After the Removal

A submission by the
Aboriginal Legal Service of Western Australia (Inc)
to the
National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families

Prepared by Tony Buti

[Cover photograph courtesy of Aboriginal Affairs Department - Aboriginal residents of Moore River Native Settlement circa (1945)]

Dedicated to

ROBERT SAMUEL RILEY

(1954-1996)

who worked tirelessly to have the story told

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FOREWORD

In the report *Telling Our Story,* released in April 1995, the Aboriginal Legal Service of WA (Inc) recorded the stories of many in the Aboriginal community who have been directly affected by the assimilation policies pursued by successive governments in Western Australia.

These policies encouraged the systematic removal of Aboriginal children from their communities to missions, government institutions, and foster care.

This submission, *After the Removal,* follows on from *Telling Our Story.* It has been prepared by the Aboriginal Legal Service of WA (Inc) for submission to the National Inquiry into the separation of Aboriginal children from their families.

The National Inquiry is charged with an enormous responsibility because it quite likely represents a once-only opportunity to investigate such a shameful part of the history of this country.

Aboriginal people are understandably weary with inquiries, and with the lack of resolute action or tangible result that follows them. Yet they persist because they must for the benefit of past, present and future generations of Aboriginal children, and of all children.

Their participation in this project is testament to their extraordinary capacity to maintain a trust that the Australian community will ultimately join with them in their endeavour to secure significant social justice for Aboriginal people.

The *After the Removal* submission is very wide-ranging because those who gave their personal histories to the Aboriginal Legal Service of WA (Inc.) requested that it be so.

They have made recommendations that they know will assist in overcoming the enduring effects of the assimilation policies, and the removal practices that these promoted, and in aiding the

reconciliation process between Aboriginal and non-Aboriginal Australians.

These considered strategies for repairing the damage; these expressions of Aboriginal goodwill, must be reflected in recommendations that come from the National Inquiry.

The recommendations of the National Inquiry must, in turn, be given effect swiftly and decisively by Australian governments. Nothing less can be acceptable.

This *After the Removal* submission provides an opportunity for non-Aboriginal Australia to acknowledge an obligation and a resolve to come together with the Aboriginal community in effecting a genuine process of healing.

The Executive Committee and management of the Aboriginal Legal Service of WA (Inc.) strongly urges the National Inquiry, and the governments of Australia, to ensure that such an opportunity is not squandered, as so many in the past have been squandered.

Listen to the voices herein. Hear the pain and the anguish. Do not, yet again, betray the trust.

Ted Wilkes

President
Aboriginal Legal Service of Western Australia (Inc)
May, 1996

ACKNOWLEDGEMENTS

Gavin Douglas provided research and writing assistance for Parts D and F of this submission. Mala Dharmananda completed the empirical analysis and prepared most of chapter 3. Robyn Ayres, Christine Choo, Helen Churchwood, Lee Gordon, Monica O'Brien, Deirdre O'Brien, Tony Shelley and Lyn Zinenko helped with proof reading. Lesleigh Braybrook helped co-ordinate the collection of personal histories and other court officers and country staff of the Aboriginal Legal Service of Western Australia (Inc) also provided assistance in collecting personal histories. Carolyn Tomich helped place the written personal histories in order. Angela Bromfield provided library research assistance. Mark Johnston and Tom Pankhurst assisted with word processing. Margaret Stephens typed the submission. The Family and Records section of Family and Children's Services provided access to a number of native welfare files. Peter O'Brien designed the cover. The Australian Section of the International Commission of Jurists kindly gave permission for their written submissions to the *Kruger and Bray* High Court cases to be reproduced here. The efforts of all mentioned are most appreciated.

A great thank you and acknowledgement is reserved to those people who often under distress provided personal histories of their removal from their families or the removal of family members.

EXPLANATION

To protect the identity of the individuals who are named within, pseudonyms have been used. However, in some instances, such as the Homeswest case studies, the correct names of Homeswest staff remain. In the Homeswest case studies, the addresses of some tenants have been changed. When reference is made to native welfare files, the name or reference number of the files are not included in order to preserve confidentiality. The native welfare files were obtained from Family and Children's Services.

When State government is referred to, it means the State government of Western Australia. However, some recommendations require a national approach, which would involve all the State and Territorial governments in association with the Commonwealth government.

LIST OF ACRONYMS

AAD	Aboriginal Affairs Department
ALSWA	Aboriginal Legal Service of Western Australia (Inc)
ATSIC	Aboriginal and Torres Strait Islander Commission
ALRC	Australian Law Reform Commission
CDEP	Community Development Employment Program
CROC	Convention on the Rights of Children
CSHA	Commonwealth State Housing Agreement
CYPF Act	Children, Young Persons, and Their Families Act (NZ)
EOC	Equal Opportunity Commission (Western Australia)
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PAMS	Perth Aboriginal Medical Service
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
UDHR	Universal Declaration of Human Rights
WAMA	Western Australian Municipal Association

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OVERVIEW

Chapter 1 - Introduction

The ALSWA makes this submission to the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* ("the National Inquiry") on behalf of the 710 clients who provided personal histories of their removal, their parents' removal, their siblings' removal, or their children's removal. The wishes and recommendations made by the ALSWA clients which shape the structure and content of this submission are very wide ranging and impact on a variety of laws, practices and policies which impinge upon the lives of Aboriginal people. The over-riding wish of ALSWA's clients is that they, and their communities, have the responsibility for determining the best way for the delivery of services to them, the responsibility for the care of their children, and reparation (including monetary compensation and culturally appropriate counselling) as part of the remedy for the losses they have endured because of the systematic removal of Aboriginal people from their families.

Chapter 2 - Historical Framework

Legislation concerned specifically with Aboriginal people was enacted very early in the State's history. Legislation dealing specifically with Aboriginal people was closely linked with wider government policies to manage and control Aboriginal people. This was especially so in the area of Aboriginal child welfare. Under some legislation, the Chief Protector of Aboriginal people was the legal guardian of every Aboriginal and "half-caste" child until such child attained the age of 16. The Chief Protector could order that any Aboriginal person be removed from a reserve or district to another reserve or district and be kept there. Aboriginal children were also removed under child welfare legislation which contained powers with respect to destitute and neglected children.

The dominating creed that led to the practice of removing Aboriginal children from their families in Western Australia, as in the rest of Australia, was the assimilation policy. This was clearly espoused by a number of people in "authority". Correspondence kept on the native welfare files of a number of clients of the ALSWA records how a number of authorities and mission workers actually discouraged and prevented contact with those removed from their families. While there have been changes in Aboriginal child welfare since 1950, the fact remains that Aboriginal children are still being removed from their families at an unacceptable rate, whether by the child welfare or the juvenile justice systems, or both.

Chapter 3 - The Effects - Empirical Analysis

Information collected from people who provided their personal histories to the ALSWA was used to create a database which was empirically analysed. Information was obtained on the profile of those interviewed, the background to their removal from their families, the type and extent of time spent in foster care, institutions, or missions, their experiences of physical and sexual abuse, and the possible consequences of removal. The findings of the empirical study indicate that respondents' lives consist of a pattern of constant and repeated dislocation: from their homes with their families and relatives to missions, foster homes and adopted parents of a different culture to other missions, foster homes and government institutions. The dislocation that characterises their early childhood and adolescence further led, or contributed to, their marginalisation from the wider community, evidenced by unemployment, imprisonment, substance abuse as well as physical and mental problems.

Chapter 4 - The Effects (Damages, Losses) Identified - The Remedies Sought

The findings of the empirical study presented in chapter 3, and the evidence collected by the ALSWA of the impact of the assimilation policies and removal practices is consistent with the research on the effects of removing children from their families. The effects are wide ranging and include:

- psychological effects such as problems with identity, adjustment, mental illness and

increased instances of self-injury and suicide; and

- social and cultural effects resulting from a lack of education, problems with identity and "fitting in", lack of access to cultural heritage, problems with parenting and contact with the criminal justice system.

Many of the effects and losses mentioned by those interviewed had been played out by Aboriginal people being grossly over-represented in the criminal justice system and their children in the juvenile justice and child welfare systems. There is a continuous poverty cycle that many Aboriginal people find themselves in. This exacerbates the losses they have suffered as victims of the assimilation policies and the resulting removal practices.

People who, often under great distress, gave their personal histories to the ALSWA, suggested a variety of recommendations that governments should implement to address the pain and suffering many Aboriginal people who were removed from their families continue to experience. The people who gave their personal histories to the ALSWA want governments and the whole Australian community to respond to the impact and effects of the assimilation policies and removal practices.

The demand for monetary compensation, culturally appropriate counselling and action to alleviate the problems of Aboriginal contact with the criminal justice system and child welfare system are some of the strongest requirements raised by the majority of people interviewed by the ALSWA. However, the other remedies mentioned are also keenly sought and should become part of the final report by the National Inquiry to the Commonwealth government. They address many of the underlying issues highlighted by the RCIADIC as to the causes for the desperate plight of Aboriginal people today.

Chapter 5 - Reparation and Legal Issues

There are a number of possible causes of action that can be brought by the children who were removed from their parents, or the parents themselves. Possible causes of action relate to fiduciary duty, breach of statutory duty, negligence, wrongful imprisonment, breaches of

constitutional rights and genocide. Some of the causes of action need to overcome barriers such as limitation statutes and judicial assessment of damages. However, this cannot deny the existence of a cause of action, and reinforces the moral obligation on governments to provide reparation for those affected by the assimilation policies and removal practices.

International law reinforces the obligation on governments in Australia to respond to the demands of those affected by being removed from their families. There are a number of international conventions and decisions in overseas jurisdictions which arguably place a legal obligation on Australian governments to provide reparation. Further, there is a report by the Special Rappatouer of the United Nations which provides strong international legal argument and moral justification for the awarding of reparation, and the principles under which reparation should be awarded.

Reparation can take the form of restitution, compensation and rehabilitation. All forms of reparation must be addressed. In regards to rehabilitation, governments have moral obligation, fiduciary obligations, international law obligations, and obligations under anti-discrimination legislation to ensure the delivery of adequate services to Aboriginal people affected by the assimilation policies and removal practices.

Chapter 6 - Housing

The Western Australian government's own Task Force on Aboriginal Social Justice linked the need for adequate housing with individual well-being and family cohesion. The Task Force also acknowledges the difficulty Aboriginal people have in obtaining satisfactory housing. The importance of housing to an individual's life and to family cohesion cannot be underestimated. Without housing, an individual's education, economic and socio-cultural developments are severely curtailed. Without adequate housing, family cohesion and ability to care for children is severely inhibited. The ALSWA has had many clients who have given their histories regarding their removal from their families who have also suffered a lack of family cohesion because of inadequate housing. Thus, the cycle of family breakdown caused by assimilation policies continues today.

Major problems remain with the philosophy and practices of Homeswest, the major public provider of housing in Western Australia to Aboriginal people. Many Aboriginal people have been detrimentally affected by the policies and practices of Homeswest. In fact, it is submitted that many of the policies and practices of Homeswest amount to direct and indirect discrimination against Aboriginal applicants and tenants.

The hardship many Aborigines face in their dealings with Homeswest is exacerbated by their dealings with the private housing industry. Many Aboriginal people interviewed by the ALSWA reported stories of direct discrimination by real estate companies who would not provide them with accommodation.

Chapter 7 - Health

It has been argued by the Western Australia Government Task Force on Aboriginal Social Justice that improvement in health should be the most important single objective in terms of improving the conditions of Aboriginal people. Aboriginal health cannot be seen as standing in isolation: poor health is a consequence of low socio-economic status, poor housing, low education attainment and a variety of other social practices. It seems very much apparent that without a comprehensive approach, that is without a major continuing thrust in areas such as basic hygiene, housing and education, many constructive health programs are doomed to failure. This cannot be over-stressed. Environmental health and mental health are two areas that require particular attention in the Aboriginal arena. Further, what is of utmost importance is that there be a commitment that Aboriginal people have consultative and decision making status at all stages of the planning and the implementation of health service delivery to Aboriginal people and communities.

Chapter 8 - Aged Care

Of all Aboriginal people, the elderly have had the longest exposure to discriminatory and disruptive government policies. However, aged care is a neglected area of Aboriginal health care. Aboriginal aged care issues need urgent investigation and assessment. Relevant information needs

to be collated on the needs of Aboriginal elderly in order to develop appropriate and effective programs and services. Such work should be given greater priority. Consulting with Aboriginal people, in this case the elderly, should be mandatory in providing services to the Aboriginal aged. The Aboriginal elderly must determine what services they seek and how they should be provided.

Chapter 9 - Education

Not only are Aboriginal people undereducated, compared to the mainstream Australian population, but they are correspondingly disadvantaged in the labour market. This only exacerbates the disadvantages that many Aboriginal people who were removed from their families as children still endure. Without adequate education for them and their children, the poverty cycle will continue.

Not only is it important that Aboriginal students have a curriculum that is culturally appropriate, it is also important for non-Aboriginal students to receive education about Aboriginal culture. Further, Aboriginal studies should also educate all students about successive government policies and practices which led and continue to lead, to the removal of Aboriginal children from their families and the residual effects on the Aboriginal community.

Chapter 10 - Local Government

Local government and its potential impact on Aboriginal people has been sadly neglected. Local governments have a crucial role to play in the delivery of services to Aboriginal people and communities, including remote communities. It is crucial that local government, like the other strata of government, have a genuine commitment to the delivery of services to Aboriginal people and communities. However, the crux of the matter is that Aboriginal people must be involved in decisions as to the delivery of those services. In fact, they must control the process.

