UN agencies and other intergovernmental organizations who undertake studies on the impact of projects to be implemented in indigenous peoples territories.
- Policies and legislation dealing with or affecting indigenous peoples.
- Any policies or programs that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories

The check list for engaging with indigenous communities specifically include:

#### Human Rights-Based Approach to Development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognize the cultural distinctiveness and diversity of indigenous peoples;
- Governments should consider the introduction of constitutional and or legislative provisions recognizing indigenous rights;
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives;
- Such participation shall be based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand;
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution;

#### Mechanisms for representation and engagement

- Governments and private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities;
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision making structures through which they engage with other sectors of society;

### **Design, negotiation, implementation, monitoring, and evaluation**

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes;
- Indigenous peoples and communities should be invited to participate in identifying and prioritizing objectives, as well as in establishing targets and benchmarks (in the short and long term);
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation;
- In engaging with indigenous communities, governments and private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities;

### **Capacity-building**

- There is a need for governments, the private sector, civil society and international organizations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them;
- Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities;
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants; and
- There is a need for human rights education on a systemic basis and at all levels of society

### ***International Agenda for Change***

The principles recognized in this action-oriented report recognize the agenda for change and should be progressed through the United Nations commitment to the Millennium Declaration, including the Millennium Development Goals process, as well as the Program of Action of the Second International Decade of the World's Indigenous People.

## Mental health issues

### Documents extracted in this section:

- Human Rights and Equal Opportunity Commission, *Submission to the Senate Select Committee on Mental health*, 2005
- Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous mental health*, Speech, Djirruwang Aboriginal Health Program, Charles Sturt University - Student Conference, 29 September 2005

### See further:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young persons with cognitive disabilities and Australian juvenile justice systems*, Report to Attorney-General's Department 2005 (Reproduced below in section f)
- Mental Health Council of Australia, Brain and Mind Research Institute and human Rights and Equal Opportunity Commission, *Not For Service: Experiences of Injustice and Despair in Mental Health Care in Australia*, online at: [www.humanrights.gov.au/disability\\_rights/notforservice/index.html](http://www.humanrights.gov.au/disability_rights/notforservice/index.html)

### **Human Rights and Equal Opportunity Commission, *Submission to the Senate Select Committee on Mental Health, 2005*<sup>11</sup>**

#### *Policies on Indigenous mental health*

In order to develop and maintain a holistic view of Indigenous mental health it is critical that the historical and socio-political contexts of Indigenous Australians are embraced. The adoption of this context is fundamental to understanding contemporary mental health concerns of Indigenous communities.

The *National Aboriginal Health Strategy* (NAHS) defines Aboriginal health as a matter of determining all aspects of their life, including control over their physical environment, of dignity, of community self-esteem, and of justice. It is not merely a matter of the provision of doctors, hospitals, medicines or the absence of disease or incapacity.

The NAHS also noted in 1989 that:

Culturally appropriate services for Aboriginal people in the mental health area are virtually non-existent. Mental health services are designed and controlled by the dominant society for the dominant society. The health system does not recognise or adapt programs to Aboriginal beliefs and law, causing a huge gap between service provider and user. As a result, mental distress in the Aboriginal community goes unnoticed, undiagnosed and untreated.

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<sup>11</sup> Available online at: [www.aph.gov.au/Senate/committee/mentalhealth\\_ctte/submissions/sub368\\_attach1.pdf](http://www.aph.gov.au/Senate/committee/mentalhealth_ctte/submissions/sub368_attach1.pdf).

The current document for the delivery of Indigenous health services is the *National Strategic Framework for Aboriginal and Torres Strait Islander Health* (2003). The Framework was developed by the National Aboriginal and Torres Strait Islander Health Council (NATSIHC) and is based on the 1989 *National Aboriginal Health Strategy* (NAHS). It is not meant as a replacement to the NAHS but rather to complement it. The Framework also took into consideration the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (1991) and the *Bringing them Home – the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997), as well as incorporating the findings of *Health is Life – the report on the Inquiry into Indigenous Health* (2000). The Framework also considered (where existing) State/Territory policy frameworks for the delivery of Indigenous health services.

The Framework has received the support of Federal, State and Territory governments. The implementation of the Framework relies on each jurisdiction developing its own ‘specific initiatives, priorities and timeframes.’ These individual implementation plans will form the basis on the reporting of progress and will be examined later in this paper. State and Territory implementation plans are critical to advancing the aims of the National Framework because each jurisdiction is more able to identify priorities and develop benchmarks.

In 2003 the Social Health Reference Group, released a *Consultation Paper for the Development of the National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Well Being 2004-2009*. This has subsequently been adopted.

The Strategic Framework aims to improve social and emotional well being and mental health service delivery.

As such, the document touches on a range of issues that must be addressed in order for social and emotional well being to be improved, including broad issues such as socio-economic status and racism, and the work of various sectors such as employment, education, housing, justice, Aboriginal and Torres Strait Islander affairs, and family and children’s services. It is written this way in recognition of the need for a coordinated, whole-of-government approach led by the community.

### ***Statistics on mental health***

While there is anecdotal evidence that mental health issues significantly affect the lives of Indigenous people, very little quantification has occurred:

- The 1996 national consultancy, *Ways Forward*, reported that mental health problems significantly affected at least 30% of Indigenous communities.
- Urban studies in the 1990s reported that between about one quarter and 54% of people attending Aboriginal medical services had a mental health disorder. Women tended to present earlier, while men’s first presentation was often following involuntary admission into acute psychiatric care.

The Western Australian Aboriginal Child Health Survey (WAACHS) Vol. 2, released in April 2005 marks a watershed in the quantification of Indigenous mental health problems. The sample was 5,289 children surveyed through their primary carers and, when appropriate, through self-assessment. It reported that 1 in 4 Indigenous children are at high risk of developing clinically significant emotional or behavioural difficulties. This compares to about 1 in 6 to 7 of non-Indigenous children.

Research has also indicated that children with poor mental health have a greater tendency to develop into adults with poor mental health.

- *Suicide and other forms of self-harm:* In 1998, Indigenous males committed suicide at 2.6 times the rate in the non-Indigenous population; for females the rate is double that of females in the non-Indigenous population. In 2000-01, Indigenous males were hospitalised at 2.2 times the rate of males in the general population and females at 2.0 times the rate of females in the population for intentional self-injury. The National Health Survey in 2001 reported 10% of Indigenous people were likely to consume alcohol at risk or high-risk levels, compared with 11% of non-Indigenous people. However, this finding contrasts with other sources that report Indigenous people consuming alcohol at risk levels twice that of the non-Indigenous community. Apart from alcohol, substance abuse is reported to be higher in Indigenous communities.
- *Indicators for other forms of harm behaviours:* Violence is symptomatic of poor mental health in perpetrators and is associated with substance abuse. It is also stressor to the mental health of victims. Violence kills Indigenous people at four times the rate of the non-Indigenous population. Reported physical, or threatened physical, violence, appears to have doubled over 1994 - 2002: 12.9% of respondents in 1994 identifying as victims, compared to 24.3% of respondents in 2002 in Indigenous social surveys. In 2001, Indigenous females were 28.3 times more likely to be hospitalised for assault than non-Indigenous females; males at 8.4 times the non-Indigenous rate.

While the WAACHS identifies Indigenous children to be at risk, these indicators suggest that there are significant mental health problems in the Indigenous adult population. However, in the absence of adequate data collections, it is not possible to ascertain the extent. A first step in any address to Indigenous mental health is to address the paucity of data collections in this area.

There are many reasons as to why obtaining accurate detailed information is difficult. First, there is an incomplete identification of Indigenous people in census data (i.e. people not identifying) as well as in administrative data (i.e. hospital records). Second, it is difficult to collect data from remote communities. Third, primary health care providers such as Aboriginal health workers and drug and alcohol workers do not have a uniform process whereby to collect data. In other words there is currently no national data collection process that is able to provide accurate information on the incidence of mental health disorders or treatment occurring among Aboriginal and Torres Strait Islanders.

The Australian Institute for Health and Welfare (AIHW) in identifying these problems believe that poor and inadequate data collection methods can be improved if efforts

are made at all levels. Accordingly the AIHW proposed that the 2004-2005 National Aboriginal and Torres Strait Islander Health Survey include a model to access various aspects of the social and emotional wellbeing of Aboriginal and Torres Strait Islander people.

### ***Prevention***

Public health emphasises prevention above cure. Understanding the causes of poorer mental health among Indigenous peoples is the key to prevention. In that regard Indigenous peoples have asserted that their health, including mental health, cannot be treated as a discrete issue; the *National Aboriginal Health Strategy* (NAHS, 1989) proposing that:

Health to Aboriginal peoples is a matter of determining all aspects of their life, including control over their physical environment, of dignity, of community self-esteem, and of justice. It is not merely a matter of the provision of doctors, hospitals, medicines or the absence of disease and incapacity.

Since the NAHS it has been identified that the stress caused by the social environment operates as a physical and mental health determinant. It is referred to as a ‘psychosocial’ because it involves the interaction the ‘objective’ social environment and the ‘subjective’ perceptions a person might have about it. The greater the degree of control a person has over their life and the greater the degree they feel they can participate in (influence) the way their social environment operates, the better their physical and mental health will be.

Two individuals living in an identical social environment may not experience the same level of psychosocial stress: this relates to personal resilience. An important variable that impacts on this is social cohesion and support.

In terms of the mental health of Indigenous people in Australia, it is important to consider the impacts of the community environment and the wider environment, including its political dimensions.

### ***Environment within communities***

The Royal Australian College of Physicians recently reported that the combination of problems suffered within Indigenous communities is *the* prime example of negative social determinants of health in Australia. Violence and addiction in communities undermines the resilience of members and erodes the capacity of communities to support the mental health of members. The impact of addiction on communities has been most closely observed in relation to alcoholism, although petrol sniffing and other substance abuse must be considered in relation to some communities.

Social support and social cohesion are associated with good mental health. Studies show that people in long-term, familial relationships and close-knit communities are better able to deal with stress and will live longer than those who do not. While dysfunctional communities have been the subject of media attention over the past few years, it is interesting to note that the WAACHS found that the environmental safety and health (ESH) of Indigenous children improved with isolation (i.e. in remote

communities). Children living in Perth had significantly poorer (five times worse) ESH than those living in very remote communities. The WAACHS evaluation concludes that traditional cultures and ways are protective against poor ESH. The WAACHS also reported that 1 in 4 Indigenous children were being raised in families with a 'poor quality of parenting'; 1 in 5 in families that functioned poorly. Thirty four per cent of children were being raised in single parent families. These children had twice as high rates of poor ESH as those living with both original parents.

Particular traumas: war, natural disasters, large-scale human rights violations and so on are psychosocial stressors on individuals (*Bringing them home*, 1997, reported the forced removal of Indigenous children affected the majority of Aboriginal families throughout Australia, in one or more generations and to have had a range of traumatic mental health impacts). The WAACHS reported that the children in the care of carers who were forcibly removed were 2.3 times more likely to be at high risk of clinically significant emotional or behavioural difficulties than in the care of carers not removed.

Strengthening communities and culture clearly has potentially positive implications for the mental health of community members. Likewise, policies and programs that erode the strength and culture of communities can be considered as having negative impacts on community members.

### ***Non-Indigenous Australia as a social environment***

Racism, and related forms of discrimination, can be considered examples of a health determinant with a collective dimension. It can be thought of as having three inter-dependent layers:

- Institutionalised racism: evidenced by differences in socio-economic status and 'ghettos' it is usually the outcome of historical events in which one race was subjugated to the will of another (for example, the enslavement of Africans in the United States and the dispossession of Indigenous peoples in Australia);
- Personally mediated racism: police brutality, disrespect, name calling, and so on;
- Internalised racism: hatred of self and other members of group.

Some of the dimensions of racism, through policies involving the reconciliation of racial groups, are amenable to change. Living free of racism and racial discrimination is a fundamental human right. To the degree human rights can inform policies to combat racism they can be thought of as health measures. In respect to this, *Health is Life* reported that 'a meaningful reconciliation' would be 'likely to contribute to long term improvements in [Indigenous peoples] health and welfare'.

Other collective dimensions go deeper. The sense of *individual* personal control and power is one dimension of control; collective control is a further one. In relation to Indigenous peoples, it may be that *collective* control constitutes a dimension of psychosocial determinants. Collective control is linked to the human right to self-

determination. This idea that psychosocial determinants have a collective dimension remains at the cutting edge of research:

A... complex problem involves the potential health impacts associated with violating individual and collective dignity. The Universal Declaration of Human Rights considers dignity, along with rights, to be inherent, inalienable and universal. While important dignity-related impacts may include such problems as the poor health status of many indigenous peoples, a coherent vocabulary and framework to characterize dignity and different forms of dignity violations are lacking. A taxonomy and an epidemiology of violations of dignity may uncover an enormous field of previously suspected, yet thus far unnamed and therefore undocumented damage to physical, mental and social well being.

Indigenous peoples have asserted that their health is influenced by psychosocial factors arising from their socio-political situation. The NAHS proposed that:

The Australian state by way of its Governments must address the very real issue of Aboriginal Peoples' indigenous rights. If this is not done in the implementation of this report will see much of the same of what colonialist-Australia's history now tells us, and at the very most, only marginal improvements [in health] are likely to occur.

In order to achieve the necessary improvement in Aboriginal health, Aboriginal people believe they must again be able to control their destiny and to accept responsibility for their own decision-making.

Internationally, Indigenous peoples have linked their health to the recognition of their human rights. The *Geneva Declaration on the Health and Survival of Indigenous People* (1999) issued after an international consultation on the health of Indigenous peoples, organised by the World Health Organization declared Indigenous health to be a 'collective and individual inter-generational continuum encompassing a holistic perspective' and that the:

philosophy and principles contained in the *United Nations Draft Declaration on the Rights of Indigenous Peoples* and all existing international instruments dealing with human rights and fundamental freedoms [were] essential for the attainment of the health and survival of Indigenous Peoples.

There have been very few studies undertaken or completed to provide an evidence base to support the idea of these collective dimensions to psychosocial determinants. However, a number of reports have made the association for Indigenous peoples in Australia:

- Cumulative mental health impacts caused by failures to protect and respect rights including those stemming from racism, discrimination and marginalisation were noted in the report of the Royal Commission into Aboriginal Deaths in Custody (1991).

- Ways Forward (1996) reported the following stressors acting upon Indigenous mental health:
  - Collective and intergenerational trauma and loss as a direct result of colonisation and the ensuing disruption to cultural well-being;
  - Failure to respect Indigenous people's human rights. This was described as constituting a continuous disruption to Aboriginal well being resulting in increasing mental ill health'. In particular, 'self determination is central to Aboriginal people's well-being and 'denial of this right contributes significantly to mental ill-health';
  - Racism, stigma, environmental adversity and social disadvantage. The report stated that these 'constitute ongoing stressors and impact in very negative ways on... mental health and well being'. It recommended that 'any strategies to improve mental health and well-being must address these structural issues'.

Research into these areas remains inadequate as was noted recently:

Research into the health status of [Indigenous] peoples must begin to focus beyond statistical data... Some researchers have observed that 'there is abundant evidence that psychosocial factors have a profound impact on health', but that 'little research to date has targeted the possible biopsychosocial pathways by which social, environmental and contextual conditions of living affect health'. Indeed, the Australian Institute of Health and Welfare, while recognising the multiplicity of factors that might account for poor health status, relies predominantly on biomedical indicators of health. This fails to embrace the less easily measured aspects of community living and wellbeing, now deemed to be of prime importance by Indigenous peoples and public health researchers alike.

### ***Conclusions***

There is still much to be done in order to improve and advance the social and emotional well being of Aboriginal and Torres Strait Islander people who, for a variety of reasons, experience poorer mental health relative to non-Indigenous Australians. There is a body of evidence that suggests systemic discrimination and disempowerment and economic and social disadvantage are contributing to this situation. Unless these broad issues are addressed, there may not be an improvement to the mental health of Indigenous Australians.

In the meantime, attention must be paid to ensuring integrated primary mental health care services (incorporating mental health, family violence and substance abuse services) are accessible to Indigenous Australians. These are most likely to be provided through the rolling out of comprehensive primary health care services through the PHCAP scheme and through the *National Strategic Framework for Aboriginal and Torres Strait Islander Health*. There is also a need for a significant increase in funding to clinical services for Indigenous Australians, particularly attention needs to be paid to ensuring they are physically and culturally accessible.

Programs must be put in place to address the needs of Indigenous carers of the long-term mentally ill living in the community.

**Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous mental health*, Speech, Djirruwang Aboriginal Health Program, Charles Sturt University - Student Conference, 29 September 2005<sup>12</sup>**

I welcome Gatherings such as this one because they shine light on the issue of Aboriginal and Torres Strait Islander mental ill health; something that is overlooked in the debate about passive welfare and substance abuse; or dealt with inappropriately through the criminal justice system. Yet without addressing mental ill-health as an issue in its own right, efforts to improve life in many communities are likely to come undone. Poor mental health contributes to the crisis of family violence, anti-social behaviour, substance misuse, confrontation with the legal system, low participation in schooling and employment that are seen in a significant number of Aboriginal and Torres Strait Islander communities.

The Human Rights and Equal Opportunity Commission has been actively involved in addressing the mental health of Indigenous people. I highlight:

- In 1993, the landmark *Report of the National Inquiry into the Human Rights of People with Mental Illness*, known as the Burdekin report. This helped to highlight the issues confronting Indigenous people with a mental illness including many of the issues I will raise today – still current 12 years later.
- In 1997, the well known *Bringing them home* report also highlighted mental health issues, particularly in relation to Aboriginal people forcibly and unnecessarily removed from their families as children.

In the *Social Justice Report 2004*, I signalled I would continue this focus by addressing the mental health concerns of Aboriginal and Torres Strait Islander peoples as a priority throughout my term as Commissioner.

The three main issues I want to discuss today are:

- Data issues;
- The need for greater understanding of Aboriginal and Torres Strait Islander mental health and ill-health;
- Mental health services for Aboriginal and Torres Strait Islander people.

**1. Data issues – how big is the problem?**

No one is really sure how big an issue mental ill-health is in communities, although anecdotal evidence and smaller studies suggests it is a significant problem.

The most significant data yet obtained has been through the emotional and social well-being component of the Western Australian Aboriginal Child Health Survey published in April 2005, with a survey sample of approximately 5000 children. It reported that **1 in 4 Aboriginal children are at high risk of developing clinically**

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<sup>12</sup> Available online at: [www.humanrights.gov.au/speeches/social\\_justice/indigenous\\_mental\\_health.htm](http://www.humanrights.gov.au/speeches/social_justice/indigenous_mental_health.htm).

**significant emotional or behavioural difficulties.** This compares to about 1 in 6/7 of non-Indigenous children.

Most of the data we have about mental ill-health in Aboriginal and Torres Strait Islander adults is that gleaned after crisis situations, when the mental health issue results in hospitalisation. According to the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, in 2003 – 2004 Aboriginal and Torres Strait Islander males were hospitalised at 3 times the rate of non-Indigenous males for a variety of mental disorders; while for females the rate was twice that of non-Indigenous females. While such data is useful, it is of limited use in quantifying the burden of mental ill-health in communities.

There is currently no national data collection process that is able to provide accurate information on the incidence of mental health disorders or treatment occurring among Aboriginal and Torres Strait Islanders in communities. All we know is that suicide, substance abuse and family and community violence are problems and there are services in place in some communities to address these, but how matched the response is to the problem it is impossible to determine.

There are many reasons as to why obtaining accurate detailed information is difficult.

- First, there is an incomplete identification of Indigenous people in census data (i.e. people not identifying) as well as in administrative data (i.e. hospital records).
- Second, it is difficult to collect data from remote communities.
- Third, primary health care providers such as Aboriginal health workers and drug and alcohol workers do not have a uniform process whereby to collect data.

These issues have been identified in many reports and it is time that they were addressed.

## **2. Understanding the problem.**

Understanding the causes of mental ill-health among Aboriginal and Torres Strait Islander peoples is the key to prevention. As the old adage goes: ‘prevention is better than cure’. However, few studies have been undertaken to model Aboriginal and Torres Strait Islander mental health or what determines ill-health. The only common conclusion among commentators seems to be that non-Indigenous models of mental health and ill-health have only limited application.

In that regard, **listening** to Aboriginal and Torres Strait Islander people about mental health is vital. When they are asked, a common theme that emerges is that mental and physical health cannot be treated as discrete issues but must be considered in a holistic context – as the *National Aboriginal Health Strategy* put it:

**Health to Aboriginal peoples is a matter of determining all aspects of their life, including control over their physical environment, of dignity, of community self-esteem, and of justice. It is not merely a matter of the**

## **provision of doctors, hospitals, medicines or the absence of disease and incapacity.**

In that the *National Aboriginal Health Strategy* linked mental and physical health with self determination, it was ahead of its time. Since then it has become widely accepted that the stress caused by perceived lack of control of one's environment operates as a physical and mental health determinant in all population groups. It is referred to as a 'psychosocial' stress because it involves the interaction of the 'objective' social environment and the 'subjective' perceptions a person might have about it.

However, how this mental health principle manifests in different ways in Aboriginal and Torres Strait Islander peoples is not understood. Studies of Afro-Americans in the United States have linked the experience of racism to a perceived lack of control and poorer mental health, and other studies have indicated that the perception of control may have a collective dimension in minority groups. However, how relevant or applicable this research is to Aboriginal and Torres Strait Islander peoples is not clear. Other factors may also contribute; for example, some Aboriginal and Torres Strait Islander people have linked their mental health to the land and contact with the land.

Understanding the role self-determination and empowerment can play in Aboriginal and Torres Strait Islander mental health and ill-health has many levels.

For example, at the individual level, ensuring Aboriginal and Torres Strait Islander people can access education and employment could be seen as a mental health measure – study after study has shown that an increased perception of control comes with increased income and understanding of one's environment.

At a community level, community controlled services and self-governance might also be considered as mental health measures.

More broadly, constitutionally protecting the right of self-determination of Aboriginal and Torres Strait Islander peoples at national level, and other so called 'symbolic' reconciliation measures - such as a treaty - may also need re-thinking in terms of their impact on mental health. In that regard, I also note that the landmark *Ways Forward* report into Aboriginal and Torres Strait Islander mental health in 1996 linked the mental health of Aboriginal and Torres Strait Islander peoples with the recognition of their rights.

There is a need for greater research into Aboriginal and Torres Strait Islander mental health – research that is carried out in a manner acceptable to Aboriginal and Torres Strait Islander people. Only if Aboriginal and Torres Strait Islander mental health is understood can we begin the task of preventing rather than curing the incidence of mental ill-health we see today in Aboriginal and Torres Strait Islander peoples today.

### **3. Treating the problem - mental health services**

There are many points that could be made in relation to the provision of mental health services to Aboriginal and Torres Strait Islander peoples and communities. I refer you

to both the upcoming release of the report of the Senate Select Committee on Mental Health and the report of Dr Sev Ozdowski, and the Mental Health Council of Australia for a detailed consideration of these. However, I would identify the following five points as essential:

**First**, more mental health services are needed in communities. Data presented in the *Consultation Paper for the Development of the National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Well Being 2004-2009* revealed the lack of availability and accessibility of mental health services to Aboriginal and Torres Strait Islander people:

- 74% of residents of discrete communities have inadequate access to visiting or resident mental health workers;
- Aboriginal and Torres Strait Islander people have disproportionately low access to general practitioners and private medical specialists, such as psychiatrists, because of the cost of such services.
- only 38% of Commonwealth funded Aboriginal Community Controlled Health Services have a dedicated mental health or social and emotional well being worker.

Primary mental health services are most likely to be provided through the rolling out of comprehensive primary health care services through the Primary Health Care Access Program and through the *National Strategic Framework for Aboriginal and Torres Strait Islander Health*. However, the provision of services must be formally linked to need.

**Second**, ensuring that mental health services are culturally sensitive; to this end, governments need to deal directly with Aboriginal and Torres Strait Islander people and communities as well as collaborate with primary health care providers in order to develop and deliver culturally appropriate services. Other avenues to that end include:

- **increasing resources to Aboriginal Community Controlled Health Services** to meet the increasing mental health and social and emotional well being needs placed upon the Aboriginal and Torres Strait Islander primary health care sector. These services are also best placed as providers of traditional mental health healing and other traditional ways of addressing mental ill-health. Linking into health services activities, CDEP and SRAs could also be used as vehicles of mental health promotion within communities.
- **reforming mainstream and private provider community based mental health care** to better meet the needs of Aboriginal and Torres Strait Islander consumers. This could be through cultural awareness training of staff working in these agencies.
- **training an Indigenous mental health workforce** – psychiatrists, psychologists and so on – as happens here and can I take this opportunity to praise the work done here at the Dijrruwang Program to that end, its value cannot be overestimated.

**Third**, breaking down ‘health silos’; for example, all medical and para-professionals working with Aboriginal and Torres Strait Islander people should have a basic

knowledge of possible mental health issues so to facilitate the prevention or early address of mental health problems before they become a crisis. Other silos that must be broken down are those that separate out mental health, family violence and substance abuse services. These should be integrated within comprehensive primary health care services to reflect the fact that these things are often linked.

**Fourth:** Programs must be put in place to address the needs of Indigenous carers of the long-term mentally ill living in the community.

**Fifth:** education of the broader community and Aboriginal and Torres Strait Islander communities about mental health issues. The stigma about mental ill-health must be broken down and communities affected by mental health issues should be informed so they can be as actively involved as possible in relation to addressing mental health issues. Community members who act as carers too need support from other community members as well as from special programs.

## e) Indigenous women and imprisonment and post-release programs

### Documents extracted in this section:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous women and corrections; A Landscape of Risk*, Chapter 5, *Social Justice Report 2002*
- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Walking with the Women- Addressing the needs of Indigenous women exiting prison*, Chapter 2, *Social Justice Report 2004*

### **Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous women and corrections; A Landscape of Risk*, Chapter 5, *Social Justice Report 2002*<sup>13</sup>**

The rising rate of over representation of Indigenous women is occurring in the context of intolerably high levels of family violence, over-policing for selected offences, ill health, unemployment and poverty.

Indigenous women are victims of a complex frame of dynamics upon their lives including violence, poverty, trauma, grief and loss, cultural and spiritual breakdown. There is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives. A recent NSW study stated,

The relationship between Aboriginal women and violence also highlights how the separation between ‘victim’ and offender’ is not clear at all. In reality many Aboriginal people in the criminal justice system are both offenders and victims, for example, some 78% of Aboriginal women in prison have been victims of violence as adults. More than four in ten Aboriginal women in prison were victims of sexual assault as an adult (44%).