Chapter 11 - Over-representation of Adult Aborigines in the Criminal Justice System

The level of adult Aboriginal involvement in the criminal justice system is unacceptable. A concerted effort must be made to reduce this over-representation. Besides addressing the underlining issues which lead to the unacceptable rate of Aboriginal people within the criminal justice system, greater efforts must be made to change the criminal justice system itself. The policing issue is of utmost importance because it is at this stage that an Aboriginal person comes into contact with the criminal justice system. Further, the issues of the court systems, including sentencing and recognition of Aboriginal customary law need to be examined, as does the cultural appropriateness of the prison system. Also, a concerted effort must be made to ensure that Aboriginal people receive community based orders rather than imprisonment. However, the real answer lies in reducing Aboriginal involvement in the criminal justice system in the first place.

Chapter 12 - Child Welfare Paradigm

Aboriginal children continue to be subject to insidious forms of child removal and institutionalisation through the welfare and juvenile justice systems. As Aboriginal children are the future of Aboriginal society, this has major repercussions for Aboriginal society. The impact that child removal from families has on Aboriginal communities cannot be underestimated.

The historic forces which provide a backdrop to the current situation are tragic. They continue to haunt generations of Aboriginal people and influence the upbringing of the new. Beyond having to work against these factors, it seems that policy drafters and practitioners are still struggling to formulate how best to cater for the needs of Aboriginal children and families. There is an urgent need for a thorough, detailed independent analysis of Family and Children's Services' Aboriginal child policy and practice to assist in developing a more effective, co-ordinated and appropriate child welfare program.

The non-government Aboriginal child welfare sector is under-resourced. The co-ordinated practices and operations of these agencies is crucial to the success of government policies in the area of Aboriginal child welfare. In the future, such Aboriginal agencies will be increasingly relied upon to provide services to the Aboriginal community. They will be held accountable for the welfare of Aboriginal people by Aboriginal and non-Aboriginal society. It is imperative that they do not fail and that every opportunity is given to Aboriginal people to determine the best way to care for their children.

Chapter 13 - Juvenile Justice

The incarceration rate of young Aboriginal people in Western Australia is startling. Adequate attention to Aboriginal youth issues and progressive juvenile justice reform has been lacking. Outstanding issues include policing and legislation in the juvenile justice area. Section 138B of the *Child Welfare Act 1947* (WA) needs to be examined, and the *Young Offenders Act 1994* (WA) needs careful attention and amendment. The Western Australia government should look at models in New Zealand to enact new juvenile justice legislation in Western Australia. New juvenile justice legislation should include the rights of children as recognised under international law, and provide for major involvement of Aboriginal people and communities in post sentencing decision-making and the delivery of services to juvenile Aboriginal prisoners.

Chapter 14 - Conclusion

This submission has documented the legislation, attitudes, practices, personal histories, and continuing effects of that shameful part of Australian history where Aboriginal children were removed from their families pursuant to assimilation policies. This submission also looks at the wishes of Aboriginal people interviewed by the ALSWA in respect to improvements in service delivery to Aboriginal people, reduction of Aboriginal representation in the adult and juvenile justice system and the involvement of Aboriginal children in the child welfare system. Several issues become very obvious, the first being the sheer enormity of the impact on Aboriginal people of the past assimilation policies and practices of removal authorised by State governments, secondly, the strong demand by Aboriginal people for redress, and thirdly the most appropriate

way in which their children should be cared for.

Aboriginal needs must be identified from the perspective of Aboriginal people. Governments and bureaucrats will have to learn to take advice from Aboriginal people before giving it out. There also needs to be legislative reform to ensure a positive change for Aboriginal people and respect for their rights. Going hand-in-hand with legislative development and reform is a need to provide adequate reparation to Aboriginal people affected by the past assimilation policies which resulted in the systematic removal of Aboriginal children from their families.

With regard to the future of Aboriginal society, it is imperative that the National Inquiry formulate recommendations which reduce the number of Aboriginal children removed from their families and communities and allow Aboriginal and Torres Strait Islander communities to have responsibility for determining the best way for the delivery of services to them. To this end, the ALSWA urges the National Inquiry on behalf of those who gave the ALSWA their personal histories to heed the recommendations contained in this submission. Further, it is crucial that all recommendations are given effect by governments and other relevant organisations.

SUMMARY OF RECOMMENDATIONS

Chapter 5 - Reparation and Legal Issues

Recommendation 1

That the Commonwealth and State governments accept the proposed basic principles and guidelines contained in the Final Report of Mr van Boven of the United Nations on the study concerning the right to reparation, (restitution, compensation, and rehabilitation) for victims of gross violations of the human rights and fundamental freedoms.

Recommendation 2

That the Commonwealth and State governments give effect to the proposed basic principles and guidelines recommended by van Boven to justify and award reparation to persons, families and communities affected by the separation of Aboriginal children from their families.

Recommendation 3

That the State government make a public statement in Parliament acknowledging the devastating impact of the policies and practices of removing Aboriginal children from their families on individuals, their families and the Aboriginal community, and express regret, and apologise on behalf of the people of Western Australia.

Recommendation 4

That those religious denominations involved in assisting in the removal of Aboriginal children from their families make a similar apology as stated in recommendation 3.

Recommendation 5

That the Commonwealth government make a similar statement as suggested in recommendation 3.

Recommendation 6

That the Commonwealth and State governments fund appropriate Aboriginal organisations to assist affected individuals and families to locate lost family members and enable reunions to take place.

Recommendation 7

That the State government ensure that all native welfare files and Aboriginal child welfare files become the property of the relevant individuals or their successors. An Aboriginal Task Force be established to determine the most appropriate way to transfer ownership and to assist individuals to decide what and how much of the file they wish to see.

Recommendation 8

That religious and other charitable organisations involved in the removal and control of Aboriginal children removed from their families ensure that all related files and records become the property of the relevant individuals or their successors.

Recommendation 9

That the State government introduce legislation to amend the following Acts of Parliament to enable action to be commenced to provide legal redress for injuries, pain and suffering caused:

- ***sections 38 and 47A of the Limitation Act 1935 (WA);***
- ***section 6 of the Crown Suits Act 1947 (WA);***
- ***section 16 of the Native Welfare Act 1963 (WA); and***
- ***section 17 of the Aboriginal Affairs Planning Authority Act 1972 (WA).***

Recommendation 10

That the State government establish a Task Force to investigate allegations of abuse of Aboriginal people resident in government institutions, missions, orphanages, and/or foster care, which may justify the bringing of criminal charges, and report to the Director of Public Prosecutions.

Recommendation 11

That the Commonwealth and State governments commit to proper and substantial levels of monetary compensation to be paid to all individuals, families and communities affected by the removal of Aboriginal children from their families under the assimilation policies.

Recommendation 12

That the Commonwealth and State governments establish a Task Force which has a majority of Aboriginal representation to develop a non-technical, expeditious and effective mechanism to distribute monetary compensation to all individuals, families and communities affected by the removal of Aboriginal children from their families under the assimilation policies.

Recommendation 13

That the Commonwealth government enact legislation which enshrines the Convention on the Prevention and Punishment of the Crime of Genocide into the domestic law of Australia.

Chapter 6 - Housing

Recommendation 14

That the State government establish an independent permanent body with significant Aboriginal representation to provide a new management/personnel plan together with a new set of written policies which reflect the cultural and familial imperatives of Aboriginal people throughout the State and which are also based on a recognition of the needs of Aboriginal people which flow from dispossession and removal.

Recommendation 15

That the Minister for Housing ensure there is no "social mix policy" officially or unofficially in existence at Homeswest and no policy or practice which treats Aboriginal people less favourably in the allocation of housing and decisions regarding transfers and evictions.

Recommendation 16

That Homeswest policy be amended so that overcrowding due to Aboriginal familial obligations cannot be a ground for any action against a tenant.

Recommendation 17

That Homeswest consult with Aboriginal communities and organisations and employ Aboriginal cultural advisors to assist in designing and building a range of culturally appropriate accommodation.

Recommendation 18

That Homeswest increase its employment of Aboriginal staff at all levels.

Recommendation 19

That Homeswest ensure all staff at all levels undergo a properly accredited Aboriginal cultural awareness program designed and run by Aborigines.

Recommendation 20

That Homeswest give paramount consideration to the health condition of an applicant or tenant in the allocation of assistance or in the making of decisions concerning the continuity of an existing tenancy.

Recommendation 21

That Homeswest change its policy so that in addition to the health condition of an applicant or tenant, decision-makers must also consider the social, familial and personal circumstances of an applicant or tenant (including their age, the best interests of any children, their financial circumstances and the consequences of a refusal to assist or house the applicant or tenant) as being more important and having greater weight in the decision-making process than consideration of any debt the applicant or tenant may have to Homeswest.

Recommendation 22

That Homeswest abandon the policy which excludes from Emergency Housing Office assistance, applicants who:

- ***(i) have a current debt to Homeswest;***
- ***(ii) allegedly have created or contributed to their own hardship; or***
- ***(iii) have an alleged previous history of "anti-social" behaviour.***

Recommendation 23

That Homeswest eliminate the policy which prevents housing of an applicant until they have paid 100 per cent of rental arrears and 50 per cent of tenant liability.

Recommendation 24

That Homeswest establish a "Tenancy Assistance Committee" which includes Aboriginal financial planners and cultural advisors who will assist Aboriginal tenants meet their financial and other commitments to Homeswest.

Recommendation 25

That Homeswest abandon their policy concerning tenants who have been declared bankrupt.

Recommendation 26

That the State government introduce amending legislation to prohibit the use of Section 64 of the Residential Tenancies Act 1987 (WA) by public housing authorities, and amend Section 71 of the Act so that an order for termination of a tenancy can only be made if, having considered all the circumstances of the case, it is appropriate to do so.

Recommendation 27

That the State government legislate to create an Administrative Appeals Tribunal for merit based review of decisions including the decisions of Homeswest officers which affect tenants.

Recommendation 28

That the State government establish an independent committee with Aboriginal representation to monitor and investigate the decision making process of Homeswest in regards to evictions.

Recommendation 29

That all Homeswest staff at all levels receive policy directives and in-service training to ensure that there is no tendency (in attitude and practice) to allocate Aborigines only to certain "designated" properties and limit access to all other properties.

Recommendation 30

That the State government establish an independent Aboriginal Task Force to review policies, practices and culture of the Aboriginal Housing Board to ensure that all Aboriginal applicants are treated fairly and according to a standard merit and needs criteria.

Recommendation 31

That the Commonwealth government provide the Race Discrimination Commissioner with adequate funds to conduct an inquiry under the Race Discrimination Act 1975 (Cth) into Homeswest policies and practices as they relate to Aboriginal people.

Recommendation 32

That the Real Estate Institute of Western Australia engage an Aboriginal team to provide compulsory cultural awareness to actively counter racism and to provide an understanding of Aboriginal people and their needs.

Recommendation 33

That the Real Estate Institute of Western Australia set up an independent appeals board to hear complaints of racism against its members.

Recommendation 34

That the Commonwealth and State Auditor-Generals conduct an immediate audit on the allocation and spending by the Western Australia government of Commonwealth government grants for public housing.

Recommendation 35

That the Commonwealth and State Housing Departments and public housing authorities employ Aboriginal people who have executive level responsibilities in decision-making on issues impacting on Aboriginal people.

Recommendation 36

That the Commonwealth and State governments and relevant departments undertake thorough consultation processes with Aboriginal communities and organisations when allocating government grants and planning strategies in regards to Aboriginal housing.

Chapter 7 - Health

Recommendation 37

That Commonwealth, State and local governments, in consultation with Aboriginal people, communities and organisations draw up a timetable to improve co-operation, reduce duplication and give more power to Aboriginal people to determine priorities and the appropriate delivery of health services to Aboriginal people.

Recommendation 38

That Commonwealth, State and Local Governments after consultation with Aboriginal communities, make a commitment to the delivery of culturally appropriate health services to Aboriginal communities within a prescribed period.

Recommendation 39

That Commonwealth, State and Local Governments make a major commitment to improving the delivery of culturally appropriate health services to Aboriginal children.

Recommendation 40

That the Commonwealth and State Governments ensure the identification of the underlying causes of mental health problems and specifically acknowledge the impact of the assimilation policies and removal practices on the mental health of Aboriginal people.

Recommendation 41

That the Commonwealth and State Governments make a commitment to address the underlying causes of mental health problems of Aboriginal people.

Recommendation 42

That the Commonwealth and State governments guarantee further funding to the National Inquiry or another appropriate body to continue to investigate the mental and other health problems caused by the assimilation policies and removal practices.

Recommendation 43

That the Commonwealth and State Governments provide sufficient funding for the establishment of adequate and culturally appropriate counselling, healing and community services to Aboriginal people.

Recommendation 44

That the Commonwealth Government commit itself to guaranteeing the $13.4 million pledged by the last Commonwealth Labour Government for the development of innovative Aboriginal strategies that address mental health within Aboriginal communities and improve access to mainstream services.

Recommendation 45

That the Commonwealth Government commit itself to ensuring that any national programs which may be implemented to improve men's health addresses Aboriginal men's health issues.

Chapter 8 - Aged Care

Recommendation 46

That the Commonwealth and State governments provide funding to public housing and aged care agencies to establish accommodation appropriate for Aboriginal elderly taking into account their culture and age.