In NSW, Aboriginal women are over represented as victims of violent crime. In comparison to a NSW non-Indigenous woman, an Aboriginal woman is:

- Four times more likely to be murdered;
- More than twice as likely to be the victim of sexual assault, or sexual assault against children;
- Four times more likely to be the victim of assault; and
- Seven times more likely to be a victim of grievous bodily harm.

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<sup>13</sup> Available online at: [www.humanrights.gov.au/social\\_justice/sjreport\\_02/chapter5.html](http://www.humanrights.gov.au/social_justice/sjreport_02/chapter5.html).

Consistent with this, in Western Australia 67 percent of Indigenous women incarcerated in October/November 2001 reported having experienced abuse as children or adults.

Accompanying these factors is a strong argument that Aboriginal women receive poor responses from police to complaints about violence and other disturbances. One reason suggested for under-policing in relation to alleged assaults is a perception that family violence is part of Aboriginal culture or a 'tribal norm'. Another connected reason is the view that Aboriginal women are undeserving of police protection.

Recent trends in incarceration also indicate that Indigenous women are increasingly gaoled for violent assaults, and some commentators suggest there is a relationship between violent behaviour by victims of violence. Carol La Prairie's investigations of similar statistics in Canada suggest that there are three ways Indigenous women living in violent situations may end up convicted of violence offences: 'they may retaliate with violence against abusive family members; they may resort to drug and alcohol abuse to escape abuse; or their victimisation may lead to the abuse and neglect of others'.

Anecdotal evidence suggests increased arrest for violence is the result of Indigenous women who behave violently to protect or defend themselves because they know that they would not receive police protection.

The causes of the rise in the rates of imprisonment of Indigenous women are complex and inter-related. Research has identified a strong correlation between imprisonment of Indigenous women and the experience of sexual assault and separation from family. The impact of alcohol related crime, and increasingly in some jurisdictions, drug related crime requires further investigation.

In general recommendation 19 on Violence against Women, the Committee on the Elimination of Discrimination Against Women notes the effects of family violence on women and requires states parties to compile statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence. States parties are required to report on gender violence, to monitor its impact on women, and to put in place services and measures to reduce the incidence of violence against women.

Good policy directions and compliance with human rights standards need to be based on sound and comprehensive research. The standard of research can be enhanced through increased liaison between the Australian Bureau of Statistics, crime researchers, correctional departments and Indigenous peoples.

It is not always to the offender that we need to look to understand the causes of increasing incarceration. Election driven law and order campaigns primed to drive up incarceration, a lack of government action to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and a lack of judicial activism to implement the recommendation of the Royal Commission on non-custodial sentences are some obvious and ongoing causes of over-representation.

In some instances, the causes of over-representation are more complex and profound. Offender focused answers frequently identify the effects of colonisation as the cause of offending behaviour. For example, issues such as unresolved trauma, loss and grief are identified as core problems with ‘social issues/problems such as family violence, crime/imprisonment, alcohol and drug abuse, suicide, low self esteem, ill health, self harming etc. etc are in the periphery and are the symptoms. Understanding intergenerational violence, for instance, requires us to consider the impact of colonisation, the breakdown of cultural norms, and repeated abuse. The symptoms and the causes need to be identified and addressed.

Links must be drawn and holistic models developed and supported which address the connections between culture, drug use, alcohol use, separation from family, violence, poverty, spiritual needs, housing, health, boredom, race discrimination and gender discrimination.

Indigenous people are constructing, reconstructing and participating in programs and models for dealing with criminal justice issues. These include community policing, night patrols, Community Justice Panels and Groups, circle sentencing, and participation in courts such as the Nunga Court (SA), Murri Court (Qld) and Koori Court (Vic).

Programs have now been developed and evaluated, particularly around family violence for women, men and children, and the Indigenous participation in drug court trials. These indicate that it ‘is very important to give responsibility back to the community, through the case management, future planning and post release programs and services. The community must also be properly supported in these initiatives’.

Indigenous peoples have looked to new models and in doing so, look to the past for answers. One example is the development of restorative justice models to deal with violent behaviour within communities. Restorative justice models engage community, victim and offender. The victim’s right to safety and security are paramount, and the participation of Indigenous Elders is essential.

### **The importance of Pre- and Post-Release Programs for Indigenous Women**

In relation to programs dealing with violence Judy Atkinson notes:

Aboriginal women say they have asked for such programs for a considerable time but that their requests are being ignored by those people in government who are responsible for implementing a structural response to issues of violence in society. Most women I work with are feeling that even when they choose to use the programs and systems being made available, sometimes ‘women only’ services, sometimes ‘generalist services’, these services are not meeting their needs. The women often experience another level of victimisation.

It is essential to recognise the diversity of needs of Indigenous women. While there are some similarities, women in rural and urban areas will have different needs, women in remote areas will have different needs again.

Effective pre-and post-release programs should include community based, Indigenous specific programs to help women deal with the effects of violence and to help women develop alternative strategies for coping with violence in the future. People require protection from violent behaviour and alternative structures for prevention and punishment of violent behaviour which provide more than imprisonment with all its risks and consequences.

Indigenous people have been developing and implementing models such as Strong Culture, Strong Families (Western Australia). The Kapululanga Aboriginal Women's Association project is aimed at revitalising cultural practices and principles to challenge and overcome family violence.

The We-Al-li project in Queensland provides a series of educational/therapeutic programs for workers and for victims and perpetrators of age, gender, race or class violence. The workshops enable individuals to 'own' their violent experiences and behaviours, to become aware of the many forms of violence in our society, and to be empowered to change their own victim/victimising behaviours.

The methods for dealing with violence outside the goal system, include the development of restorative justice models. Kelly describes restorative justice as follows:

It must be a grass roots community initiative. The entire Aboriginal community must be consulted and involved in the whole process of establishing the program...An essential element that must be met in order to implement restorative justice practices for Aboriginal family violence is that the rights of the victims must be maintained.

Effective pre-and post-release programs need to recognise and treat the complexity of experience of the experience of Indigenous individuals who are both victims and perpetrators of violence. Programs will also need to provide support for Indigenous women to reintegrate back into the community. The types of support required by each woman will be determined by her location and other issues. For instance, for some women there may be issues of payback, and she may not be able to return to her community until those issues are resolved. Other women may need to return to small communities, where contact with the perpetrator of violence cannot be avoided.

Pre-and post-release programs should include assistance for past injuries suffered by women, and strategies for dealing with these issues in the future. Where drug and alcohol use, associated with incidents of violence has become problematic, programs should address these needs.

Some women may face another form of dispossession because of the impact of violent relationships on their lives. They may not be able to return to their home community, as a result of their own or other people's violence. In either scenario, women need support to re-enter potentially volatile situations. Pre-and post-release programs need to be sensitive to kinship obligations, and to support Indigenous women to work with their customary obligations and to positively re-integrate into the community in which they live.

## **Aboriginal and Torres Strait Islander Social Justice Commissioner, Walking with the Women- Addressing the needs of Indigenous women exiting prison, Chapter 2, Social Justice Report 2004<sup>14</sup>**

The *Social Justice Report 2002* provided an overview of the experiences of Indigenous women in corrections. It highlighted the ‘landscape of risk’ that Indigenous women are exposed to which leads to their high level of involvement with the criminal justice system. The report expressed concern at the rapid growth of the Indigenous female prison population, as well as high rates of recidivism. The report identified a lack of post-release support programs for Indigenous women when they exit prison. It called for further research to address the lack of information on the existence and accessibility of such programs.

Addressing this, the Social Justice Commissioner’s unit conducted research and consultations during 2003 and 2004 to identify what support programs are available to Indigenous women upon their release from prison. This included accommodation options, counselling and other programs which may assist in reconnecting Indigenous women with their families and communities.

Indigenous women are particularly vulnerable to intersectional discrimination within criminal justice processes. This is due to a number of factors.

First it is due to the combination of socio-economic conditions faced by many Indigenous women. Many Indigenous women in Australia today live well below the poverty line. Indigenous women’s life expectancy (like Indigenous men) is considerably less than non-Indigenous Australians. They are more likely than non-Indigenous women to be unemployed, to have carer responsibilities for children other than their own, to receive welfare payments and to have finished school at an earlier age. Indigenous women are also more likely to be a victim of violence and also more likely to live in communities where violence is prevalent. These factors contribute to make Indigenous women particularly vulnerable and their needs more complex than others.

Second, the consequences of family violence in Indigenous communities, and its impact on Indigenous women, have not been grappled with appropriately by the criminal justice system. The criminal justice system is extremely poor at dealing with the underlying causes of criminal behaviour and makes a negligible contribution to addressing the consequences of crime in the community. Policies and programs provide relatively little attention to the high rate of Indigenous victimisation, particularly through violence and abuse in communities. Indigenous women disproportionately bear the consequences of this.

It is now well understood that Indigenous women experience extremely high rates of family violence and that past experiences of violence and abuse are extremely common among Indigenous female prisoners.

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<sup>14</sup> Available online at: [www.humanrights.gov.au/social\\_justice/sjreport04/2WalkingWithTheWomen.html](http://www.humanrights.gov.au/social_justice/sjreport04/2WalkingWithTheWomen.html).

The *Social Justice Report 2003* identified a range of significant initiatives currently underway at all levels of government to address family violence in Indigenous communities. It expressed concern, however, that often responses to such violence have not recognised the distinct situation of Indigenous women.

The barriers confronting women post-release are often issues that they faced prior to incarceration. Jail exacerbates the difficulties they face. In her research of mortality among Indigenous women prisoners after being released from jail in Victoria, Martyres identifies the importance of contextualising a women's life circumstances prior to, during and immediately following imprisonment:

Most women who enter prison do so from a background of extreme social and economic disadvantage. Factors such as high unemployment rates, substance abuse, complex mental health needs and poor education impact on the lives of many women prisoners.

For Indigenous women, this picture is even starker. As noted earlier, Indigenous women face a number of entrenched problems (such as the impact of Indigenous family violence and its associated social issues) which can render them more vulnerable to intersectional discrimination.

The workers at Elizabeth Hoffman House, a crisis accommodation service for Indigenous women located in Melbourne said that Aboriginal women being released from prison have very few options. If they do not have family and community to return to, they rely on whatever crisis accommodation is available (often inappropriate and very short term) or return to violent partners. The workers said that many of the women they work with are reluctant to use mainstream crisis accommodation services because of the lack of 'black faces' there. They said that some Aboriginal women are reluctant to go to a service that does not have Indigenous workers, because they feared being misunderstood and judged.

Many Indigenous women released from prison also have drug related and/or mental health issues which can exacerbate problems in obtaining suitable housing. Ogilvy comments that:

The special need of prisoners frequently make accessing programs of one sort or another difficult. For example, many domestic violence shelters exclude people with drug problems and many hostels exclude women with children. Given that for women prisoners, coping with drug related issues and motherhood are often critical to their re-integration back into the community, these sorts of exclusions can seriously impede successful re-integration into the general community.

Throughout the consultations for this chapter, the issue of healing and wellness was raised as an important issue for Indigenous women exiting prison. Processes for healing were seen as having the potential to increase the health and wellbeing of Indigenous women, with a possible outcome of this being reductions in rates of involvement of Indigenous women in criminal justice processes.

This attention to healing was in part based on emerging evidence from overseas, primarily in Canada and New Zealand, that indicated that addressing the healing needs of individuals and communities has a positive impact on reducing the over-representation of Indigenous peoples in criminal justice processes. Healing has also emerged in these countries as a significant process for empowering Indigenous communities and creating improved partnerships to address the legacy of family violence and abuse (including legacies of past government processes, such as the residential schools system in Canada).

There are, however, relatively few programs and services for Indigenous women exiting prison that presently focus on healing processes in Australia. The conversion of concepts of healing into actual programs and services is very much in its infancy here. As the case study of the Yula Panaal Cultural and Spiritual Healing Program in New South Wales demonstrates, they also face difficulty in attracting operational funding.

Indigenous concepts of healing are based on addressing the relationship between the spiritual, emotional and physical in a holistic manner. An essential element of Indigenous healing is recognising the interconnections between and effects of violence, social and economic disadvantage, racism and dispossession from land and culture on Indigenous people, families and communities.

Healing can be context specific – such as; addressing issues of grief and loss- or more general by assisting individuals deal with any trauma they may have experienced. The varying nature of healing demonstrates that it cannot be easily defined, with healing manifesting itself differently in different communities.

The main issue raised during the consultations is that healing is not a program, rather it is a process. Healing is not something that should only be available at the post-release stage, rather it should be available at any point when a woman is ready – this may be before a woman comes into contact with the criminal justice system, or after they have been in and out of prison over a number of years. Further, healing in the context of criminal justice, attempts to help the individual deal with the reasons why they have offended in the first place. This element of healing is strongly linked to the notion of restorative justice. For this reason, healing has the potential to fit within a restorative justice framework.

The Yula Panaal Cultural and Spiritual Healing Program is run by Yulawirri Nurai. In 2001, the Indigenous Land Corporation (ILC) purchased a 50 acre property, Yula Panaal, at Kywong for Yulawirri Nurai. The property was acquired for the purpose of it becoming an accommodation facility/healing centre for Aboriginal women exiting the NSW prison system. It is also anticipated, the centre, once operating could be considered an alternative sentencing option for Aboriginal women instead of imprisonment.