Recommendation 47

That the Commonwealth and State governments provide funding for more Aboriginal health workers/liaison officers in hospitals and medical settings to work with the Aboriginal elderly.

Recommendation 48

That all medical professionals complete a properly accredited Aboriginal cultural awareness program to ensure sensitivity to the cultural needs of Aboriginal people.

Recommendation 49

That the Commonwealth and State governments provide funding to employ caregivers to assist Aboriginal elderly care for their extended family.

Recommendation 50

That the State government establish a Task Force of Aboriginal community leaders to inquire into the issue of "elder abuse" and make recommendations to relevant government departments and non-government agencies towards solving this issue.

Recommendation 51

That the Commonwealth and State governments give a commitment to ensure that adequate resources are provided to allow these recommendations to be implemented.

Recommendation 52

That the Commonwealth and State governments provide funding and a suitable environment to programs which allow elderly Aborigines to fulfil their function as cultural role models for their children and grandchildren.

Recommendation 53

That the Commonwealth and State governments provide funding for a pool of trained caregivers to cater for the variety of needs within the Aboriginal community.

Recommendation 54

That in the provision of health and welfare, attention be given by the Commonwealth and State governments to ensure elderly Aborigines set their own priorities, and that such services take into account culture specific needs.

Recommendation 55

That residential care services initiate programs to promote family access, interaction and cultural activities.

Recommendation 56

That information regarding Aboriginal services and assistance be thoroughly disseminated by the relevant government departments so that Aboriginal caregivers and families looking after an elderly Aboriginal person receive adequate support.

Recommendation 57

That departments and agencies providing services and assistance to the aged population at large, initiate programs to ensure Aborigines are aware of such services and that flexibility be employed in the provision of services.

Chapter 9 - Education

Recommendation 58

That relevant Commonwealth and State education bodies (authorities) employ Aboriginal people in decision-making and policy development positions. Aboriginal decision-makers should be given the authority and resources to develop Aboriginal educational plans and curricula in Aboriginal education.

Recommendation 59

That the State Education Department ensure an increase in the number of Aboriginal people participating at all levels of the education hierarchy, from the Minister of Education, to school principals, to teacher aides and students, as well as Aboriginal education advisers.

Recommendation 60

That the State Education Department provide better educational facilities to remote Aboriginal communities.

Recommendation 61

That there be two distinctive compulsory streams or courses on Aboriginal culture and history conducted in all government and non-government schools for all students at both the primary and secondary levels. The first should be on Aboriginal culture, history and present day Aboriginal society, and the second on the assimilation policies that led to the separation of Aboriginal and Torres Strait Islander children from their families.

Recommendation 62

That a joint Commonwealth/State structure be established by the Commonwealth and State governments to develop guidelines for assessing the merit of proposals by Aboriginal communities for establishing Aboriginal Independent Community Schools:

- ***to distribute grants to establish Aboriginal Independent Community Schools and the ongoing distribution of grants; and***
- ***to continuously assess Aboriginal Independent Community Schools.***

Recommendation 63

That the Commonwealth and State governments provide increased funding for Aboriginal Independent Community Schools.

Recommendation 64

That the Aboriginal and Torres Strait Islander Commission, the Aboriginal Affairs Department, and the Commonwealth and State Education and Health Departments collaborate in designing a health education plan which gives Aboriginal communities the responsibility to create a health education program specific to each community.

Recommendation 65

That the State government establish a Task Force which has a majority of Aboriginal representation to assess the Best Start program and if necessary, recommend culturally appropriate changes.

CHAPTER 10 - LOCAL GOVERNMENT

Recommendation 66

That Local governments make the "normalisation" of essential service provision for all Aboriginal communities a priority.

Recommendation 67

That Local, State and Commonwealth governments recognise that self-government is an aim for Aboriginal communities, particularly those in remote and rural locations, and that all levels of government implement policies and practices which reflect this recognition.

Recommendation 68

That authorities charged with Local government responsibilities widely consult Aboriginal people on all matters affecting them.

Recommendation 69

That strong consultative relationships be developed between Local, State and Commonwealth State governments and Aboriginal communities and organisations regarding service provision to Aboriginal people.

Recommendation 70

That the State and Commonwealth governments jointly guarantee that adequate funding is directed to Local government and Aboriginal community needs.

Recommendation 71

That Local, State and Commonwealth governments recognise that the ultimate form of self-determination for Aboriginal people is self-government.

Recommendation 72

That Local, State and Commonwealth governments facilitate the transition of identified Aboriginal communities to limited or complete self-government (or any other plan that is considered appropriate for the particular community), including any legislative reform, training, infrastructure development or provision of any other assistance that may be required.

Recommendation 73

That the State government ensure that the recommendations of the Report of the Chief Executive Working Party on Essential Services to Aboriginal communities be implemented.

Chapter 11 - Over-Representation of Adult Aborigines in the Criminal Justice System

Recommendation 74

The Police Commissioner direct that police officers should attempt, where possible, to caution Aborigines rather than arrest them.

Recommendation 75

That the Police Commissioner direct prison officers to undertake a short intensive course to ensure that the discretion as to whether to proceed by way of arrest or summons is properly exercised when dealing with Aboriginal people.

Recommendation 76

That the Police Commissioner direct that if possible and reasonable in the circumstances, Aboriginal people should be brought before the court by way of summons rather than arrests.

Recommendation 77

That the Police Commissioner direct that recruits complete a properly accredited Aboriginal cultural awareness training program.

Recommendation 78

That the Police Commissioner direct that serving officers complete a properly accredited Aboriginal cultural awareness training program every two to three years.

Recommendation 79

That the Police Commissioner establish a protocol whereby the ALSWA is contacted when an Aboriginal person is to be questioned over an offence (falling within an agreed category), prior to questioning commencing.

Recommendation 80

That the State government introduce legislation enshrining the Anunga rules into the law of Western Australia.

Recommendation 81

That the Police Commissioner establish a protocol for bail that sets out the circumstances in which the ALSWA should be contacted.

Recommendation 82

That the State government establish a working party with representation from the ALSWA and other interested parties to recommend appropriate amendments to the bail legislation to improve access to bail.

Recommendation 83

That the Police Commissioner develop protocols to deal with the apprehension and detention of intoxicated persons.

Recommendation 84

That the Police Commissioner establish a protocol which gives the right to a telephone call to all Aboriginal persons detained by the police prior to being questioned and charged.

Recommendation 85

That the Police Commissioner establish a protocol where the police are to give all Aboriginal people charged a written record of the charges, and give the legal representative a copy of the complaint, the police facts and if relevant, a copy of the record of convictions.

Recommendation 86

That the Police Commissioner after intensive consultations with the ALSWA, local communities and other appropriate agencies establish a comprehensive protocol dealing with the local policing issues.

Recommendation 87

That the State government establish a properly resourced statutory independent body to investigate complaints against the police, and if the complaint is made by an Aboriginal person, one of the investigating officers should be Aboriginal.

Recommendation 88

That the Minister of Police commission an inquiry to investigate the ratio of police to residents in predominately Aboriginal towns and suburbs vis-a-vis predominately non-Aboriginal towns and suburbs, and make appropriate recommendations to reduce any over-policing in predominately Aboriginal towns and suburbs.

Recommendation 89

That the State government ensure that Aboriginal Fines Liaison Officers be employed in all Magistrates Courts in Western Australia.

Recommendation 90

That the State government ensure that interpreter services be provided at all court sittings in Western Australia.

Recommendation 91

That the State government ensure that an Aboriginal Customer Service designed by Aboriginal people be provided in all lower and higher courts in Western Australia to make the courts more "user-friendly" and reduce the alienation felt by many Aboriginal people when they enter the court system.

Recommendation 92

That the State government ensure that an Aboriginal cultural advisor be appointed to all courts in Western Australia.

Recommendation 93

That the State government amend the Justices Act 1902 (WA) to remove the power of Justices of the Peace to imprison.

Recommendation 94

That the State government appoint more magistrates so as to reduce the need to utilise Justices of the Peace.

Recommendation 95

That the State government appoint more Aboriginal Justices of the Peace.

Recommendation 96

That the State government appoint more Aboriginal Magistrates.

Recommendation 97

That the State government provide funding for appointment of more Aboriginal Court Officers by Aboriginal Legal Services, Community Legal Services and the Legal Aid Commission.

Recommendation 98

That the State government amend Section 49 of the Aboriginal Affairs Planning Authority Act 1972 (WA) so it is applicable to all offences and that its effect not be limited to "traditional" Aborigines.

Recommendation 99

That the Chief Justice of the Supreme Court of Western Australia ensure that Judges, Magistrates and Justices of the Peace undergo a cultural awareness program which is to include courses on customary law and the continuing effects of the assimilation policy and removal practices.

Recommendation 100

That the State government amend the Sentencing Act 1995 (WA) to include recognition in the sentencing principles of punishment under customary law as a mitigating factor.

Recommendation 101

That the State government amend the Sentencing Act 1995 (WA) to include in the sentencing principles that imprisonment should be a sanction of last resort.

Recommendation 102

That the State government amend the Sentencing Act 1995 (WA) to include in the sentencing principles that the judiciary consider the Aboriginal defendant's contrition, rehabilitation, and Aboriginality in mitigation.

Recommendation 103

That the State government amend the Sentencing Act 1995 (WA) to require that the judiciary must be informed whether the Aboriginal defendant was removed from his/her family in childhood, and of any continuing effects resulting from the removal, and if so, this to be a mitigating factor in sentencing.

Recommendation 104

That the State government make more resources available to allow Aboriginal prisoners to be relocated at the prison nearest to their home and/or family.

Recommendation 105

That the State government give Aboriginal organisations and communities the resources and responsibility to organise and manage culturally appropriate courses in prison.

Recommendation 106

That the Ministry of Justice made a concerted effort to increase the number of Aboriginal prison officers.

Recommendation 107

That the Ministry of Justice ensure all Aboriginal prisoners are given permission to attend family funerals.

Recommendation 108

That the Ministry of Justice appoint Aboriginal experts to design and run culturally appropriate sex offenders treatment programs.

Recommendation 109

That the Ministry of Justice erect "half way houses" near Aboriginal communities to accommodate soon to be released Aboriginal prisoners near their families.

Recommendation 110

That the Ministry of Justice employ Aboriginal peer support officers at every prison to meet the overwhelming needs of Aboriginal prisoners.

Recommendation 111

That the Ministry of Justice undertake consultation with Aboriginal organisations and communities to determine and improve the cultural appropriateness of community based orders, and to determine whether there are any practical alternatives that do not include imprisonment.

Recommendation 112

That while community based orders remain the alternative to imprisonment, where possible, the courts should issue community based orders rather than imprisonment.

CHAPTER 12 - CHILD WELFARE PARADIGM

Recommendation 113

That Family and Children's Services and relevant non-government agencies further develop practice guidelines for implementation of the Aboriginal Child Placement Principles to enhance the responsiveness of the program and ensure appropriate responses are made that cater for the diversity of Aboriginal culture.

Recommendation 114

That the State government establish a joint government/non-government Task Force which includes Aboriginal representatives, to assess and make necessary recommendations to improve its effectiveness.

Recommendation 115

That Family and Children's Services employ more Aboriginal staff at all levels within the organisation, including policy making, administration and program positions, and especially in country and remote areas.

Recommendation 116

That all staff at Family and Children's Services complete a properly assessed cultural awareness program designed and conducted by Aboriginal people.

Recommendation 117

That Family and Children's Services prepare and release a current statement of its Aboriginal child welfare policy, including departmental directives regarding Aboriginal case-management and methods of assessing procedures/casework/complaints.

Recommendation 118

That the State government instigate an independent review of the Aboriginal child welfare policy of the Family and Children's Services and make appropriate recommendations.

Recommendation 119

That Aboriginal non-government agencies be increasingly relied on to provide placement, case management, policy and directive formulation, assessment and education services to Family and Children's Services and other involved government agencies.

Recommendation 120

That Family and Children's Services introduce programs of community assessment which pro-actively engage service-users and encourage public comment generally.

Recommendation 121

That the State government provide adequate resources to Yorganop to undertake wide ranging consultations with Aboriginal communities and organisations.

Recommendation 122

That direct State government funding to Manguri be increased to a level to maintain its long-term viability.

Recommendation 123

That direct State government funding to Djooraminda Aboriginal Corporation be increased to a level to maintain its long-term viability.

Recommendation 124

That a peak organisation be formed to represent Aboriginal non-government child welfare agencies.

Recommendation 125

That the peak organisation have formal liaison status with Family and Children's Services.

Recommendation 126

That all government and departmental policies and directives in relation to Aboriginal people be informed by the rapid developments in the area of Aboriginal affairs, rights and expectations. Attention should be given to:

- ***international law;***
- ***programs and developments in other countries;***
- ***academic studies;***
- ***Commonwealth and State commissioned government reports; and***
- ***non-governmental reports and studies***

Recommendation 127

That the State government implement immediately recommendations 188 and 192 of the Royal Commission into Aboriginal Deaths in Custody.

Recommendation 128

That relevant government and non-government organisations design performance indicators to be included in all Aboriginal targeted or specific programs.

Recommendation 129

That the State Government enshrine in legislation the Aboriginal Child Placement Principles.

Recommendation 130

That the State government transfer policy making and implementation on Aboriginal child welfare from centralised non-Aboriginal bureaucracy to decentralised Aboriginal Communities.