Yula Panaal is based on the Indigenous Canadian Okimaw Ochi healing Centre in Saskatchewan, Canada. While using the Okimaw Ochi model as the basis for Yula-Panaal, it is intended that Australian Indigenous traditions and spirituality will be the focal point of the centre. However, unlike Okimaw Ochi, Yula-Panaal will provide a haven for women post release instead of being a correctional facility.

Attempts by Yulawirri Nurai to receive funding to trial this initiative continue, with no success at the time of writing. It has now been over three years since the initiative was first proposed and since the land for the centre was purchased.

The traditional approach to distributing available funding for programs and services is dictated by an economy of scale. This impacts negatively on Indigenous women as it delivers minimum resources to a population within the community that has a high level of need. Given that Indigenous women are manifestly the smallest population in the Australian prison system, it is somewhat understandable that they are the group with the least amount of resources directed towards them. However it is precisely this lack of direct resources that goes some way to maintaining Indigenous women's distinct disadvantage in society.

The research undertaken by the Social Justice Unit was in response to a number of concerns raised in the *Social Justice Report 2002*, namely that there was little being done by governments and the community sector to address the concerns confronting Indigenous women post-release. Encouragingly, we learnt of some ground-breaking approaches being undertaken by some state governments and the community sector.

In acknowledging the importance of the intra-State relationships between government departments and community organisations, it also follows that there must be a coordinated approach at the national level. The Council of Australian Governments (COAG) is perhaps best places to ensure that national standards and benchmarks for reducing the over-representation of Indigenous women in the criminal justice system specifically and Indigenous people generally are developed and implemented.

Regarding indigenous women with humanity, dignity and respect is crucial to well-being. One step towards this can be made by ensuring Indigenous women have the freedom of choice to access support services should they choose to both during imprisonment and post-release; to access accommodation that is appropriate to their requirements; and to provide health and other community support services that meet their needs as Indigenous women.

## f) Indigenous youth and the criminal justice system

### Documents extracted in this section:

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young persons with cognitive disabilities and Australian juvenile justice systems*, Report to Attorney-General's Department 2005

### **Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young persons with cognitive disabilities and Australian juvenile justice systems, Report to Attorney-General's Department 2005*<sup>15</sup>**

Note: This extract is from a research project undertaken by the Social Justice Commissioner in 2005. It identifies pathways into the criminal justice system for Indigenous juveniles with cognitive disabilities and other mental health issues. The importance of early childhood development and the impact of family violence is identified as a key concern. Addressing Indigenous juvenile offending is integrally linked to efforts to address the consequences of family violence in Indigenous communities.

- *Statistical overview*

The Australian Bureau of Statistics (ABS) has estimated that the Aboriginal and Torres Strait Islander population in 2001 was 458,500 people or 2.4% of the total Australian population. The Aboriginal and Torres Strait Islander population is growing faster than the non-Indigenous population. The annual rate of growth for Indigenous people has been estimated at 2.3% compared with approximately 1.2% for non-Indigenous people. It is estimated that the Indigenous population will grow to more than 550,000 by the year 2011.

Indigenous young people comprise 26% of the total Indigenous population, whereas young non-Indigenous people comprise 18% of the non-Indigenous population. The Indigenous population has a median age of 20 years, which means that 50% of the population are aged 20 years or below. In 2001, the percentage of Indigenous young people aged 12-24 years was estimated to be 3% of the total percentage of young people in Australia.

Given that a significant characteristic of the Indigenous population is youth, and considering the challenges that face Indigenous young people it is imperative that innovative solutions be sought to address the overrepresentation of Indigenous people in the Australian criminal justice system.

Indigenous Australians, including youth, are the fastest growing prison population in all states and territories. Since the release of the report of the Royal Commission into

<sup>15</sup> Available online at: [www.humanrights.gov.au/social\\_justice/cognitive\\_disabilities.doc](http://www.humanrights.gov.au/social_justice/cognitive_disabilities.doc).

Aboriginal Deaths in Custody in 1991 there has been an increase in the overall national adult prison, but a decline in the juvenile prison population.

Indigenous males comprise 46 percent of the total national male juvenile detention population and Indigenous females comprise 57 percent of the total national female juvenile detention population.

Although overall there has been a decline in rates of detention for both Indigenous and non-Indigenous juveniles, the ratio of over-representation continues in a stable trend. Indigenous young people are 20 times more likely to be incarcerated than non-Indigenous young people. This ratio varies between state and territories depending on size of Indigenous youth population.

Very few studies have been undertaken examining juvenile recidivism. However a national picture can be gleaned from the studies that have been undertaken.

A Queensland study on youth criminal trajectories reveals that Indigenous young people were most likely to progress from the juvenile system to the adult criminal justice system. The study found that:

The intersection of gender and Indigenous status intensifies the risk of maintaining a criminal trajectory from youth to adulthood. ... Indigenous males were most likely to enter the adult system, compared to non-Indigenous males and all females. Nearly 90 per cent of Indigenous males entered the adult system compared to 78 per cent of non-Indigenous males. Indigenous females, however, were more likely than non-Indigenous females to enter the adult system.

A recent NSW study on youth criminal trajectories reported that the court reappearance rate for Indigenous juveniles is about 187 per cent higher than that of non-Indigenous juveniles. The study also reports that:

The odds of an Indigenous juvenile defendant appearing in an adult court within eight years of his or her first court appearance are more than nine times higher than those for a non-Indigenous defendant.

A 2001 Victorian study revealed similar results with 65 per cent of Indigenous young people in the juvenile justice system having committed more than one offence as compared with 47 per cent of non-Indigenous young people in the juvenile justice system.

While we are able to gauge the amount of times an Indigenous young person may end up in juvenile detention and the likelihood of entering the adult criminal justice system, there is less known about the extent and the future offending trajectories of Indigenous young people with a cognitive disability and/or mental health problem.

There are four key factors that hinder identification of the number of people affected by cognitive disabilities:

- The absence of solid statistical data examining more generally the extent of disability in Indigenous populations (further influenced by the mode in which such information is collected) including the fact that tools for assessing cognitive disability may not be culturally appropriate;
- The limited solid information in the extent of cognitive disabilities in the criminal justice system settings;
- Differing frameworks in Indigenous and non-Indigenous communities for defining and understanding cognitive disabilities;
- The tendency for cognitive disability to be ‘masked’ in Indigenous populations as a consequence of the many other disadvantages endured by Indigenous people.

Given these barriers it is difficult to provide precise information on the prevalence of Indigenous young people with cognitive disabilities in the juvenile justice system.

Nevertheless, information can be assembled from a variety of sources which indicate the issue is extensive. In a recent submission made to the Senate Community Affairs References Committee Inquiry into children in institutional care, People With Disabilities Australia (PWD) noted that a large percentage of juvenile detainees have a disability. PWD’s submission claimed:

a lack of assessment, treatment and services for children with a mental illness means that many of these children fall through a range of service systems and end up in the juvenile justice system, ‘consigned to incarceration rather than treatment.’

The Inquiry also reported on a 1997 South Australian study which found that:

... many of the young people then entering the State’s juvenile justice system could be classified as intellectually impaired; 28 per cent were of borderline or below average intellectual functioning.

The *Young People In Custody Health Survey* conducted by the NSW Department of Juvenile Justice revealed the following:

- 88% of young people in custody reported symptoms consistent with a mild moderate or severe psychiatric disorder;
- 30% reported symptoms consistent with Attention Deficit Hyperactivity Disorder;
- 21% reported symptoms consistent with schizophrenia;
- 10-13% were assessed as having an intellectual disability;
- 8% of young men and 12% of young women reported having attempted suicide in the previous 12 months;
- 21% of young men and 56% of young women reported drinking in the hazardous/harmful range; and,
- 51% reported that drug use had caused them problems.

With regards to cognitive ability the report sets out:

The pattern of results suggests that compared to other adolescents, many young people in custody may have difficulty comprehending, communicating and problem solving using language or numbers. Conversely, their practical reasoning (fluid intelligence skills or ability to solve non-verbal problems) is close to a typical adolescent's.

With further regard paid to Aboriginal and Torres Strait Islander young people in custody the report formulates that a 'culture fair' estimate for Aboriginal and Torres Strait Islander young people in custody with an intellectual disability would be 10 percent.

Simpson and Sotiri comment that:

Within the context of the criminal justice system, a cognitive disability may have many disadvantaging implications including:

- Reducing a person's capacity to understand laws and societal norms.
- Reduced planning skills and impulse control.
- Being easily lead and eager to please.
- Increasing a person's vulnerability to be a victim of crime.
- Reduced communication skills.
- Inaccurate and devaluing community attitudes.

Being both Indigenous and having a cognitive disability is potentially a major dual disadvantage.

Simpson and Sotiri further observe:

The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes into contact with the criminal justice system. If brain injury is acquired early in life, and is never properly assessed, there is potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than being a brain injury. A lack of response to questions may be viewed as being the consequence of language and cultural barriers, rather than reflecting a lack of understanding.

- ***Main Findings***

The research project consulted with a range of Indigenous people and agencies, federal and state/territory government departments, community organisations and the university sector. Emerging from the consultations were the following themes:

- Early childhood intervention and engagement with education;
- Diversion from the juvenile justice system – alternative sentencing mechanisms;
- Culturally relevant and appropriate assessment tools;

- Resources in the community; and
- Coordinating government services - joint care management.

The report provides a brief discussion of the concerns raised regarding each of the main themes. Included in the discussion are outlines of some policy and program responses to the issue as well as some best practice examples addressing the issues.

- ***Early childhood intervention and engagement with education***

Aboriginal and Torres Strait Islander Australians, as is well known and documented, experience poorer levels of socioeconomic outcomes than non-Indigenous Australians. Indigenous Australians experience higher rates of unemployment, family violence, incarceration, poorer health, including earlier death, poorer access and participation in education and inferior and inadequate housing choices. It is against this background that many Aboriginal and Torres Strait Islander people, including children, come into contact with the criminal justice system.

Given that many Indigenous families and communities experience lower socioeconomic status than non-Indigenous communities generally, then it should come as no surprise to find that some Indigenous young people living in poor physical and social environments experience higher rates of cognitive/intellectual disabilities and poorer mental health.

Participants at the Roundtable discussion raised the socio-economic environment of many Indigenous communities as major concern and an area which needed immediate attention.

Participants also discussed a range of developmental issues that impact on the cognitive functioning and mental health of Indigenous young people and their communities such as Foetal Alcohol Syndrome, petrol sniffing, physical and emotional violence and poor nutrition.

A presentation delivered to the Roundtable participants outlined the major findings of the *Western Australian Aboriginal Child Health Survey (WAACHS)* which was conducted by the Telethon Institute of Child Health Research. The presentation reiterated the concerns of the Roundtable, especially in relation to the well being and development of babies and children.

The *WAACHS* revealed that Aboriginal children experience a high risk of clinically significant emotional or behavioural difficulties. The survey highlighted the facilitators of poor social and emotional well being as being:

- Biological stress such as low birth weight and poor nutrition;
- Stress that accumulates and overwhelms the individuals ability to cope;
- Chaotic and unpredictable environments, such as those resulting from multiple family stresses, high levels of residential mobility and changes to household composition;
- Social exclusion; and
- Social inequities arising from differences in the accumulation and use of resources and reduced access to the means to generate these resources.

The survey stresses the importance of positive experiences in early childhood as crucial to the development of good health and well being. It notes that early care and nurturing have a decisive and long-lasting impact on how people develop, their ability to learn, and their capacity to regulate emotions. The survey comments:

The brain's plasticity also means that there are times when negative experiences or the absence of appropriate stimulation are more likely to have serious and sustained effects.

And,

The major risks to early brain development include exposure to abuse/or neglect: maternal depression; parental substance abuse; poor nutrition and poverty.

The WAACHS also observes:

There are clear associations between family and household factors and risk of clinically significant emotional and behavioural difficulties experienced by Aboriginal children and young people.

The factor most strongly associated with high risk of clinically significant emotional or behavioural difficulties in children was the number of major life stress events (e.g. illness, family break up, arrests or financial difficulties) experienced by the family in the 12 months prior to the survey.

The Productivity Commission has also noted concern about the development of Indigenous children and young people. The Steering Committee for the Review of Government Service Provision (SCRGSP) has been tasked by the Council of Australian Governments (COAG) to examine Indigenous disadvantage, and further, to develop a strategic framework to address that disadvantage. The *Overcoming Indigenous Disadvantage - Key Indicators* report identifies key areas for improvement and encourages mainstream agencies to adopt the proposed benchmarks when developing policy and programs aimed at addressing disadvantage in Indigenous communities. One of the priority outcomes identified in the report is positive childhood development.

Similarly *Pathways to Prevention*, a report developed for the National Crime Prevention strategy examining the developmental and early intervention approaches towards crime prevention, urges government to focus on early developmental phases of a child as a means to thwarting future contact with crime.

In 1991 the Royal Commission into Aboriginal Deaths in Custody identified the links between early disengagement with the formal education system and early involvement in the criminal justice system. Supporting this claim the Australian Bureau of Statistics (ABS) identified that 37.1 percent of Indigenous adults coming into contact with the criminal justice system had ceased schooling before year 10.