Recommendation 131

That the State government introduce legislation similar to the Children's, Young Persons, and Their Families Act 1989 (NZ) and/or amend relevant statutes to incorporate, where appropriate, recognition of Aboriginal rights, special needs, law and resolution procedures. Acts that should be considered for reform are:

- ***Child Welfare Act 1947 (WA);***
- ***Community Services Act 1972 (WA);***
- ***Family Court Act 1975 (WA);***
- ***Children's Court of Western Australia Act 1988 (WA); and***
- ***Adoption Act 1994 (WA)***

Recommendation 132

That the State government ensures all relevant legislation guarantees Aboriginal control over Aboriginal child welfare.

Recommendation 133

That the Family Court of Western Australia, after consultation with a wide section of Aboriginal communities, instigate programs and services which will improve the access of Aboriginal litigants and defendants in the Family Court.

Recommendation 134

That the Aboriginal and Torres Strait Islander Commission provide special grants to Aboriginal Legal Services to improve their ability to meet the family law needs/rights of Aboriginal people.

Recommendation 135

That the State government amend the Family Court Act 1975 (WA) to make it mandatory in cases involving Aboriginal children that the person appointed as separate representative is familiar with Aboriginal culture, legal and social issues.

Recommendation 136

That the State government amend the Family Court Act 1975 (WA) to give appropriate recognition and effect to traditional Aboriginal marriages, Aboriginal resolution processes, Aboriginal kinship obligations and other cultural needs.

Recommendation 137

That Commonwealth and State Attorney-Generals and the Family Court of Australia and Family Court of Western Australia establish and maintain dialogue with Aboriginal communities on their needs in the area of family law.

Recommendation 138

That the State government amend the Adoption Act 1994 (WA) to enshrine the Aboriginal Child Placement Principles.

Recommendation 139

That the State government provide assistance to establish a non-government Aboriginal body to advise governments and governmental departments on adoption issues involving Aboriginal children.

Recommendation 140

That the Commonwealth and State governments provide assistance to establish an Aboriginal women's organisation to liaise with Commonwealth and State Attorneys-Generals and Minister for Aboriginal Affairs on issues relevant to Aboriginal women.

Recommendation 141

That the Commonwealth and State governments fund the establishment of special women's units within Aboriginal Legal Services and/or separate women's Aboriginal Legal Services.

CHAPTER 13 - JUVENILE JUSTICE

Recommendation 142

That the State government repeal Section 138B of the Child Welfare Act 1947 (WA) and replace it with a section that gives police the power only to refer a child to a "welfare agency" in regards to child welfare matters.

Recommendation 143

That the State government amend the Young Offenders Act 1994 (WA) so that the rights of young people are protected at all stages of the criminal process in a manner which is consistent with the best interests of the child and which recognises the vulnerability of young people.

Recommendation 144

That the State government amend the Young Offenders Act 1994 (WA) so it is based on the premise that criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.

Recommendation 145

That the State government amend the Young Offenders Act 1994 (WA) to recognise the principle than a young person should always receive a lesser sanction than an adult.

Recommendation 146

That the State government establish a Review Committee to monitor and review the effectiveness and adequacy of the Juvenile Justice Teams in order to promote teams that are multi-disciplinary and community based in their approach.

Recommendation 147

That the State government amend the Young Offenders Act 1994 (WA) so that community supervision orders offer community work options which are culturally appropriate.

Recommendation 148

That the State government amend the Young Offenders Act 1994 (WA) so young people are not placed in work camps, or alternatively strict conditions on eligibility are applied in the placement of young people in work camps.

Recommendation 149

That the State government repeal the Special Order provisions of the Young Offenders Act 1994 (WA).

Recommendation 150

That the Ministry of Justice give attention to ensuring workers supervising release orders are adequately resourced and trained.

Recommendation 151

That the State government ensures that all legislation dealing with juvenile justice conform to Australia's obligations under international law.

Recommendation 152

That the State government amend relevant legislation so that the police are no longer required to undertake moral policing activities.

Recommendation 153

That the Minister of Police ensures that the police at all levels be made fully aware of their obligations under International, Commonwealth and State law, particularly the Convention of the Rights of Children, Beijing Rules, the Equal Opportunity Act 1984 (WA) and the Racial Discrimination Act 1975 (Cth).

Recommendation 154

That the State government encourage dialogue between the police force and relevant juvenile justice agencies.

Recommendation 155

That the State government repeal Section 50 of the Police Act 1892 (WA) and in the meantime a protocol be established which provides guidelines for the use of the section.

Recommendation 156

That the Police Commissioner order that decisions to proceed by way of arrest in the case of juveniles should be automatically reviewed by a senior officer.

Recommendation 157

That the State government incorporate into legislation recommendations 243-245 of the Royal Commission into Aboriginal Deaths in Custody, and in the interim the Police Commissioner incorporate the recommendations into a police protocol.

Recommendation 158

That the State government ensure the policing process be rigorously constrained within a legislative rights framework, which inter alia, obliges police to communicate in an age appropriate and culturally appropriate manner.

Recommendation 159

That consultation takes place between the Ministry of Justice, the Police Service, Youth and Aboriginal Legal Services in regards to the operation and performance of juvenile justice teams.

Recommendation 160

That the State government amend the relevant sentencing provisions of the Young Offenders Act 1994 (WA) to emphasise that custodial sentences for juveniles be a measure of last resort, and to give due considerations to the rehabilitation of juvenile offenders.

Recommendation 161

That all involved agencies maintain criminal justice statistics, so as to facilitate the monitoring of Aboriginal interaction of the system and the success of various programs.

Recommendation 162

That relevant government and non-government agencies develop program objectives and performance indicators so that the success or failure of programs can be assessed and policy development be enhanced.

Recommendation 163

That the State government use the Children, Young Persons, and Their Families Act 1989 (NZ) as a model to enact new juvenile justice legislation.

Recommendation 164

That the State government ensure that new juvenile justice legislation guarantees the rights of children as recognised under international law.

Recommendation 165

That the State government ensure that new legislative reform provides for major involvement of Aboriginal people and communities in post-sentencing decision making and in the delivery of services to juvenile Aborigines in prison, such as culturally appropriate counselling, social, cultural and educational programs.

Recommendation 166

That the Ministry of Justice work with Aboriginal communities to examine the desirability of and the need for juvenile detention centres in regional locations.

CHAPTER 1

INTRODUCTION

The importance and responsibility of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* ("the National Inquiry") cannot be over-estimated. The National Inquiry, announced in May 1995, is to inquire into a shameful part of Australia's history which led to the systematic removal of indigenous children from their families. The National Inquiry has been charged with:

- tracing past laws, practices and policies that lead to the removal of Aboriginal and Torres Strait Islander children from their families and the effects of those laws, practices and policies;
- examining compensation issues;
- examining current laws, practices and policies with respect to services and procedures available to those affected by removal and recommending appropriate changes; and
- examining current laws, practices and policies with respect to child placement and care of Aboriginal and Torres Strait Islander children and recommending appropriate changes, taking into account the principle of self-determination.[1]

The ALSWA is presenting this submission to the National Inquiry on behalf of the 710 clients who have provided personal histories of their removal, their parents' removal, their siblings' removal, or their children's removal from them. Much of the information collected from ALSWA clients has already been recorded in *Telling Our Story*.[2] This submission has been prepared to specifically address the terms of reference of the Inquiry.

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1 Self-determination for the indigenous peoples of Australia should be at the forefront of all recommendations made.

2 ALSWA, *Telling Our Story*, ALSWA, Perth, 1995.

Past legislators, governments and departmental authorities may wish to argue that the welfare of Aboriginal children was the rationale behind the policies and practices which led to Aboriginal children being removed from their families. This argument is strongly refuted, and it is submitted that there is little doubt that the systematic removal of Aboriginal children from their families and culture was driven by the government's obsession with control of Aborigines and the goal of assimilating Aboriginal children into the dominant non-Aboriginal community. The emphasis was on the assimilation of "half-caste" Aboriginal children into the mainstream non-Aboriginal community and the segregation of "full-blooded" Aborigines from "half-castes" and the non-Aboriginal community.[3]

The policy of assimilation was cruelly expounded by Mr. A. O. Neville, Chief Protector of Aborigines in Western Australia, in a speech he made at the initial conference of the Commonwealth of State Aboriginal Authorities held in Canberra in April, 1937. In part he said:

> *The opinion held by Western Australian authorities is that the problem of the native race, including half-castes, should be dealt with in a long range plan. We should ask ourselves what will be the position, say, 50 years hence; it is not so much the position today that has to be considered. Western Australia has gone further in the development of such a long range policy than has any other State, by accepting the view that ultimately the natives must be absorbed into the white population of Australia. That is the principal objective of legislation which was passed by the Parliament of Western Australia in its last session. I followed closely the debates which accompanied the passage of that measure, and although some divergence was, at time, displayed, most members expressed the view that sooner or later the native and white population of Australia must become merged. The Western Australian law to which I have referred is based on the presumption that the Aborigines of Australia sprang from the same stock as we did ourselves; that is to say, they are not negroid, but give evidence of Caucasian origin.*
>
> ...
>
> *If the coloured people ["half-castes"] of this country are to be absorbed into the general community they must be thoroughly fit and educated at least to the extent of the three R's. If they can read, write and count, and know what wages they should get, and how to enter into an agreement with an employer, that is all that*

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[3] The segregation of the Aboriginal people ("full-blooded") from non-Aboriginal populations was judicially recognised by the Chief Justice of the Supreme Court of Western Australia in the case of *Hodge v Needle* (1947) 49 WALR 1 at 3.

should be necessary. Once that is accomplished there is no reason in the world why these coloured people should not be absorbed into the community. To achieve this end, however, we must have charge of the children at the age of six years; it is useless to wait until they are twelve or thirteen years of age. In Western Australia we have power under the Act to take any child from its mother at any stage of its life, no matter whether the mother be legally married or not.

...

Another important point is marriage. I realise that the problem in Queensland as outlined by Mr. Bleakley, is different, but the natives in Western Australia are mostly of 'purer' stock. There is some Asiatic blood in the north and a certain amount of negroid strain is to be seen due to the fact that some of the early settlers brought with them to Western Australia negro servants who left their mark on the native population. The negro strain remains. The Asiatic Cross, however, is not a bad one. We find that half-caste Asiatics do very well indeed; in fact, very often they beat the white cross. In order that the existing state of affairs in Western Australia shall continue, and in order to prevent the return of those half-castes who are nearly white to the black, the State Parliament has enacted legislation including the giving of control over the marriages of half-castes. Under this law no half-caste need be allowed to marry a full-blooded Aboriginal if it is possible to avoid it, but the missions [mission stations] do not always take steps to prevent this from occurring; they allow the half-castes under their control to marry anybody.

...

We have much the same difficulty in Western Australia. Every administration has trouble with half-caste girls. I know of 200-300 girls, however, in Western Australia who have gone into domestic service and the majority are doing very well. Our policy is to send them out into the white community, and if the girl comes back pregnant our rule is to keep her for two years. The child is then taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment. At the expiration of the period of two years the mother goes back into service. So that it really does not matter if she has half a dozen children. Our new legislation makes it an offence for a white man to have sexual intercourse with a coloured girl. About twelve prosecutions are pending for contravention of that provision of the new act, and before long I am sure that there will be a diminution of that trouble.[4]

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[4] Refer to ALSWA, *Telling Our Story, op.cit.*, Appendix A, for the full speech.

The goal Neville envisaged was one where "part Aborigines" (the "half-caste") would be absorbed by the white community and the "full blooded Aborigines"[5] would "die out as quickly as possible".[6] The policy and practice of removing Aboriginal children from their families and communities was an attempt to "breed out" the Aboriginal race. It amounted to genocide.[7]

Equally, it is submitted that many of the "authorities" who were delegated the responsibility of enforcing the legislation in the assimilation policies, did so in an insensitive and unjustifiable manner. The report *Telling Our Story* records how young children, some younger than six months, were removed from their families in a traumatic manner and transported to missions, government institutions and foster homes. Often when siblings were removed they were separated from each other even if they were in the same institution. Children were in many instances subjected to incredibly strict disciplinary regimes, inhumane treatment and sadly, they were subjected to physical and sexual abuses. When the authorities decided it was time for the children to leave the rigid environment of an institution or mission, they were frequently sent to the outside world without the necessary life skills and family support systems. This is the root cause of many of the social and health problems faced by Aborigines in society today. As J H Wooten, QC, Commissioner of the RCIADIC stated:

> *The horror of a regime that took young Aboriginal children, sought to cut them off suddenly from all contact with their families and communities, instil in them a repugnance of all things Aboriginal and prepare them harshly for a life as the lowest level of worker in a prejudiced white community is still living legacy amongst Aborigines today.*[8]

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5 Unfortunately, such terms as "part Aboriginal" and "full blood Aboriginal"are still used by some.

6 Haebich, A., *For Their Own Good*, University of Western Australia Press, Perth, 1988, p150. Also Neville, A.O., *Australia's Coloured Minority*, Currawing Publishing Co., Sydney, 1947.

7 Refer to Chapter 5 for discussion on genocide.

8 Wooten, J.H., *Report of the Inquiry into the Death of Malcolm Charles Smith of the Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1989, p20.

The parents of the children who were taken away were often manipulated and humiliated into allowing their children to be removed. However, most times they were powerless to prevent their children being removed. On other occasions, the parents and/or grandparents did not know their children would be taken away. Subsequently, when they attempted to make contact with their children, they did not know where they were or were refused access to them.