In recognising early and ongoing engagement with the education system as a crucial development pathway in minimising later contact with the juvenile and criminal justice system *Overcoming Indigenous Disadvantage* emphasises the importance of high quality early childhood education.

The report also places a strong emphasis on the importance of continuing importance of educational outcomes throughout the transition between childhood and early adulthood. The report notes:

For most students, compulsory education ends in year 9 or 10. Many of the Indigenous students who elect to leave at this point have poor literacy and numeracy skills. They are, as a result, limited in what their options may be for the future. As stressed by many of the Indigenous people consulted, this all too often leads into boredom, despair, substance abuse, and criminal activity. The retention of Indigenous students at this stage in their education is, therefore, one of the potential milestones in breaking the cycle of disadvantage.

For those Indigenous young people with a cognitive/intellectual disability or a mental health issue the difficulties of remaining in the education sector are vast. However maintaining links with the sector including vocational programs is vital to social and emotional well being. Remaining in education has been shown to greatly reduce contact with the juvenile justice system. Gaining an education can contribute to self esteem as well as greatly enhance the potential to positively contribute to the community and the society more broadly.

A Department of Family and Community Services (FaCS) research paper on early intervention strategies also acknowledges the increasing recognition being paid to positive experiences in early childhood development as being crucial to an individual's future outcomes. While supporting the broad range of programs and initiatives developed to assist young people who may experience disadvantage, the report highlights the concern:

...that disadvantages experienced by children, families and the community will not be solved by ameliorative programs alone and that structural causes must also be addressed.

It is imperative therefore that when authorities consider crime prevention strategies, especially those that focus on juvenile offending or youth recidivism, a broad approach is adopted, not one that merely looks at what can be done once an offence has been committed.

- ***Diversion from the juvenile justice system – alternative sentencing mechanisms***

Several consultations, including the National Roundtable, raised the potential for diversionary programs as a way to address the specific issues confronting Indigenous young people with a cognitive disability and/or a mental illness who come into contact with the juvenile justice system.

Diversionary programs aim to divert the offender, in this case a juvenile offender, away from the formal criminal justice system. Diversion can include oral or written warnings, formal cautions, victim-offender and family conferencing or referral to a community based program. There are also innovative sentencing mechanisms such as circle sentencing and drug courts, which divert offenders from the normal court sentencing process.

Encouragingly, and increasingly, legal systems in Australia are employing, in varying degrees, a range of restorative justice practices to address accelerating incarceration rates of Indigenous people. Moreover, a range of diversionary programs exist for young offenders in Australia, although the type and extent of their use varies considerably between each state and territory.

Juvenile diversionary programs have been developed recognising, that if a young person comes into contact with the formal criminal justice system, especially the custodial system, then they are more likely to have ongoing contact with the system, than those individuals initially diverted from the system. In other words, if involvement with the criminal justice system can be avoided then the chances of re-offending are decreased. According to the offence diversion can be implemented as pre-court or pre-detention.

However there have been no studies conducted examining the impact of diversionary practices with Indigenous young people with cognitive/intellectual disabilities or mental health issues, therefore no comment can be made as to the effectiveness of diversion for this group. However community consultations revealed a concern about the adequacy of resources available in some communities to support those Indigenous young people with a cognitive disability and/or mental illness being diverted from formal justice settings.

- ***Culturally relevant and appropriate assessment tools***

The consultations, including the Roundtable discussion, revealed that often young people, have not received any kind of assessment (either for cognitive disability or mental health) prior to their incarceration.

Young people who have received an assessment, prior to a first custodial sentence, have usually displayed obvious signs of a disability or mental illness. The magistrate will only be advised of the young person's condition if legal counsel or other involved agency, such as community services, have raised concerns about the young person's ability to understand the situation he or she is facing. Many of those consulted for this project expressed concern only those young people displaying 'obvious' signs of cognitive/intellectual disability or mental illness, will be referred for assessment. For those young people with a mild disability or mental illness, or perhaps a serious condition that is not manifest at the time of their arrest or court appearance, an assessment will not be carried out until they enter the detention centre.

Further concerns were raised by research participants about the cultural suitability of assessment and subsequent health services provided to Indigenous young people in detention. Concern was raised at to the access to Aboriginal Medical Services and

other Indigenous specific services such as Indigenous mental health professionals, which was minimal to none.

Of even further concern is access to services available to young people in detention. The Victorian Youth Parole Board and Youth Residential Board have recently expressed concern that some young people in juvenile detention still do not have access to regular psychiatric services.

However most of the responses received from relevant government departments outlined comprehensive health (including mental health) programs delivered to young people in detention. The responses also acknowledged (although few provided detailed information) the importance of culturally sensitive assessments with some jurisdictions having implemented appropriate assessment procedures.

Simpson and Sotiri have observed:

In recent decades, there has been a movement away from an over-reliance on IQ scores for assessing disability. For example, IQ scores have a cultural bias and are ill-equipped to assess conditions such as autism. Also, many people in contact with the justice system have multiple diagnoses, such as an intellectual disability and a psychiatric disability, drug or alcohol disorder, and/or a brain injury.

The issue of the degree of a person's 'support needs' has taken greater prominence as a flexible way to assess the nature and extent of a person's need for assistance in everyday living.

In Victoria for example the *Offending Needs Indicator for Youth (ONIY)* has been developed which has an emphasis on the developmental needs and well-being of the young person.

- Demographic factors are noted so that workers are alerted to any particular needs a young person may have. These include Indigenous status and a range of health and developmental needs including:
  - Risk of self-harm or suicide
  - Mental Health
  - Cognitive function
  - Developmental level
  - Poor literacy/numeracy
  - Health issues.

Equally, moves are being made in several jurisdictions to address not only the assessment procedure but the delivery of services to Indigenous youth in detention. For instance in South Australia:

Children, Youth and Family Services, in partnership with Child Adolescent Mental Health Services, has established "Indigenous Well-Being" workers to provide mental health assessment, follow up services and referral for Indigenous young people (including those with cognitive disabilities) in the State's two juvenile detention centres.

In Victoria also, the Juvenile Justice and the Youth Services Branch and the Mental Health Branch of the Department of Human Services have joined forces to address and enhance access to services for young people in juvenile justice with mental health problems. Although this is not an Indigenous specific program, it does acknowledge the high rates of young Indigenous people in detention with mental health issues.

The Victorian Youth Parole Board and the Youth Residential Board in their 2005 Annual Report expressed the following concern:

... that over the past several years there has been an increase in the number of young people on custodial sentences who present with mental health problems. These issues are often compounded by substance abuse and persistent behaviour problems. Young people with a 'dual diagnosis' (mental health/alcohol and other drugs) are often assessed as being outside the criteria for both mental health and substance abuse service systems.

The report continues:

The Boards do not underestimate the challenges inherent in service provision for these young people. However, they are concerned that, for those released into the community on parole, appropriate services and supports are often not available. In fact, it is the experience of the Boards that there is a lack of intensive support and treatment services available for extremely vulnerable young people with complex needs who are leaving the custodial system.

Moves to address these concerns are welcome, but whether these strategies are enough to address the specific challenges facing Indigenous young people with cognitive disabilities and/or mental health problems remains to be seen.

- ***Resources in the community***

The consultations heard that very few resources exist in the community that support Indigenous young people with a cognitive disability or a mental health problem especially those who are involved with or have been involved with the juvenile justice system.

Discussions with research participants revealed concerns with regards access to community support services and the inadequacy of services to deliver specific services to Indigenous young people post-release or as part of a community corrections order.

If diversionary programs are to be supported by the community then the community sector needs to be adequately resourced and supported by appropriate funding bodies.

The *Social Justice Report* 2004 highlighted the lack of appropriate community services available to Indigenous women upon their release from prison. Although the report focuses on the lack of appropriate accommodation options available to Indigenous women post release, the concern extends to community support services generally.

People With Disabilities Australia (PWD) expressed concern in their submission to the Senate Inquiry into children in institutional care about the high percentage of children in detention with a mental illness or cognitive disability. The submission said:

These findings link failures in the mental health, child protection, disability and community service systems with increased risk of children entering the juvenile justice system. These failures include lack of support services, appropriate treatment and behaviour intervention programs, family based care services and accommodation options; the use of inappropriate and harmful service practices, such as physical restraint and medication; the risk or actual occurrence of physical and sexual assault; and the reliance on the police to resolve challenging behaviour. There is also evidence to suggest that the lack of support services for children and appropriate policies and practices to deal with challenging behaviour often leads services to rely on or view juvenile justice facilities as ‘providing a stable and secure care environment and … as a solution to a complex problem.

- ***Coordinating government services – joint care management***

Another issue that was raised repeated throughout the consultations and the Roundtable discussions was that often young people are referred from one service to another, with each agency working in isolation and rarely working together for the benefit of the young person. This contributes to the siloing of services i.e. disability services and juvenile offender services - which is to the detriment of the young person.

It is difficult for most young people to navigate themselves around the different services available to them, let alone if the young person has a cognitive disability or a mental illness. The young person may also be additionally disadvantaged if they are Indigenous and have an unfamiliarity, fear or mistrust of government officials.

Sometimes though a young person (especially if a co-morbidity exists) may require more immediate attention to a specific issue, suicidal behaviour for example. In this situation it may be more appropriate for a particular service to take charge and delay attention to the person’s accompanying needs.

However many people we spoke with expressed the concern that once a young person is entrenched into a particular system (i.e. a mental health system) then is unlikely that other issues will be adequately addressed. This is especially so for young people in detention. Recently however there have been moves to address the problem of agencies not communicating and working effectively with each other.

- ***Report conclusions and summary***

The early years of development are crucial to averting a cognitive disability or later mental health problems. The alleviation of socioeconomic adversity such as unemployment, family violence and incarceration can all impact on the well being and positive developmental progress of a young person. Studies, such as the *Western*

*Australian Aboriginal Child Health Survey* have shown the negative impacts of poverty on a young person's physical and mental development.

Participants of the consultations also strongly supported diversionary programs as a means for addressing the specific issues that confront Indigenous young people with cognitive disabilities and/or mental health problems. While there has been little to no research undertaken on this, anecdotal evidence seems to be that a young person with a disability or mental health issue will benefit from a diversionary approach rather than a custodial sentence.

The consultations also heard concerns regarding the methods for assessing cognitive disabilities and mental illness are not culturally appropriate and that culturally sensitive testing needs to be further implemented not only in detention centres but in schools and other community environments. People involved with Indigenous young people, such as teachers, police and health professionals need to receive training on identifying symptoms and being able to address the issue in a culturally sensitive manner.

All this depends however on the availability of culturally appropriate services in the community. The research while not providing a mapping of services available in the community or in detention did hear from participants that this was an area requiring more support from government and community alike. The presence of culturally appropriate services in the community may serve not only as a source of prevention to offending in the first instance, but may be also crucial to providing ongoing support to young people, their families and their communities. Community support agencies can play a vital role in diversionary programs as well as in probation and parole programs.

## g) Indigenous victims of crime

### Documents extracted in this section:

Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Addressing the needs of Aboriginal and Torres Strait Islander peoples as victims of crimes*, Speech, Launch of White Ribbon Day, 18 November 2005<sup>16</sup>

I stand here as the Aboriginal and Torres Strait Islander Social Justice Commissioner and also as an Ambassador for White Ribbon Day, the International Day for the Elimination of Violence Against Women. My presentation today will generally focus on issues faced by Aboriginal and Torres Strait Islander women as victims of crime.

Almost 20 years ago, on November 29, 1985, the United Nations General Assembly adopted by consensus a Declaration of the basic principles of justice for victims of crime and for the victims of the abuse of political and other forms of power. There is real cause to celebrate the 20th anniversary of this event. Twenty years ago, governments' responses to crime were largely focused on 'catching criminals', with little regard to their victims.

Today the victims of crime are acknowledged and offered support including – where possible – being provided with redress and restitution. In Australia, the influence of the Declaration can be seen in victim's rights now enshrined in state and territory legislation: for example, the right to victim's compensation or to have Victim Impact Statements admitted at trials.

Victims rights are of particular importance to Aboriginal and Torres Strait Islander peoples as they are far more likely to be the victim of violence than non-Indigenous people in Australia.

For example, the Australian Bureau of Statistics' National Aboriginal and Torres Straits Islander Survey (what I will refer to as the 'NATSISS') indicates that Aboriginal and/or Torres Strait Islander people aged 18 years or over experienced double the victimisation rate of non-Indigenous people in 2002. However, the NATSISS is likely to under-reported the true extent of the problem. I say this because it did not survey Aboriginal and Torres Strait Islander people in institutional settings – notably hospitals and prisons - the very places one might expect to find a high concentration of victims of crime.

Indeed, according to the Australian Bureau of Statistics and the Australian Institute of Health and Welfare in their excellent biannual report *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People*, Aboriginal and Torres Strait Islander males were hospitalised for assault at almost **7 times the rate** of the general population males, and Aboriginal and Torres Strait Islander females at **30 times the rate** of that of females in the general population in 2003-2004.

<sup>16</sup> Available online at: [www.humanrights.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.humanrights.gov.au/speeches/social_justice/victims_of_crime_speech.html).

The Australian Bureau of Statistics note, however, that there is likely to be an undercount. While the Bureau does not spell it out, it is not too hard to imagine how this might be so, with assault victims attributing injuries to other causes, to avoid scrutiny and the potential involvement of the police.