The experiences, effects and losses attached to the assimilation policies and practices are traumatic and far-reaching. This submission records the experiences, effects and losses identified by those who provided information to the ALSWA.[9] The clients also set out a number of recommendations to remedy the losses that they have suffered and continue to suffer. Some clients made strong recommendations on the current unacceptable involvement of Aboriginal adults in the criminal justice system, and Aboriginal children with the child welfare and criminal justice systems. The wishes of the ALSWA's clients on how to remedy their losses and to reduce their children's involvement with the child welfare and criminal justice systems, have shaped the form and content of this submission to the National Inquiry.

The wishes and recommendations made by the ALSWA's clients are very wide ranging and cover a significant variety of laws, practices and policies that impinge upon the lives of Aboriginal people. This is not surprising given the far-reaching effects of the assimilation policies and removal practices of the past, and the present separation of Aboriginal children from their families by the child welfare and criminal justice systems. Further, nearly all Aboriginal people in Western Australia have been affected, directly or indirectly, by the past policies and practices of assimilation which led to the removal of children from their families. This necessitates that the National Inquiry take a broad view of the terms of reference.

A broad and detailed approach is necessary because some current laws, policies and practices which initially may not appear relevant to the terms of reference of the National Inquiry, on close examination, are very relevant. Taking just one example, the public housing provider in Western Australia, Homeswest, has all too often been over-zealous in evicting Aboriginal tenants for arrears of rent or alleged "anti-social" behaviour. Eviction of Aboriginal people from their homes

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[9] Also refer to ALSWA, *Telling Our Story, op.cit.*

only perpetuates the break-up of families, as parents often have to move to temporary accommodation and take their children to other accommodation where they may be under the care of strangers. Thus, people who were removed under the assimilation policies, once again, are segregated from their families, and their children are denied the opportunity to be cared for by their parents.

It is imperative, if the National Inquiry is to be of use to Aboriginal and Torres Strait Islander people, that a wide ranging and detailed approach be taken. It is hoped that the National Inquiry examines the whole range of laws, practices and policies that touch the lives of Aboriginal people who were separated from their families, and seriously considers the recommendations made in this submission which reflect their wishes. Those who provided their personal histories to the ALSWA hope that the National Inquiry will not only accept their wishes and recommendations in regard to the delivery of services and reparation for those removed, but also in regards to over-representation of Aboriginal adults within the criminal justice system and the continued removal of Aboriginal children from their families and communities today. The over-riding wish of ALSWA's clients is that they and their communities have the responsibility for determining the best method of service delivery, the responsibility for the care of their children and that they receive reparation including monetary compensation and culturally appropriate counselling as part remedy for the losses they have had to endure because of the systematic removal of Aborigines from their families.

Neil's Story

I was made a ward of the State when I was four years of age. I think the reason I was made a ward of the State was because my parents were alcoholics. At the time we were living at Mingenew Reserve.

I was sent to New Norcia Mission. I remember my three older sisters being there but I don't remember if they went there the same time as me or before me.

I remember seeing my sisters on occasions but not very often. It was only for short periods of time and we were not able to get to know each other.

I only stayed at New Norcia for a short time. It was a one-off incident. I remember whilst I was at New Norcia, there was a certain Catholic brother whose name I know but I don't want to say, came along to where I was with other kids. He picked me up and I was telling him that I wanted to stay and play with the kids. He took no notice to me and took me to his room, which was a study/bedroom.

He sat on the edge of his bed. He made me sit on his knee. I can remember him praising me up and telling me I was a good boy. At the same time he was running his hands over my legs and my face. This went on for a short time. He then stood up and then lay me on the bed, face down. My legs were hanging over the side of the bed. He started to pull my shorts down. I started to cry as I was getting very scared and confused because I didn't know what he was doing. I can remember him holding me down with one hand and laying over the top of me. I can remember something being rubbed against my bum. He was rocking back and forth on top of me as he held me down, and at the same time he was praising me. This went on for a couple of minutes. He then got off. He pulled my shorts back up. He sat me back on his knee and continued to praise me. I was crying. He told me not to tell anyone otherwise I would get into trouble.

He walked me back to where the kids were still playing. I could not talk to anyone because I was very scared, confused and very angry. I couldn't understand what was happening.

I never told my sisters. I kept this to myself and bottled it all up inside me. I never told anyone about this until I was charged with sexual assault against my niece. This was in 1987-1988. I received treatment in Fremantle gaol.

I am back in prison for a sexual assault that happened in 1992. I received five years with parole.

As I said before, I was only in New Norcia for a short time. When I was six years of age I was sent to Tardun Mission. I stayed there until I was 14 years of age. I was kicked out because of my behaviour.

While I was at Tardun I started abusing the other kids.

The punishment at Tardun was pretty severe, especially as I got older. Father Frank pulled our shorts down and if we did anything wrong he would hit us across the bum with thick leather and a rubber strap. He would take his hand right back and hit us with real force. We had marks on our bum and we were unable to sit down for weeks without discomfort. Another thing we were required to do if we were caught misbehaving was to cut the lawn with a double edged razor. We were also made to scrub the bathroom with a razor and Ajax and get rid of mould in the bathroom. We were also made to dig trenches if we misbehaved. It would be 35° outside but we still had to dig the trenches in the middle of the day.

During the school holidays I was allowed to go back home to my mum and dad. That wasn't enjoyable because mum and dad were still drinking a lot and fighting. It was really awful because it wasn't nice at home and I hated being at the mission. It was worse at the mission. But it didn't really matter what I wanted. The authorities made me go back to the mission.

When I was kicked out of the mission I went back home. That didn't work out so I just left home and started hitch-hiking around.

I eventually went to Mullewa where I started drinking beer regularly and I ended up getting in trouble with the law. I was sent to Mount Lawley Boys Detention School.

After I left there I just wandered around without any purpose in my life. My life has been mixed up. I don't believe I have had a chance to lead a normal life because of the abuse and severe discipline I experienced at the missions.

CHAPTER 2

HISTORICAL FRAMEWORK

Introduction

It is not intended here to provide a comprehensive historical analysis and discussion of the policies and practices that led to the systematic removal of Aboriginal children of Western Australia from their families, to be raised in missions, government institutions and by foster parents.[10] However, it is important to provide at least a brief historical framework to help the reader understand the background of the assimilation policies and removal practices, and the context in which the decisions were made to remove Aboriginal children from their families. To this effect, this chapter will focus on the legislative background which dealt with Aboriginal people in Western Australia, relevant child welfare legislation, and the attitudes and practices that govern the removal of Aboriginal children from their families.

Legislative Background

1. Aboriginal Welfare

Legislation concerned specifically with Aboriginal people was enacted very early in the State's history. The very pieces of legislation enacted to deal specifically with Aboriginal people were closely linked with wider government policies to manage and control Aboriginal people. This was especially so in the area of Aboriginal child welfare.

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[10] The reader is referred to ALSWA, *Telling Our Story*, *op.cit.*, and Haebich, A., *For Their Own Good*, University of Western Australia Press, Perth, 1988. Also refer to Choo, C., "*Black must go White*": *The Removal of part-Aboriginal children from their mothers. An exploration of the policy and practices of A. O. Neville, Chief Protector of Aborigines*, Unpublished thesis, Master of Philosophy (Australian Studies), University of Western Australia, Nedlands, 1989.

(a) Industrial Schools Act 1874 (UK)

In the 1880s, missionaries began to provide "education" for Aboriginal children. The process of gaining access to the children began with contacting parents, getting them to agree to give up their children, and then formalising the agreement under Section 5 of the *Industrial Schools Act 1874* (UK).[11] Subsequently, Aboriginal children were moved to the missions, thus separating them from parents, family and tribe. Conflict arose when Aboriginal parents requested the return of their children, as the missions were loath to relinquish control over them.[12]

(b) Aboriginal Protection Act 1886 (UK)

In 1886, colonial administrative and management procedure in relation to Aborigines was altered by the *Aboriginal Protection Act 1886* (UK) which set up an Aborigines Protection Board with a variety of duties of a "welfare" nature in relation to Aboriginal people. Section 6(3) of that Act required the Board to "submit to the governor any proposals or suggestions relating to the care, custody or education of Aborigines," while Section 6(6) required the Board to "exercise a general supervision and care over all matters affecting the interests and welfare of the Aborigines, and to protect them against ill-treatment, imposition and fraud".

Despite the presence of the Board, the governor continued to rely predominantly on the Colonial Office for policy direction.

(c) Aborigines Act 1897 (WA)

It was not until 1897 (self-government was granted by the *Constitution Act 1889* (UK)) that Aboriginal affairs became a State responsibility. The legislature of the State of Western Australia, enacted the *Aborigines Act 1897* (WA) which created the Aborigines Department, staffed by a Chief Protector and public servants who were to be the new guardians of the Aboriginal people.

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[11] Aborigines Department, 33/00, case cited, *minute*, 26 January, 1900. Held in loose service at AAD library, Perth.

[12] *Ibid.*

(d) Constitution Act 1889 (UK)

Section 70 of the *Constitution Act 1889* (UK) provided for the payment of 1 per cent of consolidated revenue to be issued to the Aborigines Protection Board and to be expended generally to promote the *preservation* and well-being of Aborigines. There was an apparently ineffectual attempt to repeal that legislation in 1897 and in a further retrospective repeal in 1905, the validity of which was challenged in the action of *Snowy Judamia and Ors v Western Australia.*[13]

(e) Aborigines Act 1905 (WA)

Apart from its repeal of Section 70 of the *Constitution Act 1889* (UK), the *Aborigines Act 1905* (WA) set up a bureaucratic structure for the control of Aboriginal people. It provided for the Aborigines Department to have duties described by Section 4, consisting of a variety of specified duties and "generally assisting in the preservation and well-being of the Aborigines". By Section 6, the duties of the Department included, inter alia, "to provide for the custody, maintenance and education of the children of Aborigines" (sub-section 3). Section 7 provided for the appointment of a Chief Protector of Aborigines, who was accountable to the Minister, to be responsible for the administration of the Department and the execution of the Act throughout the State. Section 8 provided that the Chief Protector was the legal guardian of every Aboriginal and half-caste child until such child attained the age of 16 years. The employment of Aboriginal people was restricted under further provisions, for example:

- special rules provided for employment agreements and restrictions relating to the employment of Aboriginal people on ships;
- provision was made for the creation of reserves;

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[13] *Snowy Judamia, Crow Yougarla, Paddy Yarbarloo, Betty Thomas and Lesley Arkie v The State of Western Australia*, WA (S.Ct) Unreported, 1 March, 1995, Appeal Ful 34 of 1995. However, the challenge was defeated because the court at first instance, and the Full Court on appeal, held that Section 6 of the *Crown Suits Act 1947* (WA) statute barred the action for declaration and other relief against the Crown in right of the State of Western Australia. The actual validity or invalidity of the 'repeal' did not need to be decided.

- the Protector was enabled to manage the property of Aboriginal people; and
- there was a large number of miscellaneous provisions, some of which appear to have been directed at the protection of Aboriginal people (such as those forbidding female Aboriginals from being within two miles of any creek used by pearlers) and others which appear to have been designed to protect others from Aboriginal people (for example, prohibitions on the supply of guns to Aboriginal people).

Section 12 of the 1905 Act empowered the Chief Protector to order that any Aborigine be moved from a reserve or district to another reserve or district and be kept there. Many summary offences were created for contravention of the various provisions of the Act, and extensive regulation-making powers were conferred on the governor.

The second reading of the Aborigines Bill illuminated the intentions and attitudes underlying the prospective Act. It was stated that "half-castes if bred with white people, become in some respects almost as expert as the whites" hence requiring particular segregation from both Aboriginal and white societies.[14] In 1909 police, protectors and Justices of the Peace were given the power to remove any half-caste child to a mission without the authorisation of the Chief Protector.[15]

Anna Haebich argues that the 1905 Act, "set up the necessary bureaucratic and legal mechanisms to control all Aboriginal contacts with the wider community, to enforce the assimilation of Aboriginal children and to determine the most personal aspects of Aboriginal lives".[16]

The guardianship powers created by the 1905 Act were extended by the 1911 amendments so that the Chief Protector had the power of removal "to the exclusion of the rights of the mother of an illegitimate or half-caste child".[17]

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14 *Hansard*, Western Australian Parliament, Vol. 28, 1905, p432.

15 Western Australian Government, *Western Australian Government Gazette*, Western Australia Government Printer, Perth, 19 February, 1909, p588.

16 Haebich, A., *op.cit.*, p84.

17 *Aborigines Act Amendment Act 1911* (WA), Section 3.

(f) Native Administration Act 1936 (WA)

The *Native Administration Act 1936* (WA) amended much of the nomenclature of the 1905 Act and bestowed even greater powers on the newly named Commission of Native Affairs. Section 8 of the 1936 Act declared the Commissioner the legal guardian of every native child until the age of 21, "notwithstanding that the child has a parent or other relative living". Section 8 also provided the Commissioner with the power to direct, from time to time, which person was to have the custody of an Aboriginal child of whom the Commissioner was legal guardian. The power to remove any "native" to reserves or districts and keep them there, was extended to include "institution or hospital". The removal powers previously contained in Section 12 of the 1905 Act were now contained in Section 13 of the new Act.