I also note that in the *Health and Welfare* report that Aboriginal and Torres Strait Islander deaths from assault were, for various age groups reported at, **10 to 18 times higher** than the rate in the general population for males and **6 to 16 times** the rate for females over 1999 – 2003.

There are also particular crimes that are almost certainly significantly under-reported.

**First are crimes of sexual violence.** It should be no surprise that in the same way sexual violence is often shrouded in secrecy in the general community, it is even more difficult to estimate with any accuracy the extent and experience of Aboriginal victims of rape. However, I note one study carried out in New South Wales in 2002 that found more than 40% of Aboriginal women in prison identified as victims of sexual assault as an adult; and another in Western Australia that found 67% of Indigenous women incarcerated in October/November 2001 reported having experienced abuse as children or adults.

In this and so many other ways crime victimisation feeds a vicious cycle in communities. I believe that a good deal of the mental health problems reported in Aboriginal and Torres Strait Islander peoples and communities – low self-esteem, depression, guilt, fear and relationship difficulties, substance abuse through to self-harm and suicide – are as much a result of exposure to violence and crime, as drivers of it. Crime victimization feeds into a broader pattern of trauma experienced by many Aboriginal and Torres Strait Islander people and that must be acknowledged by governments and policy makers.

I also want to reflect on why many Aboriginal and Torres Strait Islander women do not report sexual assault. Reasons given in studies that address this question included: intimidation by authority figures and white people in general; the closeness of communities leading to fear of reprisals or shame; the relationship of the victim to the victimiser; unfamiliarity with legal processes; and a fear that the victimiser will be sent to prison.

**The second area where crime is likely to be underreported is in relation to crimes within the family.** In particular, crimes against Aboriginal and Torres Strait Islander children, which are all too often reliant on medical and social services authorities to expose. Substantiated child protection orders data does provide some insight into the extent of this – that is, where a child is legally determined to have been physically, sexually or emotionally abused, or neglected by his or her family or carers. And the rate for which these orders are made is far higher in relation to Aboriginal and Torres Strait Islander children than non-Indigenous children. Again referring to data in the *Health and Welfare* report, in 2003 -2004 in Victoria, orders were made **at ten times the rate** of those made in relation to non-Indigenous children, and in WA and SA, **eight times the rate**.

I note that for many Aboriginal and Torres Strait Islander men and women, the cycle of victim and victimiser and the normalisation of violence begins in the family, in the home, and in the community, even if they were not directly victimised themselves. In my opinion, any child that witnesses family violence is also a victim of crime.

**Now having surveyed the potential extent of the problem, the first question I want to address is - Why is this happening?** What are the reasons? Well, my first observation is that in many, although certainly not all, cases it is Aboriginal and Torres Strait Islander people who are the perpetrators of violence against other Aboriginal and Torres Strait Islander people, particularly within communities.

In my opinion, the high levels of victimisation reflect a real crisis - a breakdown of community and family structures and a deterioration of traditional, customary law and practices - processes used for generations to regulate the behaviour in communities. All these were integral component of the operation of Aboriginal families and societies.

A related issue is that many Aboriginal and Torres Strait Islander people are exposed to high levels of chronic stress on a regular basis; through poverty, lack of education and employment prospects, racism and discrimination, and cultural dislocation. Because of these things, many Aboriginal and Torres Strait Islander people have little sense of how to control their lives, as individuals, communities and as a distinct cultural and racial group within Australia. They may also be traumatised by, for example, being removed from their families as a child, or be carrying the intergenerational effects of such removals. To the degree these things cause chronic stress they can manifest as mental health problems and as substance abuse – as already noted - drivers of violent crime. Also, men's violence against women has been linked to male offenders' perceived lack of control over their lives.

**So what to do about it?** Well, while acknowledging the important place of victims support services in a total response, I also make the point that prevention is obviously a far better option. Responses are needed now rather than later. The NATSISS, for example, reported a doubling of reported threatened or actual violence being experienced by Aboriginal and Torres Strait Islander people over 1994 (the year of the first survey) and 2002 when the second survey occurred.

At its broadest, an address to the issue of Aboriginal and Torres Strait Islander victimisation is related to a much broader response to the systemic issues that affect Aboriginal and Torres Strait Islander people and communities – an address to poverty and overcrowding in communities is required, for example. And to empower Aboriginal and Torres Strait Islander peoples as individuals, communities and as cultural and racial groups to take control of their lives. However, I do not want to dwell on that now.

Below this broad level, a number of interventions are required. To that end, I welcome the recent focus on family violence in communities and the roll out of family violence prevention services over the past few years and programs like the Indigenous Women's Leadership Program developed by Kerrie Tim and her team at the Office of Indigenous Policy Coordination. I also welcome initiatives such as the recently announced *National Emotional and Social Well Being Framework for*

*Aboriginal and Torres Strait Islander People* and some of the new Shared Responsibility Agreements that seek to encourage communities to address family and community safety – through for example, establishing night patrols in communities where there is little if any police presence, through empowering and strengthening women, or through encouraging the community’s men to work closely with family violence prevention services.

However, more needs to be done.

- There is a need for more Aboriginal and/or Torres Strait Islander people to be trained as mental health professionals and para-professionals to work in communities. And also the need for mainstream services to be more attuned to the needs of Aboriginal and Torres Strait Islander people. To that end, I note, for example, the excellent work being done at the Djirruwang Program at Charles Sturt University to train an Aboriginal and Torres Strait Islander mental health workforce.
- I also highlight the need for more and integrated primary mental health, substance abuse and family violence services in communities. Services that are controlled by the community they serve.
- There is also a need for greater linkages between Aboriginal and Torres Strait Islander peoples and communities and the justice system. I highlight, for example, the impact of circle sentencing and specialist Koori Courts on getting Aboriginal and Torres Strait Islander people out of the cycle of crime and violence. A significant feature of this approach is empowering Aboriginal elders in the community through the sentencing process and by providing a safe place for victims of crime to be involved in the process, if they so choose. While these processes need to be specifically tailored to the cultural circumstances of each community in which they are to operate, and do not provide a panacea for all social problems facing Indigenous communities, the early signs are highly encouraging in bringing meaning into the criminal process for offenders, particularly chronic offenders.

**Finally, what about Aboriginal and Torres Strait Islander peoples’ rights as the victims of crime?** Are they accessing the support and other services available? Well the evidence suggests that in some cases Yes, and in others No. For example:

- **Western Australia:** At the Western Australian Victim Support Service, for example, in the last 12 months 11.6% of referrals were for Aboriginal and Torres Strait Islander people, approximately four times their representation in the Western Australian population (about 3%)<sup>17</sup>) For the country/regional services, the referral figure is 24.8% and for the metro region it is 2.1%.
- **Northern Territory:** Victims of Crime NT does record Indigenous status. In 2003-04, 9% of referrals were for Aboriginal and Torres Strait Islander people and in the current financial year this has increased to 12%. While the increase is to be

welcomed, this figure still represents less than half of Aboriginal and Torres Strait Islander peoples' representation in the NT population (about 30%<sup>18</sup>).

However, in the main, we just don't know. Although I do not want to single particular support services out here, I highlight that, while they provide an important service and their professionalism is not questioned, a number of state and territory victims support services and victims compensations services, in particular, do not record Indigenous status of their clients. This in my eyes is a significant oversight – how is a service to know it is meeting the needs of Aboriginal and Torres Strait Islander people if monitoring is not taking place?

From a human rights perspective, it is essential that all Australians enjoy the same opportunity to access and use these services. And equality of opportunity must be related to relative needs of different population groups. As such it is incumbent on such services to proactively ensure they are meeting the higher need for victims support services of Aboriginal and Torres Strait Islander people. This is particularly important given that Aboriginal and Torres Strait Islander people, and particularly women, are a vulnerable and easily marginalised population group. However, the first step in this direction is monitoring.

Further steps are then of course required: for example:

- Establishing or strengthening linkages with hospitals and prisons, and Aboriginal legal and medical services;
- Greater efforts must also be made to establish services or outreach services in remote communities to ensure people there can access them. Ideally, these would be integrated into mental health, substance abuse and family violence services;
- In general, there is also room for awareness raising and the promotion of victims support services to Aboriginal and Torres Strait Islander people.
- I am also a strong believer that we need to continue to focus our efforts to work with Aboriginal and Torres Strait Islander communities to educate people about violence and send a strong message that it is not part of Aboriginal culture.

A final point I want to make is that it is important for victim support services to recognise that Aboriginal and Torres Strait Islander people may not approach issues like family violence, or victimisation in the same way as non-Indigenous people. For many Aboriginal and Torres Strait Islander victims of crime and family violence the solutions to that problem are seen to lie in strategies that attend to the needs of all members of the community, particularly in 'healing' rather than punishing the victimisers.

This point of difference was discussed in my *Social Justice Report 2004* in relation to the post-release needs of Aboriginal and Torres Strait Islander women. Victim support services need to acknowledge and address that fully engaging with Aboriginal and Torres Strait Islander 'victims' and women in particular may require a quite different set of capabilities and quite a different approach. Again, such services are best designed and delivered by Aboriginal and Torres Strait Islander people to Aboriginal and Torres Strait Islander peoples.

## **h) Substance abuse issues**

### **Documents extracted in this section:**

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Chapter 4 – Responding to petrol sniffing on the Anangu Pitjantjatjara Lands: A case study, Social Justice Report 2003*
- Tom Calma, *Implications of the Racial Discrimination Act 1975 with reference to state and territory liquor licensing legislation*, Speech, 34<sup>th</sup> Australasian Liquor Licensing Authorities' Conference 26-29 October 2004 Hobart, Tasmania

### **Aboriginal and Torres Strait Islander Social Justice Commissioner, *Chapter 4 – Responding to petrol sniffing on the Anangu Pitjantjatjara Lands, Social Justice Report 2003*<sup>19</sup>**

There are significant links between substance abuse and violence. The links between substance and abuse and violence mean that strategies to prevent and mitigate substance abuse also need to address the impacts of substance abuse on communities.

In 2003, my predecessor looked closely at the issue of petrol sniffing through a case study on the Anangu Pitjantjatjara Lands. There were a number of significant findings.

In 2001, the Australian National Council on Drugs published a report examining the structural determinants of substance abuse. It states that petrol sniffing and volatile substance abuse by young Indigenous people, while clearly having some similarities with non-Indigenous people, must be viewed as part of a broader picture of Indigenous disadvantage:

When combined with an environment stressed by poverty, racism and frequent bereavement, some remote Aboriginal communities have been beset by petrol sniffing among their young people. Indigenous communities with a history of involvement in the cattle industry were found by Brady to have resisted solvent-sniffing problems. This resilience was attributed to the independence, self-esteem and outlet for risk-taking afforded by involvement in the cattle industry. Individuals who had adopted Christianity or who valued other activities such as sport or fishing were also found to be resilient to sniffing solvents. Brady concluded that social and cultural factors are paramount in solving youth health problems such as solvent sniffing in Aboriginal communities.

Potential responses to address the impacts of sniffing need to address the needs of those affected by substances, those potentially at risk of taking up substances at dangerous levels, and the impacts on those who come into contact with people affected by substances.

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<sup>19</sup> Available online at: [www.humanrights.gov.au/social\\_justice/](http://www.humanrights.gov.au/social_justice/)

A 2001 coronial inquest into petrol sniffing on the Anangu Pitjantjatjara Lands found that the social impacts of petrol sniffing were as follows:

Petrol sniffing poses a range of problems to sniffers, their families, communities and to the wider society. Among the problems which have been associated with petrol sniffing are: serious health consequences including death or long-term brain damage, social alienation of sniffers, social disruption, vandalism and violence, increased inter-family conflict and reduced morale on communities, incarceration of sniffers and costs to the health system in terms of acute care and providing for the long-term disabled...

Typically, responses to address substance abuse are based on three phase health frameworks that include prevention measures, intervention strategies, and measures to overcome the impacts of those disabled through substance abuse. A range of responses to substance abuse nationally include:

- Primary interventions – to reduce recruitment into substance abuse;
- Secondary interventions – seeking to achieve abstinence and rehabilitation;
- Tertiary intervention – providing services to the permanently disabled

Specific interventions to protect those who may be victims of violence as a consequence of substance abuse are outlined by the United Nations High Commissioner for Human Rights. The following Draft Guidelines on Poverty Alleviation incorporate recommendations concerning the right to personal security which are especially pertinent to the issue of access to police services and protection.

Guideline 11: Right to Personal Security states that:

178. Police protection should be provided in poor areas particularly affected by violence, harassment, intimidation and discrimination. Poverty reduction strategies should identify the worst affected areas, such as slums, and provide them with a sufficient number of specially trained law enforcement personnel.

There have been interventions in South Australia to address the impact of violence fuelled by substance misuse. From 2002 to 2004 the South Australia Police Department implemented an Operation Safe Lands aimed at increasing police presence, improving safety and reducing public disorder on Anangu Pitjantjatjara Lands. Operation Safe Lands involved bringing five officers on to the Anangu Pitjantjatjara Lands for discrete periods of time to make a concentrated effort in targeting problems such as violence, theft, cannabis use and petrol sniffing, and develop a greater intelligence base regarding crime prevention.

This intervention was in response to the Coroners finding that there was very little protection for community members on Anangu Pitjantjatjara Lands because of the prohibitive distances the police had to travel. It was essential to decrease police response times to violence and other issues on a permanent basis.