Haebich is of the opinion that the *Native Administration Act 1936* (WA) conferred upon the Commissioner of Native Affairs greatly increased powers over the daily lives of each Aboriginal child, and established a regime of benevolent tyranny and an efficient administrative machinery to enforce it.[18]

(g) Native Welfare Act 1954 (WA)

By the time of the enactment of the *Native Welfare Act 1954* (WA), there was some marginal statutory integration of the native welfare and child welfare systems. Section 13, which enabled the Minister to require an Aboriginal person to remain within a reserve or institution, was repealed. Section 8, which provided for the Commissioner's powers of guardianship, was altered to provide that the Commissioner be the guardian of all Aboriginal children until the age of 21 *except* while the child was a ward pursuant to the *Child Welfare Act 1947* (WA). That section also enabled the Commissioner to direct from time to time, which person was to have the custody of a native child of whom he was the guardian. Many of the restrictions relating to Aboriginal people were repealed by the 1954 Act.

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[18] Haebich, A., *op.cit.*, p265.

(h) Native Welfare Act 1963 (WA)

The 1963 Act repealed all previous Aboriginal and Native Welfare Acts, so finally removing the Commissioner's guardianship powers over Aboriginal children. However, Aboriginal children could still be removed under the broad provisions of the *Child Welfare Act 1947* (WA).

The *Native Welfare Act 1963* (WA) had only some of the characteristics of the legislation which preceded it. There was still a separate department, called the Department of Native Welfare with a Commissioner of Native Welfare who was, under the Minister, responsible for the administration of the Act. The Minister was constituted a body corporate under the name of "Minister for Native Welfare". Provision remained for reserves and for management of property of certain natives. The provisions as to universal guardianship of native children and the very wide powers to direct where natives should live, no longer were to be found in the Act. However, Section 7 of the Act still provided that it was the Department's duty to "provide for the custody, maintenance and education of the children of natives". The regulation making power of the Governor included that of providing for the care, custody and education of the children of natives, and providing for the control, care and education of natives in native institutions. Section 16 of the Act exempted certain Crown servants from personal liability for anything done or omitted in good faith in connection with the exercise or purported exercise of powers or functions under the Act.

(i) Aboriginal Affairs Planning Authority Act 1972 (WA)

The State Labour government under Tonkin, elected in 1971, began dismantling legislation which treated Aboriginal people differently. The *Native Welfare Act 1963* (WA) was repealed and replaced with the *Community Welfare Act 1972* (WA) and the *Aboriginal Affairs Planning Authority Act 1972* (WA).

The newly formed Aboriginal Affairs Planning Authority (replacing the Department of Native Affairs) was to promote, "the economical, social and cultural advancement of persons of Aboriginal descent". The Authority was directed to take Aboriginal views into consideration.[19]

The Department for Community Welfare replaced the Department of Child Welfare in 1972. The new Department became the body empowered by the *Child Welfare Act 1947* (WA) to take control of "neglected children".

2. Child Welfare

In addition to legislation which specifically referred to Aboriginal people, there have been a number of Child Welfare Acts which contained powers with respect to destitute and neglected children. Aboriginal children have also been removed from their families under these Acts. The main Acts referred to here are the *State Children's Act 1907* (WA), the *Child Welfare Act 1947* (WA) and the *Community Services Act 1972* (WA).

(a) State Children's Act 1907 (WA)

The *State Children's Act 1907* (WA) created a department to be called the State Children's Department with a Secretary who, subject to the regulation and direction of the Minister, had the care, management and control of the persons and property of all State children, and the supervision of all children nursed by foster mothers. A "state child" meant a "destitute child" or "neglected child" received into a government institution or a subsidised institution, or apprenticed or placed out under the authority of the Act. An officer of the Department or a police officer had power without a warrant to apprehend any child appearing, or suspected of being a destitute or neglected child, and to place the child with an institution or other person as prescribed. A child so apprehended was then to be dealt with by the Children's Court which, if satisfied the child was in fact destitute or neglected, could commit the child to the care of the Department or send it to some institution to be specified in the order until the age of 18 years. Private persons or societies could be approved by the governor as a person or society to whose care destitute or neglected

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[19] *Aboriginal Affairs Planning Authority Act 1972* (WA), Section 12.

children could be committed, and where a child was committed to such a person or society, the person or the manager of the society became the guardian of the child. As to children placed in State institutions, there seems to have been no specific guardianship provision, although the Department was said by the statute to have "general supervision" over all State children. The court was not to commit a child to any private person or society if the father objected. There was a statutory protection given to the Department and officers by Section 130, which provided that "no action shall be brought" against the Department or anyone else for anything done in pursuance of the Act unless the statutory notice had been given within six months after the act or default complained of.

(b) Child Welfare Act 1947 (WA)

The *Child Welfare Act 1947* (WA) created a department called the Child Welfare Department with a Secretary who, under the direction of the Minister, was to carry into operation the provisions of the Act. Subject to the regulations and the direction of the Minister, the Secretary had the care, management and control of the persons and property of all wards. Again, any officer of the Department and any police officer could apprehend any child appearing or suspected to be destitute, neglected, incorrigible or uncontrolled, dispose of the child pending hearing and then apply to the Children's Court for an order in respect of the child. The court could order the child to be committed to the care of the Department, sent to an institution specified in the order until the age of 18 or released on probation upon conditions. The court apparently had power to recommend to the Secretary that children committed to the care of the Department be dealt with by being placed in a particular way, but that recommendation could be departed from with the consent of the Minister. The Minster could order the release of any ward from the control of the Department. As with the *State Children's Act 1907* (WA), there was provision for committal to the care of private persons or societies, and again the person or manager of the society was to become the guardian of the child to the exclusion of every other guardian until the child attained the age of 18 years (with provision in the case of females for the guardianship to extend until age 21). Similarly, the person or society was to permit visits by the Secretary or other officers of the Department. By Section 147 of the Act, a statutory restriction upon the right of action against the Department and its officers in terms similar to that found in the 1907 Act was inserted. This provision was altered a number of times, being replaced in 1958 with amendments in 1968, 1984

and 1987. The relevant immunity now reads in Section 146C of the *Child Welfare Act 1947* (WA):

> *A person who occupies or has occupied the officer of Minister, Director General or officer of the Department, or who otherwise carries out or has carried out any duty or function under this Act, is not personally liable for anything done or omitted in good faith in or in connection with the exercise or purported exercise of any power conferred or which purports to be conferred, or the carrying out of any duty imposed or which purports to be imposed, by this Act.*

The 1947 Act has been substantially amended over the years. Many of the changes are merely changes of name, while others involve repeal of specific provisions, for example, on the employment of children in circuses which are now either not dealt with under the Act or can be dealt with under the general provisions relating to children in need of care and protection. For the first time, in 1982 a provision was inserted allowing the child, if of the age of 14, or a parent or other person with relevant interest, to request the Minister to review a decision made pursuant to powers conferred on the Minister.

(c) Community Welfare Act 1972 (WA) and Community Services Act 1972 (WA)

The *Community Welfare Act 1972* (WA) established a Department for Community Welfare to deal with family and child welfare issues. With the passing of the *Community Services Act 1972* (WA), the department referred to in the *Child Welfare Act 1947* (WA) and the Director General referred to in that Act, became the Department for Community Services and the Director General of that Department respectively. By the 1972 Act, the Department for Community Services was established. The Minister was to be a body corporate under the name of "the Minister for Community Welfare" and there was a Director General responsible for the general administration of the Department subject to any direction of the Minister. The functions of the Department outlined in Section (c) included the promotion of individual and family welfare in the community, and the prevention of the "disruption of the welfare of individuals and families in the community". An immunity provision provided that no civil liability attached to the Minister in his personal capacity, the Director General or other officers or delegates for any act or omissions in good faith

and in the exercise of purported exercise of powers or functions under the Act. Amendments to the *Community Services Act 1972* (WA) have not significantly altered its powers or functions in relation to child welfare issues. The Department has undergone further name changes, firstly to the Department for Community Development and recently to Family and Children's Services.

Attitudes and Practices

As previously mentioned, the dominating creed which led to the practice of removing Aboriginal children from their families in Western Australia, as in the rest of Australia, was the assimilation policy. This is quite clear from the 1937 speech given by Chief Protector Neville which has been cited in the introduction of this submission. Of course, the policy of assimilation was dominant among legislators and government "authorities" long before the speech by Neville in 1937. The 1951 meeting between the Federal Minister for Territories, Paul Hasluck and the relevant State Ministers, secured agreement amongst the States to make assimilation the official Aboriginal policy.

At the 1951 meeting "assimilation" was formally spelt out. Assimilation meant that all Aborigines:

> *shall attain the same manner of living as other Australians, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and being influenced by the same beliefs, hopes and loyalties.*[20]

While this statement created a nationalistic fiction by purporting the existence of an homogeneous and unified Australia of shared interests and beliefs, it also hid the fact that the assimilation policy had been government policy and procedure from as early as, and probably prior to, the turn of the century. The policy was to separate the "half-caste" from the "full blooded" Aboriginal and assimilate the "half-caste" into "white society".

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[20] Lippmann, L., *Generations of Resistance*, Longman Cheshire, Melbourne, 1981, p38.

In the early 1900s, Prinsep, the first Chief Protector, began lobbying parliament to extend his powers as Chief Protector to include the guardianship and right of removal of all Aboriginal children. Prinsep's impetus was the increase in "half-caste" population. As the children were partly "white" they were "savable". In 1901 he addressed the State parliament, "I think it is our duty not to allow these children, whose blood is half-British, to grow up as vagrants and outcasts, as their mothers are now".[21]

In 1904 a Royal Commission was formed under Commissioner Roth to inquire into, amongst other things, the administration of the Aborigines Department and the treatment and conditions of the Aboriginal population of Western Australia. Its report discussed the "half-caste problem" and recommended that the Chief Protector became the legal guardian of all Aboriginal children up to the age of 18.[22] The rationale was that:

> *There is a large number of absolutely worthless blacks and half-castes about who grow up to lives of prostitution and idleness; they are a perfect nuisance; if they were taken away young from their surroundings of temptation much good might be done with them.*[23]

Subsequent parliamentary discussion of the report included the comment, "it may appear to be a cruel thing to tear away an Aborigine from its mother, but it is necessary in some cases to be cruel to be kind".[24] Further, it was claimed to be "wrong, unjust, and degrading to this state" to leave them as they were and a "maudlin sentiment" to consider the mother's feelings as they would "forget all about it in 24 hours, and ... is glad to get rid of it ...".[25]

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21 Biskup, P., *Not Slaves, Not Citizens*, University of Queensland Press, Brisbane, 1973, p142.

22 *Ibid*, p142.

23 *Ibid*, p61.

24 Western Australian Parliament, *Hansard*, Western Australian Parliament, Perth, Vol. 25, 1904, p558.

25 Western Australian Parliament, *Hansard*, Western Australia Parliament, Perth, Vol. 28, 1905, p426.

A letter written by the owner of a cattle station in the north-west of Western Australian to the Chief Protector on the 6 July, 1927, states:

> *Mr Stack who had left this district and taken up farming at Narrogin has written to both these boys asking them to go and work for him. If Mr Stack is allowed to have these boys I hope he will train them properly. It is not kind to give half-castes a taste of civilisation at school and then allow them to go back from where they come and sit on the wood heap and gnaw bones with the natives and dogs, or out of the same dish, as I've seen these boys do under Mr Stack's management. If it is for the boys' benefit to make a change (though it is hardly encouraging the way they have been applied for) we would not object.*[26]

Other authorities just prior to, and after, Neville's speech at the 1937 conference of Commonwealth and State Aboriginal Authorities in Canberra, expressed similar sentiments to Neville:

- *Would not the separation of the young from close contact with grown members of the settlement tend to minimise the influence of their elders and so help to eradicate what may, if too frequently visited, prove to weaken their characters and usefulness?*[27]

- *A careful watch must be kept on all admissions to Sister Kate's Home. All children must be seen as they must be of the right colour. There are already too many dark children at Sister Kate's Home. The Home is for the rescue of near-white children. It is contrary to their welfare to send dark children, deeper than quarter-caste, to the Home.*[28]

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[26] Letter from the owner of cattle station in the north-west to the Chief Protector dated 6 July, 1927, Native Welfare file.

[27] Myles, W.S., "Midland District Report", in *Annual Report for the Commission of Native Welfare*, Western Australia in Government Printer, Perth, 1937, p55.

[28] Unnamed file note, 28 April, 1941, Native Welfare file.

. *I regret it is not possible to agree to Mr Cadoux's request. James is a near-white boy. He is being reared as a white child at Sister Kate's Home, and in due course he will be placed out in employment, and will live as a white person. It would be detrimental to his future welfare to permit him to return to his mother who lives in association with natives. If this were agreed to it would undo all the good work in rearing James to white standards.*

Children placed with Sister Kate are never released to their parents. This would be a direct contradiction of the principle of their segregation from native persons, as they are placed with Sister Kate for this very reason. By Section 8 I am James' legal guardian up to 21 years, notwithstanding that his mother is alive, and since the principal consideration is the lad's welfare I regret I am unable to accede to Mr Cadoux's request. If I did so I would be inundated with similar requests from other native mothers.[29]

. *I dealt with the policy aspects some two or three years ago on other papers. On that occasion I expressed some views to Sister Kate on the question of marriages and I believe she agreed with me. Doubtless the correspondence was registered separately. I cannot see any objection to the marriage of two quadroons. Evidently Sister Kate believes in the marriage of quadroon girls to white men, to breed out the colour. A copy of Sister Kate's last letter should be placed on the other papers and referred to me, together with particulars of the castes of Ben Dianella and Julie Greenfields.*[30]

. *The admittance of the Lyn and Thatcher children, and the child of Mr Hann depends entirely on their colour, as I could not possibly agree that dark hued children be accommodated. As you know, Sister Kate's Home was established for the education and training of quarter-caste children, with the object of ultimate absorption into the community in the same manner as children who are inmates of white institutions.*

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[29] Letter from Commissioner of Native Affairs to a government official station in North-West dated 21 July, 1944, Native Welfare file.