- **Primary interventions**

Primary prevention measures include the employment youth-workers, the development of alternatives to incarceration for young offenders, and residential disability services.

Prevention of the recruitment of new sniffers is a crucial intervention in order to avoid escalation of the problem. Recruitment into petrol sniffing is perceived to stem from the boredom and futility experienced by young people in response to the degree of poverty and marginalisation.

In the Anangu Pitjantjatjara Lands, the employment of youth workers was a substantial primary intervention. It allowed for the provision of after-school and holiday programs and activities.

- **Secondary interventions**

In certain individuals, there is no hope of reversing the effects of brain damage as a result of petrol sniffing; the question now is how to treat them. For those where rehabilitation is possible, interventions can provide benefits for the community as well as for those affected by substances. The establishment of outstation programs (such as Mt Theo near Yuendumu) has provided a venue for community respite, as well as providing recreation, skills training education for substance mis-users.

Programs such as the one operating at Mt Theo provide a significant avenue through which community members can intervene in petrol sniffing and do so in culturally-appropriate ways. They are not suitable for dealing with petrol sniffers with a high level of security or rehabilitation needs. Outstations and homelands nevertheless provide a valuable option as a harm minimisation strategy and have a place within a multi-faceted approach to petrol sniffing on the AP Lands.

Another significant intervention to intervene in instances where there are substance abuse problems is to interrupt the supply of substances. Recommendation 8.4 of the South Australian Coronial Inquest called for the continuation of Avgas (aviation fuel) under the Comgas scheme as a successful harm minimisation strategy. Avgas is supplied to about thirty Aboriginal communities under the Comgas Scheme administered under the Commonwealth's Aboriginal and Torres Strait Islander Substance Use Program in the Department of Health and Ageing. The Scheme ensures that communities using aviation fuel do so at no additional cost. Avgas is not permitted otherwise for use in motor vehicles as it does not meet several of the fuel specifications under the *Fuel Quality Standards Act 2000*.

Data collected by Nganampa Health Council in the mid-1990s demonstrates:

an unequivocal and marked reduction in petrol sniffing as a consequence of the introduction of Avgas to all communities. Not only was there a significant decline in the number of petrol sniffers for the following three years but there seemed to be a marked decline in fitting among petrol sniffers, probably as a consequence of less frequent sniffing being possible because of limited access to petrol.

Child intervention and protection is important in regard to volatile substance abuse in terms of protecting children at risk of self-harm or harm by others (such as violent or abusive behaviour by sniffers or others). Proactive community development and service delivery is required including the provision of safe places for young people. These can include early childhood centres, after-school activities and holiday programs.

- **Tertiary interventions**

An appropriate tertiary intervention response is to provide disability services and facilities for petrol sniffers who have incurred a serious degree of disability. In some instances there is a need for secure care facilities with a potentially multifunctional role that might include rehabilitation.

Where there are no specific disability facilities there is a need for outreach disability workers in communities. The *Review of delivery of services to people with disabilities on Anangu Pitjantjatjara lands* found support for the provision of disability care in communities across the AP Lands:

- The Anangu preferred position is to have Anangu disability care workers based in their own communities supported and trained by a regionally based community controlled professional team.
- Given the situation in all the communities across the Lands, and while some communities may be able to deliver services in the short term, none are able to maintain effective and ongoing services to the aged and disabled. They do not have the infrastructure and resources nor capable, qualified and dedicated staff to deliver such services.
- While people may prefer to have everything delivered close to home, unless services are delivered by one of the regional agencies it is an impossible task. NPY Women's Council, Nganampa Health Council and AP Council through AP Services for housing and community infrastructure, are the current functional organisations.

A further consideration in terms of tertiary interventions is the need for consultation with communities at the local level to inform a regional response. This allows for the sharing and pooling of resources where there may not be sufficient resources in a single community to provide appropriate interventions.

**Tom Calma Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with reference to state and territory liquor licensing legislation', Speech, 34<sup>th</sup> Australasian Liquor Licensing Authorities' Conference 26-29 October 2004 Hobart, Tasmania, 28 October 2004<sup>20</sup>**

I have been asked to speak with you regarding the implications of the *Racial Discrimination Act 1975* (Cth) on liquor licence conditions and restrictions in Indigenous communities. I may at times refer to this act as the RDA.

The RDA is one of a suite of anti-discrimination laws which exist at the Federal level and which prohibit particular conduct by people at all levels of Australian society. The Act makes it unlawful to discriminate against a person on the basis of their race, as well as making speech which amounts to racial hatred or vilification unlawful.

But the RDA does more than prohibit particular acts or speech. It also has a role to play in addressing racial inequalities in Australian society, as well as in promoting racial tolerance. The focus of my presentation today is going to be on both this first, negative or prohibitive aspect to the legislation, as well as this second, positive aspect.

Generally speaking, the purpose of my talk is to identify issues which may arise under the RDA in relation to the creation of restrictive conditions on liquor licences in Indigenous communities, and in areas surrounding those communities. The Act is also relevant to the manner in which the condition is enforced and how the decision to impose the condition was arrived at, that is, what was the level and type of consultation with the community and are the restrictions a 'community-decision'?

I would also like to move away from the more legalistic aspects of these issues and raise for consideration the broader issue currently being debated around the country, that is, the efficacy of restrictions on the purchase and distribution of alcohol. In terms of Indigenous substance abuse, is it sufficient to address just the supply aspects of alcohol without addressing the causes for demand? I'll address this in more detail shortly.

## **1. Overview of relevant provisions of the *Racial Discrimination Act***

The RDA is a fairly faithful implementation in our domestic system of an international treaty which Australia is a party to, namely the International Convention on the Elimination of all Forms of Racial Discrimination, or ICERD.

The Act has three main provisions relevant to the issues we are discussing today: sections 8, 9 and 10:

- Section 9 prohibits discrimination on the basis of race, colour, descent or national or ethnic origin. This can be either direct or indirect discrimination;

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<sup>20</sup> Available online at: [www.humanrights.gov.au/speeches/race/LiquorLicensingAuthoritiesConference.html](http://www.humanrights.gov.au/speeches/race/LiquorLicensingAuthoritiesConference.html).

- Section 8 allows for an exemption to direct discrimination where the circumstances of the situation can be described as a special measure; and
- Section 10 enables a law to be found invalid if it does not provide equal enjoyment of rights on the basis of race.

Let me explain.

Section 9 (1) of the RDA prohibits *direct* discrimination on the basis of race. Direct discrimination occurs when someone is treated less fairly because of their race than someone of a different race and which has the effect of impairing their ability to exercise their human rights in a wide range of areas of public life. For example, it could be directly discriminatory if a real estate agent did not rent a house to a person because that person is an indigenous person in circumstances where they would be prepared to rent the same house to a non-indigenous person.

An action that breaches section 9 (1) (or other related provisions in the RDA such as section 13 relating to the provision of goods and services) will be unlawful under the RDA. However, the special measures provision of the RDA in section 8 sets up an exception to this. I will discuss the content of this later - but in essence, an action will not be considered discriminatory if it can be established that the purpose of the differential treatment is to confer a benefit on a particular racial group in order to remedy their unequal or disadvantageous level of enjoyment of human rights.

Some acts of discrimination, however, are more subtle than direct discrimination and do not involve a direct exclusion or preference being given to one racial group over another. This is described as indirect discrimination and is set out in section 9 (1A) of the RDA. Indirect racial discrimination can occur when a rule is applied to everyone, but it affects people of a particular race more harshly than other groups and it is not reasonable. For example, a rule that only people over a certain height can be employed in a particular job could be applied to everyone 'equally'. However, it may disadvantage some races more than others. The rule may be indirectly discriminatory if the height requirement is not necessary to do the job and is not a reasonable requirement.

There are a number of factors that a person must satisfy if they were arguing that an action amounted to indirect discrimination under the RDA. They are:

- That a term, condition or requirement was imposed on the complainant
- The requirement to comply must have interfered with the recognition, enjoyment or exercise, on an equal footing, by persons of the same race as the complainant, of any relevant human right or fundamental freedom
- The complainant does not or cannot comply with that term, condition or requirement, and
- That the term, condition or requirement was not reasonable.

There are two issues I will discuss in more detail in relation to indirect discrimination as it might apply to the context of restrictions on liquor licences. These are issues relating to:

- Compliance with the term, condition or requirement and
- The reasonableness of the term, requirement or condition.

Finally, there may be some circumstances in which someone may wish to challenge the very terms of a piece of state legislation, such as a state or territory liquor licensing Act, as being racially discriminatory rather than the discretionary decisions of, for example, a liquor licensing director in exercising his or her powers under that Act. If someone can establish that a state Act is inconsistent with the provisions of the federal RDA, then according to the Commonwealth Constitution, the federal Act will prevail to the extent of the inconsistency. If someone were to take this course of action, they would have to seek a declaration from a court under section 10 of the RDA that the state legislation is invalid to the extent of the inconsistency with the RDA. However, this particular course of action is carried out independently of the Human Rights and Equal Opportunity Commission and is not the subject of my discussion today.

In terms of liquor licence conditions, variations and declarations, I note that these are framed differently across Australia. It is not possible, within the constraints of this speech, to discuss every possible type of licence condition to decide whether it may or may not comply with the RDA. Therefore, I will attempt to address what appear to be some of the main forms of liquor restrictions imposed in order to then consider the possible impact of the RDA on those restrictions - some licence conditions may potentially raise issues of direct discrimination and special measures, whereas others may raise issues of indirect discrimination.

Before going on to do this, I think it is important to note that the legal testing of the issues I am about to raise in the specific context of liquor licensing will only occur if a complaint is made about the imposition of certain restrictions on a liquor licence. It is possible to imagine circumstances where this may occur, for example, a disaffected member of an Indigenous community who does not agree with the approach taken by other community members who support the restrictions placed on a particular liquor outlet, or by a non-Indigenous person who is unhappy with restrictions that apply to everyone who lives in a particular community. To date, there have been no complaints lodged with the Human Rights and Equal Opportunity Commission about these issues, and no federal court cases that have considered the specific issue. Therefore, a lot of what I am about to discuss is based on our thinking about the issue and applying principles from decided cases in other areas.

## **2. Direct Discrimination and Special Measures**

Where the wording of a licence condition refers to a prohibition or limit on the supply of alcohol to indigenous people specifically, this may raise issues of compliance with the direct discrimination provisions of the RDA. An example of this is a condition which prohibits a licensee selling alcohol to any indigenous person belonging to an aboriginal group in a township.

However, as I mentioned earlier, the RDA exempts a range of actions from being unlawful discrimination if they constitute a special measure. These are actions which on their face might be seen as favouring a particular racial group, but are in fact required in order to raise a group suffering entrenched disadvantage to a level of rights enjoyment equivalent to the mainstream community.

The special measures provision is contained in section 8 of the RDA, and its rationale stems from the acknowledgement under international law that if you treat people who are not equal in exactly the same way, you will not achieve actual equality between them - all you will do is perpetuate the inequality between them.

So to use an analogy, if there are two people stuck down two different wells, one of them is 5m deep and the other is 10m deep, throwing them both 5m of rope would only accord formal equality. Clearly, formal equality does not achieve fairness. The concept of *substantive* equality recognises that each person requires a different amount of rope to put them both on a level playing field.

Therefore, if an act such as the imposition of the licence condition fits the criteria for a special measure, then it will not be unlawful discrimination under the RDA.

## 2.1 Characteristics of Special Measures

Special measures have some essential characteristics. These were set out in a High Court decision in 1985 called *Gerhardy v Brown*. In that case, Justice Brennan recognised that a law or condition (or policy) will constitute a special measure if:

- It confers a benefit on some or all members of a class, and membership of this class is based on race, colour, descent or national or ethnic origin;
- It is for the sole purpose of securing adequate advancement of the group so that they may enjoy and exercise equally with others, their human rights and fundamental freedoms;
- The protection given is necessary so the group may enjoy and exercise equally with others, their human rights and fundamental freedoms.

It is important to note that Justice Brennan qualified this by saying that:

- The wishes of the members of the class are relevant - a special measure will not bring about advancement if it is conferred against the group's will, and similarly, an advancement cannot confer benefits which convert members of the class from a disadvantaged class into a privileged class;
- The special measure must not maintain separate rights; and
- The special measure must not be continued after the objectives for which they were taken have been achieved - although this does not mean that it is necessary that the special measure be created with a finite time for its existence.

## 2.2 Special Measures and Alcohol Restrictions

An interesting dilemma is raised, however, by alcohol restrictions. This is because normally, special measures treat a disadvantaged group advantageously - but in relation to alcohol restrictions - on the face of it - we are treating the disadvantaged group, disadvantageously, that is, restricting a person's right to purchase 'goods'.

In terms of 'dry community laws', or externally imposed restrictions, the question is: do these restrictions actually, in effect, confer a benefit? If the action does not confer

a benefit, then the action does not meet the requirement of being classified as a special measure and may constitute unlawful discrimination.

In terms of Indigenous substance abuse, this is where arguments feature around whether it is sufficient to address just the supply aspects of alcohol, without addressing the causes for demand. Restrictions on alcohol supply, and the conditions used to implement them, need to be argued a little differently because, strictly speaking, they do not seem to confer a benefit. In fact, appearance wise, they seem to achieve exactly the opposite.