[30] Unnamed file note, dated 15 May, 1947, Native Welfare file.

As you will realise, dark coloured children could not possibly be absorbed as whites, therefore it is my wish that every care be taken in the admittance of children in order to ensure that they are fair enough to be regarded as white when the period of education and training has been completed, and the child placed in suitable employment. Briefly these are my thoughts on this particular subject.

Mr Smart, the Inspector of Natives for the Murchison, who has his headquarters at Geraldton, can arrange to inspect the Fulton children and this officer could then let me know if he is of the opinion that they are sufficiently fair for admittance to Sister Kate's Home. In any case, I would require to personally see all the children involved, and doubtless they could be placed at the Roelands Mission Farm if they were considered to be too dark in colour to be successfully absorbed ultimately as whites.

I will also arrange to call for a report regarding the colour of the Fulton children, and if the father, Mr Paul George, is agreeable for their transfer to Roelands Mission if they are regarded as too dark for Sister Kate's, they may be brought down to Perth in order that I may see them personally.

The caste of the Lyn children is uncertain, but I believe that all members of this family are very fair in colour. However, both Mr Tom Lyn and his late wife are classified as half-caste, therefore there is a possibility that the children may be quite dark in colour.

Mr Frank Thatcher possesses a half degree of native blood, likewise the alleged father of her child, therefore the same circumstances might apply as in the case of the Thatcher children who are also half-castes.[31]

I wish to acknowledge receipt of your letter of the 19th instant, which is in regard to Margaret and Robyn Smith who were admitted to Roelands Mission Farm.

Mr Ronald Jones called upon me some time ago and I have an assurance that I was in complete accord with the mission policy of retaining the native boys and girls until sixteen years of age, and then placing them with Christian families located some distance away from the districts of their parents, in order to

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[31] Letter from Acting Commissioner of Native Affairs to office of Sister Kate's Children's Home, dated 29 October, 1947, Native Welfare file.

minimise the degree of contact and influence which is undoubtedly detrimental to the future of the child in most cases.

It is my wish that these girls remain at Roelands Mission until they attain the age of sixteen years, that is, of course, providing special or unusual circumstances do not decree otherwise. They may then be placed in employment with approved persons.[32]

I am reluctant to return girls to camps after they have been Mission trained and fitted for a better type of living. I fully understand that the mothers of those girls love their children as much, if not more than white people do, but consider that to allow the girls to go back to live under the same conditions as Merryl, would be a retrogressive step. Even to allow them to work in close proximity to their relations would mean that they would eventually drift back to the native way of living in many cases.

I have noticed in cases such as these, that eventually the girls settle down, a procedure that is rendered slower when being written to by their relations, but they eventually reach the stage when they do not want to revert back to native living and our object has been attained.[33]

The influence of the adult full blood, parents and otherwise ... although often arising from the love of their parents for the child is completely undesirable from our standards and can only delay the process of the child to such an extent and that becomes retrogression.[34]

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[32] Letter from Acting Commissioner of Native Affairs to Superintendent Roelands Mission dated, 27 July, 1948, Native Welfare file.

[33] Letter from Commissioner of Native Affairs to "family friend", dated 10 March, 1949, Native Welfare file.

[34] See McBeath, L., (Director of Moola Bulla Native Settlement), in *Annual Report for the Commission of Native Welfare,* Western Australian in Government Printer, Perth, 1950, p40.

The 1950s saw some in the judiciary and the bureaucracy recognise the harmful effects upon a child being removed from its parents and family.[35] In 1958 a Special Commission on Native Matters found that serious psychological disturbances could result from the early removal of Aboriginal children from their families. The Report went on to recommend that "in normal circumstances" children under the age of six should not be sent to the missions.[36] The Select Committee into Native Welfare in Laverton reported in 1958 that it was unanimously opposed to the separation of Aboriginal children from their families.[37]

The Commission for Native Welfare stated in 1960 that it would gradually move away from the practice of encouraging and assisting Aboriginal parents to put their children into missions and instead, encourage them to maintain their families in better "environmental circumstances".[38] In stark contrast to the policy are the statistics of the number of Aboriginal children committed under Children's Court orders between 1958 (151) and 1961 (378).

The 1960s marked considerable change in the powers of the State over Aboriginal child welfare. In 1960 the Native Welfare Department proposed a policy that discouraged breaking up Aboriginal families during the years of primary school education.[39] However, reliance on the mission to provide for removed children continued until the *Native Welfare Act 1963* (WA) was passed .

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35 *Mace v Murray* (1955) 92 CLR 370 at 380.

36 Government of Western Australia, *Report of the Special Commission on Native Matters*, Western Australian Government Printer, Perth, 1958, p28.

37 Government of Western Australia, *Report of the Select Committee into Native Welfare in Laverton-Warburton Range Area*, Western Australian Government Printer, Perth, 1958, p104.

38 Government of Western Australia, *Annual Report for the Commissioner of Native Welfare*, Western Australian Government Printer, Perth, 1960, p1.

39 Bolton, G.C., "Black and White after 1897", in Stannage, C.T., (ed), *A New History of Western Australia*, University of Western Australian Press, Nedlands, 1981.

The attitudes that had governed the management and control of Aboriginal children in the first six decades of the 20th century may have officially changed by the 1960s, but the view which still prevailed was that Aboriginal children, especially those with lighter skin, would do better by being away from their parents. The case of Jenny illustrates this situation. A note dated March 1967 on Jenny's Native Welfare Department file, states:

> *Jenny is not aware she is part Aboriginal. It does not seem necessary that she be told as it is not noticeable from her appearance and she has no contact with family.*[40]

This attitude is appalling, especially in the light of the number of letters from Jenny's mother to the Child Welfare Department and Native Welfare Department requesting that Jenny be able to return home. These requests were never granted even though the Child Welfare Department made an assessment in 1964 that Jenny's natural parents lived in acceptable conditions and behaved in an acceptable manner.

There are numerous other examples which showed that during the 1960s the authorities treated Aboriginal people in a very inferior and dismissive manner, with no awareness of their cultural values. The authorities still considered it beneficial for many children to remain away from their parents. Another case in point is the story of Malcolm, who had been separated from his parents at eight and a half months of age in 1955. A letter from the Superintendent, Central Division, to the Commissioner of Native Welfare dated 6 October, 1965, states:

> *The Superintendent at Sister Kate's Home advised me today that Mrs Evans [Malcolm's mother] had again been in contact with him about Malcolm. He stated that her previous visit to the child resulted in Malcolm wetting the bed, which is possibly caused by emotional disturbance. He said he advised Mrs Evans that she could best serve Malcolm's interest by keeping away from him.*[41]

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[40] File note, dated March, 1967, Native Welfare Department file.

[41] Letter from Superintendent, Native Welfare Department to Commissioner of Native Welfare dated 6 October, 1965, Native Welfare Department file.

On Malcolm's Native Welfare file, a note dated 3 May 1966, states that Malcolm's parents had been visiting Malcolm in order to re-establish a relationship, but had been "discouraged in their desire to take Malcolm home" (by the Superintendent Administrator of Sister Kate's Children's Home).

The unacceptable attitudes that governed Aboriginal child welfare in Western Australia from the early 1900s until at least the 1960s were magnified in the practices of removal and treatment of Aboriginal children in missions, institutions and foster care. Children were often removed from their parents or grandparents by trickery, or without informing their parents or grandparents.

> *I remember the truck. We were playing near our home. This truck parks right near us. I saw some of my friends in the truck. The local police officer got out of the truck. He told us to get in the back. I was with my two sisters, brother and cousin. We were scared. We did what he told us. Sometime later the truck stops. The police officer got out and spoke to someone. I didn't know if they changed drivers or not.*
>
> *It seemed like a few hours before we stopped again. We were unloaded. It looked very strange. We didn't know where we were. Our parents didn't know where we were. We were at Marribank Mission.*[42]

> *On the day that we were taken away two officers from the Native Welfare Department went to the school and said that they were taking myself and my sister Roslyn home to talk to our grandparents. The welfare officers also said they were going to take us down to town to buy some lollies. We actually thought that was what they were going to do. We got in the car and went to a shop and got some lollies. We started to eat lollies in the back seat but instead of going to the reserve they continued on and took the turn off to Williams and then to Wandering Mission.*
>
> *We hadn't even had the opportunity to say goodbye to our grandparents. They knew nothing about us being taken away.*[43]

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[42] Charles, born 1946 "taken away" aged 5-6 years.

[43] Simone, born 1962, "taken away" aged 6 years.

The trauma of removal was often only the beginning. Many people interviewed by the ALSWA talked about the abuse they suffered at the hands of mission staff and foster parents. Sometimes the abuse was of a sexual nature.

. *The punishments I received at the Norseman Mission were by different people, like Steve Smith who wired my penis to receive electric shocks when I wet the bed. This treatment went on for months ...*[44]

. *I found my time at Mogumber to be very cruel and rough. In my opinion we were tortured. For example when I was nine years of age I remember a staff member at Mogumber Mission by the name of William Long who used to take me into his room and play around with my private parts. I think it went on from when I was about nine years of age until twelve or thirteen. Also at other stages even when I was younger than nine I was subjected to anal intercourse by older boys. Other boys were lined up by older boys too.*[45]

. *I still tremble and have hot flushes when I think about him [foster father]. Every Thursday night, after he had been to the pub drinking he would come into my room. That's when he made me masturbate him and he would put his finger into my vagina. This went on for three years. I was only ten when it started. My foster mother hit me when I told her about it. She told me that I was lying and I was filthy.*[46]

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[44] Brian, born 1921, "taken away" aged 3 to 4 years.

[45] Alfred, born 1951, "taken away" aged approximately 1 to 2 months.

[46] Cheryl, born 1953, "taken away" aged two years. Refer further to ALSWA, *Telling Our Story*, *op.cit.*, for other examples of the harsh treatment and abuse experienced in missions, institutions and foster care.

Some of the changes in Aboriginal child welfare since 1970 have been, at the very least, a marked improvement from the assimilation policies of the past.[47] However, the fact remains that Aboriginal children are still being removed from their families at an unacceptable rate, whether via the child welfare system or the juvenile justice system or both.[48] Thus, whether we talk about the 1910s or 1940s or 1970s of even the 1980s, the tragic scenario is that Aboriginal children have, in large numbers, been separated from their families. In the past the dominating force was the assimilation policy. Now, it is contact with the child welfare and juvenile justice systems which leads to many Aboriginal children being removed from their families.

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[47] Current state of Aboriginal child welfare is discussed in Chapter 12.

[48] Refer to the Chapters 12 and 13 on child welfare and juvenile justice systems.

PART B

Shane's Story

I was born on the 11 May, 1937 at Derby. I am the second youngest out of six children. My mother was born around 1907 in Halls Creek. My dad was born in Busselton but I don't know when.

My mother was taken away from her parents. It affected her and it has affected me and the family.

I believe the fact that my mother was taken away at a very young age to work at the Beagle Bay mission affected her severely which in turn affected her in bringing up of her children and therefore our family unit.

My mother was living in Halls Creek with the Jaru tribe. She may have been on a station with her parents when she was taken away to the Beagle Bay Mission. She was about three to four years of age. The Beagle Bay Mission is about 150 kilometres north of Broome. It was run by Catholic nuns and fathers. It was a very harsh place and the children there had to work very hard. My mother received a number of floggings. My mother used to tell me that's how the nuns bought her up. My mother was very bitter about what happened to her. She was bitter about everything. She suffered a lot of hurt which reflected through to her family. She dislikes Catholics very much. My mother left the Beagle Bay Mission when she was around 20 years of age. She was sent to Broome to work.

My mother spoke a lot about polishing the church and working in the garden there. She didn't really like to talk about the Beagle Bay Mission. When she did speak about it she only spoke about incidental things.

My mother had a child some time prior to her getting married. In order for my parents to marry, my father had to get permission from the priest and Native Welfare. My mother was considered half-caste. My father's parents were British. I got on OK with my father.

Five of us children were born in Derby. My dad kept mum away from Aboriginal people.

In about 1939 we were at the Anderson station. Work was hard to come by during the depression. Dad was offered work in a tin mine in Queensland. We went to Queensland in 1939 to Charters Towers. My mother was isolated from her relatives. Dad was always out. He then joined the army. Within 10 years of leaving Derby my family started disintegrating. There was a period of 20 years before I saw my sisters again.

My mum was very bitter when she reflected on her childhood. My mum had full responsibility for the family and I think she felt guilty when the family started disintegrating. My sister Pearl left the family when she was 13. I saw my sister Pearl again only once for a brief period of time before she died.

I believe my mother took out her bitterness from her upbringing on us. Removing my mother from her family and placing her in the Beagle Bay Mission destroyed her and subsequently destroyed us.