HREOC's *Alcohol Report*, published in 1995, considers the fact that while you might be detracting from the rights of the individual to alcohol by virtue of the restriction, you may be in fact conferring rights on the group as a result (known as 'collective rights'). In the *Alcohol Report*, the Commission reasoned that alcohol restrictions could be conceived as conferring some benefits in terms of the 'collective rights' it might promote in Indigenous communities. Such benefits might be a reduction in the incidence of violent crime, a reduction in the rate of Indigenous incarceration, and an increase in money available for food.

Certainly the object of many State and Territory Acts which restrict alcohol is the promotion of these collective rights, in particular freedom from violence in indigenous communities.

However, before we can presume that alcohol restrictions fall into a class of 'benefit conferral' that would allow us to consider whether they meet the rest of the special measures criteria, I make a disclaimer: ultimately it would be up to a court to decide whether a particular restriction on alcohol does in fact achieve outcomes such as reduced incarceration rates and decreased violence and whether or not the measures taken amounts to a special measure under the RDA.

The question for a court might be: where is the proof that alcohol restrictions or supply limits achieve these rights?

The answer to this question might in fact be contingent upon whether the condition or restriction was at the request of the community (which in fact then raises issues as to how we define the request or consent of the community as a whole).

Alternatively, a judge might look at external reviews of liquor restrictions and their effect. An example of such an external review is the Federal Attorney-General's 2001 Report on *Violence in Indigenous Communities* which puts forward the view that alcohol restrictions implemented in isolation of measures to address why people abuse alcohol will only exacerbate the consequences that restrictions were designed to prevent, in particular, Indigenous family violence.

It suggests that restrictions may encourage a defection of community members from their home communities to places where alcohol is available and that restrictions can lead to binge-drinking and drink driving in places where alcohol can be readily obtained by those community members. Similar research has shown a rise in other forms of more dangerous substance abuse where alcohol is not available. I want to come back to this point a little later.

We are still awaiting the results of documents such as the alcohol management plan review in Queensland. However I think the net effect is that whether a benefit has been conferred by the restriction or condition might also hinge on the range of policies, laws or practices in place to address the *cause* of alcohol abuse in Indigenous communities.

So, I would imagine what you want to know is whether certain licence conditions or variations that you impose, which initially appear to discriminate against an aboriginal community, fall into the lawful category of a special measure.

Unlike most other federal, state and territory anti-discrimination legislation, the RDA *does not* provide a process for obtaining an exemption certificate or some type of warranty that your particular condition, restriction or variation is a special measure and therefore does not contravene the Act. There have been instances where previous Race Discrimination Commissioners have issued 'special measures certificates' for liquor licence variations - but there are a number of issues which will now caveat this practice in the future. These include the fact that:

- HREOC is going to review whether it will continue the practice of issuing special measures certificates at all;
- In the instances where HREOC has issued those certificates, it has been at the community's request - and in areas where the community has declared itself 'dry' of its own volition;
- The certificates have no legal status. They are not binding and they do not prevent complaints being made to the Commission about the restrictions imposed. Nor would the existence of a certificate guarantee that a court would classify a licence restriction as a special measure if a complaint were lodged and it proceeded to a hearing.

In other words, there is no certainty that the condition, variation or restriction is a special measure (and therefore lawful) until it is legally challenged and a court has deemed it so.

However, as I previously noted, the decision in *Gerhardy v Brown* sets out some important principles that will assist when considering whether a particular restriction constitutes a special measure. One of the important issues here is that of community consultation.

In his decision, Justice Brennan notes HREOC's *Alcohol Report* and states:

*"The wishes of the beneficiaries of the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. In the Alcohol Report, Commissioner Antonios concluded: alcohol restrictions imposed upon aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures"*

In *Gerhardy*, the importance of this consideration is that the special measure is not conferred against the "community's will".

If restrictions upon alcohol supply have not been the declared wishes of the community, but at the imposition of the government, it is not clear whether alcohol restrictions will meet this criterion.

This is important in places like Queensland where community justice groups have the power to recommend variations to licence conditions and to recommend dry-area declarations. In Cape York, there may be a conflict in that the community justice group is often made up of non-drinkers and often is not entirely representative of their community's wishes. This is made even more compromising by virtue of the fact that the community council is the licensee in most cases and often opposed to the recommendations of the community justice group.

On a practical level, you may face dilemmas in implementing licence variations which may be out of step with the wishes of the rest of the community (or community council). This could lead to tensions between the community council and the community justice group.

### **3. Indirect Discrimination**

I now wish to move onto the issue of indirect discrimination and to make some comments about licence restrictions which I understand may be more common across the country. This may arise where a condition is framed in respect of:

- A defined geographical area instead of by reference to race, or
- Where a particular outlet is restricted in when, and in what form, it can sell alcohol to all members of the public, without reference to race.

An example of the former is a condition that no alcohol be carried within the borders of a particular community. I understand that this is generally how some of the schemes in Queensland operate.

An example of the latter condition is provided by some recent decisions of the WA Director of Liquor Licensing which imposed restrictive conditions on a number of packaged liquor outlets in Derby. This resulted from an inquiry conducted in accordance with the WA *Liquor Licensing Act* into the level of alcohol related harm experienced in that community. The conditions included restricted trading hours, limits on the availability and quantity of certain types of high risk liquor products, as well as a ban on the advertising of full-strength "mainstream" packaged beers, ready-to-drink wine/spirit mixes, two litre wine casks; and spirits. Some exemptions were made to cater for the needs of special groups such as tourists, pastoralists, station owners and lodgers, but the restrictions and exemptions were imposed without reference to race.

In these types of cases, the restrictions may attract complaints of *indirect* discrimination. You will recall the four factors that a complainant must establish in order to make out a complaint of indirect discrimination. These are all equally important, but there are two factors that I wish to briefly talk about in more detail as I think they raise issues that are particularly relevant to today's discussion:

- That of a complainant's ability to comply with a condition, and

- The reasonableness of that condition.

The onus of proving inability to comply and that the condition is not reasonable is on the person who makes a complaint of indirect discrimination.

### **3.1 Ability to Comply**

For the purposes of illustrating the point, it is useful to look at the Western Australian cases I mentioned as an example. A person might argue that as a result of the decision of the WA Director, that person is required to comply with the conditions that they can only purchase full strength packaged liquor between 12 noon to 8pm Monday to Sunday from the hotel and that their ability to purchase wine in casks or flagons is limited to one two litre cask or flagon per day.

In order to make out a complaint of indirect discrimination, a complainant would be required to establish that they do not or cannot comply with these conditions. It is difficult to immediately see how this could be satisfied unless one were to argue, for example, that the addictive effects of alcohol make this requirement *practically* impossible to comply with, or make an argument to the effect that the person cannot comply with the condition "by reason of the cultural imperatives or other attributes of that person's race".

I think it goes without saying that the latter argument, if it were to be made, would be highly contentious particularly from the perspective of many Indigenous people. The former argument is not one that has been tested before the courts. However, I think it may be difficult for a person to successfully rely on it as the conditions I have referred to are not prohibiting the sale of alcohol altogether, but limiting its availability to certain times and in certain forms.

### **3.2 Reasonableness**

In order to establish indirect discrimination, it is necessary to show that the term, condition or requirement is not reasonable. Although a complainant bears the onus of showing that a requirement is unreasonable, the steps you take in your role as a liquor licensing agency in considering whether to impose restrictive conditions will have an impact on whether those conditions are ultimately found to be reasonable or not. In considering whether or not a condition is reasonable, decided cases have held that the reasons for the imposition of the requirement or condition have to be weighed against its discriminatory effects, and all of the circumstances of the case must be considered.

Arguing that a requirement is not reasonable involves showing the nature and extent of the disadvantage suffered. This will usually be done when showing the rights and freedoms that have been damaged and why the affected person does not or cannot comply with the requirement.

It is then necessary to show that the disadvantage is not justified. To do this, the reasons of the person imposing the requirement need to be considered. For example, they may be imposing the requirement for legal reasons (for example, health and safety requirements). Financial circumstances, such as the cost of not imposing the requirement, may also be relevant. It can be important to consider what the

requirement is intended to achieve and also to show that this can be done in another, less discriminatory, way.

In HREOC's *Alcohol Report*, the Commission suggested that a factor a court may consider to be integral to the reasonableness of a liquor licence condition is that a community has declared itself dry, as opposed to having a regime of restrictions imposed upon it legislatively.

In the *Alcohol Report*, that issue was discussed in relation to the request by the Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara (NPY) communities that the Curtin Springs Roadhouse vary its licence to ban sales of liquor to residents of NPY communities and people it suspects are visitors to the NPY communities. A court has not spoken directly on whether these issues will be conclusive of the reasonableness of the condition and therefore its lawfulness - but it is important to bear this suggestion in mind for two reasons.

First, in Queensland, unlike the Northern Territory, South Australia or Western Australia, communities do not have the option of declaring themselves dry - restrictions are imposed externally.

Second, if a court agrees with the position taken in the *Alcohol Report*, the type of consultation your agency has undertaken with the affected community may be relevant. The question might be whether you have only consulted with a select group in the community.

The message that comes out of this, as discussed in my previous discussion about special measures, is the importance of consulting with Indigenous communities who may be affected by the conditions you are considering imposing. Doing so has an important practical effect in reducing the chances of a court finding that the condition is unreasonable in the context of determining a complaint of indirect discrimination. More fundamentally, it recognises the importance of members of Indigenous communities having a voice in decisions to limit or prohibit the availability of alcohol to their members.

#### **4. Conclusion**

I have already emphasised the importance of ensuring informed, real community consultation when considering alcohol restrictions in Indigenous communities. The Fitzgerald Cape York Justice study last year warned that the current regime of alcohol restrictions in Queensland Indigenous communities would not be successful unless the communities were behind them. However there is another issue that must be contemplated, and that is the evidence for the fact that alcohol restrictions often do not tackle the problems of violence and neglect despite these being the reasons for the restrictions in the first place. More to the point, there seems to be evidence suggesting that alcohol restrictions *in isolation* of any mechanism to address *why* people are abusing alcohol actually entrench the problems that the restrictions were designed to stop. As I have mentioned, these are the 'collective rights' you would think alcohol restrictions would promote if they could be classified as a special measure.

So there are some important things to note here. When we look at why governments consider alcohol restrictions in Indigenous communities - and rarely would they do so in mainstream, non-Indigenous communities - we need to look at why the patterns of indigenous alcohol-consumption are so different, if in fact they are. It has often been said that in Aboriginal communities, people don't just drink for the enjoyment and then happen to get drunk. Maggie Brady's book published this remarks that of Indigenous people who drink, 80% do so in hazardous proportions. It is a form of self-medication. The concept of self-medication accords with the profile of typical alcohol-abuse in mainstream society also. The difference is the proportion of people feeling the need to engage in this self-medication.

The underlying problems government (and some communities) had hoped to eradicate by virtue of restrictions have been highlighted by a great amount of literature over the last 30 years beyond just the 2001 report of the Attorney-General's Department I mentioned previously. These include the Pathways Report, the Fitzgerald Inquiry in Queensland and the Gordon Inquiry in Western Australia. Where these reports have recommended an approach to alcohol management, they have first and foremost recommended methods dealing with 'demand'.

In terms of domestic violence, a recent report addressed the cost of family violence to the tax payer. It noted that a fundamental cause of perpetration of violence was having been a victim. Balancing this with the rest of the research seems to make a very good case for the view that alcohol is often a medium turned to in order to self-medicate past wounds of domestic violence, child abuse, dispossession and dislocation from country and culture, disempowerment, lack of self worth, self esteem etc.

Alcohol restrictions from the indigenous perspective have therefore been identified in criminology as a *situational* crime prevention technique. It is argued that this is not sustainable on its own, because it is not an *underlying* crime prevention technique. Situational methods can have a negative effect if there is not a regime of programs addressing the underlying issues. This was the thesis of the 2001 Attorney-General's Report I mentioned earlier.

In terms of the argument that restrictions can only exacerbate social problems, a non-government review of a Queensland community that had been subject to restrictions revealed some interesting statistics. While there was a decrease in alcohol-related injuries presenting to the clinic, many of the violent offenders were found to be displaced elsewhere, to areas where alcohol is readily available. Some places say there has been an increase in homeless people in towns when community members from dry areas have left in search of a place with alcohol available.

Certain areas which have never dealt with a sustained petrol sniffing problem are saying that they now have a sudden epidemic of petrol sniffing as people look for an alternate substance by which to self-medicate. Research around community courts has also suggested an increase in drink driving offences and drink driving related offences as people travel long distances on dirt roads to obtain alcohol at another location, drink as much as they can while it is readily available and then realise that its not their country to sleep on - so they travel back to their country drunk.

I do not wish to focus on prevention issues (as I have just discussed) at the sacrifice of acknowledging the important rehabilitation strategies or methods of combating drunkenness that have been initiated both by the community and governments. I note that Maggie Brady addresses the need for these programs and the fact that we need to start evaluating their effectiveness. However I strongly believe that *both* factors of prevention and rehabilitation need to be taken into account if we are serious about successful, sustainable methods of tackling the social problems we associate with alcohol-abuse.

I thank you for the opportunity to present this afternoon. Your roles are challenging and I am sure difficult in endeavouring to meet the needs and demands of many different interest groups. As Race Discrimination Commissioner I encourage you as individual authorities and as a national network to maintain a dialogue with my office so that contraventions of the RDA or human rights generally can be avoided. I support a partnership approach to address this most serious epidemic in Indigenous societies.