My brother Frank is in Meekatharra. He didn't even go to my mother's funeral, nor did Roslyn, my sister who lives in Geraldton. They won't acknowledge their Aboriginality.

I am occasionally in contact with Doreen and Colin who live in Queensland. I get in contact every 5 or 10 years. It has been about 10-12 years since I've seen Frank.

I believe my mother was straddling a fence. She associated with Aboriginal people but never really got back into their community. We have lost our cultural identity.

My mother passed away in 1991. Her files, for some reason, have been destroyed.

There are two women in Broome who were sisters of my mother. They say my mother was a very bright girl and her sisters used to give her the young ones to teach.

Life was hard for mum. She had to milk the cows. After mass they had to cook breakfast for the little ones and do all the dishes and clean up before school. After my mother finished school she helped to build the church over five years. It was very hard physical work and they had to transport big blocks of bricks.

I married in Queensland but my marriage only lasted 4 years. I had 2 boys and one girl. When I was growing up I felt very lost as my family had broken up within 10 years of moving to Queensland. I was still searching for something and trying to find out where I came from. I became an alcoholic and I believe if it wasn't for Leisha, who I met in 1979 and I am now married to, I would probably not have survived. I still hurt very much for having my cultural identity robbed from me. I believe it is due to my mother being removed from her parents and removed from her Aboriginal culture. It left a big emotional scar on my mother which did not help the relationship with her children.

I don't know where I am. It's really a big concern to me. My mother's identity is lost and so is mine. I don't know her real name and I don't really know who I am.

I remember one of my nieces wanted to do the family tree but my mother was very upset about this. She didn't want to bring up the past. I don't know where I belong and I think my other siblings have basically given up.

I know that a Bishop in Broome has the baptism papers stored at his home. They would have the information. Maybe that could identify my mother's proper details.

I would like to go back a little bit into the past. In 1950 the only ones left in my family unit were my mum, dad, my younger sister and myself. We went back to Kellerberrin. I did an apprenticeship for 5 years then I went back to Queensland for 12 years. I did many jobs including being a horse breaker and a station hand. I was very lonely and I am still very lonely because I feel that I have lost my family structure and I have lost my identity. In some ways I envy Leisha (my wife), because she is still very close to her family.

I think it is important for people to realise that it was not only the parents and children who were taken away from their parents who really hurt, but it is also the children of the children who were taken away who suffer. I just don't think people realise the consequences of removing children from their families.

CHAPTER 3

THE EFFECTS - EMPIRICAL ANALYSIS

Introduction

The personal histories and discussion recorded in *Telling Our Story* show that the children removed from their parents suffered a variety of harms and continuing effects. Their parents, siblings and communities often suffered. There have also been trans-generational effects in Aboriginal society resulting from assimilation policies and removal practices.

Almost all children removed from their parents suffered a loss of cultural identity, as they were discouraged from seeing their parents or other Aboriginal people. Some were not told they were Aboriginal, or were actively encouraged to think themselves as non-Aboriginal, with distress and confusion resulting as they began to discover the truth. All suffered from a lack of parental love and care; most spent their time either in institutions or missions where there was little close contact with any particular adult, or in foster homes which were, by and large, unsatisfactory. Many were shuttled about between institutions, missions and foster homes. Many were subjected to inappropriately harsh work and disciplinary regimes by the institutions or by their foster parents and some were subjected to what was, on any view, positive cruelty. In addition, some institutions and missions took inadequate care for the safety of the children so that third parties were able to harm them; inadequate supervision resulted in sexual abuse of some children by older children of institutional and mission workers. Other children were subjected to abuse, often of a sexual nature, by foster parents.

Without question, the variety of harms suffered as a result of the assimilation policies and removal practices have resulted in a range of dysfunctions, including suicidal tendencies, health problems, of a physical, mental and emotional nature, substance abuse, domestic violence, breakdown of

traditional family structures, welfare dependency and susceptibility to "offending behaviour."[49] Issues surrounding the forced removal of children from their parents have been, and are being critiqued from a range of perspectives, such as socio-legal, politico-legal and psychological.

ALSWA undertook an empirical study which sought to ascertain a number of pertinent issues, namely:

- whether the parents, siblings and children of any of the survey respondents had been removed;
- their experiences, for example, sexual or physical abuse at the place to which they were removed such as foster care or missions; and
- their subsequent experiences, particularly in relation to imprisonment and substance abuse.

Methodology

1. Introduction

This section outlines the ways in which information for this study was obtained. It indicates the rationale, where appropriate, for the approach taken and choice of specific techniques used.

At the outset, it is acknowledged that individual responses to the questions are self-referred; responses are dependent upon variables such as survey participants' knowledge and understanding of the intent of each question. To some extent this raises issues of methodology, which are delineated briefly. The operation of a number of factors singly or simultaneously influences or colours the answers given by individuals when completing questionnaires, such as:

- respondent's memory and/or knowledge concerning the matters raised in the questionnaire;
- the ability of the respondent to comprehend the question;

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[49] Refer to ALSWA, *Telling Our Story*, *op.cit.*; Buti, T., "Taken Away: The Loss, The Confusion", *State Aboriginal Mental Health Conference*, Perth, 19-22 November, 1995; and Beresford, Q., and Omaji, P., *Rites of Passage*, Fremantle Arts Centre Press, Fremantle, 1996.

- the extent to which a question may be ambiguous or may be perceived to be ambiguous;
- the attitudes, expressed or unexpressed, of the respondent to a particular matter;
- the degree to which the question relates to the behaviour, past or present of the respondent; and
- and the extent to which the question is based on knowledge that the respondent has or is presumed to have.

Variables such as these may impinge upon the answer that a respondent gives because such variables are frequently related to how the respondent perceives himself or herself, how they wish to present themselves to the interviewer and in answering the questionnaire.

The simultaneous operation of such factors is apparent in the relatively high rates of non-response to some questions. Where some respondents do not answer a question to which it can be reasonably assumed they know the answer, it is likely that they do not wish to present themselves in a particular light and/or they find the question threatening, in that the question brings to the surface matters that they find painful. In addition, some respondents may be concerned that disclosure could result in their identification, and therefore choose not to answer some questions. Respondents' motivation in determining what information they wish to impart frequently plays a role in influencing how respondents chose to answer some questions. Where it is likely that these variables have contributed to the level of non-response and/or have influenced responses to specific questions, these are described in the section analysing the findings of the empirical study.

Notwithstanding these observations and qualifications, self-reports provide a benchmark, in terms of how an individual recollects a specific experience, indeed of what the individual does not recollect, in relation to the policies of assimilation at the personal level.

2. Questionnaire Design

During the initial stages of the project, a list of questions was prepared and responses sought from Aboriginal people by solicitors and court officers. Based on these initial results, the first questionnaire was developed, and further to it being trialed, two other questionnaires were formulated. The differences between the second and third (and final) questionnaires are slight.

3. Survey sample

Information about the empirical study was disseminated through Aboriginal media organisations, placement of posters in the offices of the ALSWA across the State and other Aboriginal organisations. In some instances, individuals who had seen the posters and wished to participate in the study contacted the ALSWA.

All clients who had been removed from their parents, and were willing to participate in the empirical study, were either interviewed or completed a questionnaire, or both. A total of 710 individuals participated. However, the responses of only 483 survey participants are relevant to this empirical study.

4. Administration of Questionnaires

Given that a relatively high proportion of Aboriginal people live on the margins of society, tools such as telephone surveys and/or dispatch of questionnaires with self-addressed stamped envelopes were determined to be inappropriate. Consequently, a range of different approaches was used to collect the data.

Raw data was collected by the following means:

- conduct of semi-structured interviews by solicitors and court officers, using the list of questions as a guide;
- clients writing their personal stories using the list of questions as a guide;
- conduct of semi-structured interviews by solicitors and court officers, using the first questionnaire;
- clients writing their personal stories using the first questionnaire; and
- conduct of semi-structured interviews by solicitors and court officers to complete questionnaires two and three.

Means of data collection were evaluated during the initial stages of the project. Data for questionnaires two and three were collected by the conduct of semi-structured interviews. In some instances, semi-structured interviews were the only way of collecting the relevant information, since survey participants did not feel comfortable completing a questionnaire on their own.

5. Collation of Data

All data was encoded into the ALSWA database.

Findings of the Empirical Study

This section outlines the findings of the empirical study, with responses given both as numbers and in percentages. Where appropriate, variables which may underpin relatively high rates of non-response to some questions are outlined briefly.

1. Profile of Survey Participants

Of all respondents, over three quarters could both read and write (83.8 per cent), while less than a tenth (8.7 per cent) could neither read nor write.

Table 1: Level of education attained

	No	%
Primary	133	27.5
Secondary	140	29.0
Tech/Trades	24	5.0
University	21	4.3
*N/R	165	34.2
Total	**483**	**100.0**

* N/R - no response

Table 1 shows that over a third (38.3 per cent) of respondents had attended secondary school, university or obtained a technical or trade qualification. Over a third declined to answer the question (34.2 per cent), and it is possible that these respondents had no formal qualifications and/or had not completed primary school, and did not wish to answer a question which revealed, as they perceived it, to be a lack of educational achievements.

However, while more than over a third of respondents had some type of qualification, less than a fifth (18.2 per cent) stated that they were currently employed (see Table 2). Almost half the respondents (42.5 per cent) did not respond to this question, and it is possible that these respondents felt uncomfortable about disclosing their employment status.

Table 2: Employment status

	No	%
Currently employed	88	18.2
Currently unemployed	190	39.3
N/R	205	42.5
Total	483	100.0

2. Background to removal

All respondents were asked a series of questions relating to the removal from their parents. Many came from families whose parents had also been removed from their parents, as had the siblings and children of respondents.

Almost one fifth (17.4 per cent) of the respondents had parents who, as children, had been removed from their own parents. Again, the proportion who did not respond to the question is high (72.5 per cent). In this instance, a likely explanation is that the survey respondent did not know whether his/her parents had also been removed, and indeed may not have known them.

In addition, respondents had 3036 brothers and sisters between them including half brothers and sisters. Almost one fifth (18.3 per cent) of the respondent's siblings were also removed. Finally, over a third (35.2 per cent) stated that their children had been taken from them.

Table 3: Age at time of removal

	No	%
0 - 1 year	57	11.8
2 - 5 years	137	28.4
6 - 10 years	147	30.4
11 - 15 years	33	6.8
More than 16 years	0	0.0
N/R	109	22.6
Total	**483**	**100.0**

Table 3 shows the age at which respondents were removed from their parents, and over two thirds (70.6 per cent) were removed before or at the age of 10. It is possible that those respondents who could not accurately recollect their age at the time of removal did not answer this question.

Table 4: Living with at time of removal

	No	%
Mother	92	19.0
Father	7	1.4
Mother & father	302	62.6
Grandparent	22	4.6
Other relative	16	3.3
N/R	44	9.1
Total	**483**	**100.0**

As shown in Table 4, the majority of respondents were living with both parents at the time of removal (62.6 per cent). A quarter (25 per cent) were living with one or other parent or with their grandparent at the time of removal.

A much smaller proportion of respondents (9.1 per cent) were not able to identify the relative with whom they were living, whereas almost a quarter (22.6 per cent - see Table 3) did not answer the previous question regarding their age when removed. It is posited that while respondents could recollect the relative with whom they were living at the time of removal, they were not able to accurately remember, or were unsure, of their age at the time of removal.

Table 5: Removed by

	No	%
Welfare department	407	84.3
Relative	9	1.9
Other	29	6.0
N/R	38	7.8
Total	**483**	**100.0**

Over three-quarters of respondents stated that they had been removed by a "welfare department" (84.3 per cent - Table 5). About a third (33.5 per cent) stated that they had been made a ward of the State, while over a third did not respond to the question (39.4 per cent - see Table 6). Again, it is possible that respondents did not know whether they had been a ward of the State.

Table 6: Made a ward of the State

	No	%
Yes	162	33.5
No	131	27.1
N/R	190	39.4
Total	**483**	**100.0**

3. Type and extent of time spent in foster care or institutions

Survey participants were asked to identify the type of organisation, government institutions, missions, or foster care to which they were removed and were queried about the length of time they had spent there. It is apparent from the responses that some survey respondents had been sent to two or three types of organisations. A number of respondents had also been placed in more than one mission or foster care. For the purposes of analysis, each placement has been treated separately, and the total for each location to which respondents had been removed remains 483.

Table 7: Removed to government institutions

	No	%
Yes	75	15.5
No	392	81.2
N/R	16	3.3
Total	**483**	**100.0**

Less than one fifth of respondents (15.5 per cent) had spent time in a government institution. The length of time spent in government institutions varied from one year to sixteen years as shown in Table 8. About a third had spent up to 10 years in government institutions. A number of respondents did not answer this question, and it is likely that they were unable to remember the length of time that they had spent either in one government institution and/or the length of time they had spent in a number of government institutions, and/or the length of time they had spent in each government institution. As was noted in the previous section, respondents were generally more likely not to respond to a question querying age than questions regarding location of removal.

Table 8: Time spent in institutions

	No	%
0 - 1 year	7	9.4
2 - 5 years	9	12.0
6 - 10 years	9	12.0
11 - 15 years	1	1.3
More than 16 years	1	1.3
N/R	48	64.0
Total	***75**	**100.0**

* 75 respondents were removed to government institutions

About the same proportion of respondents (12.8 per cent - see Table 9) stated that they had been placed in foster care. Of those who were placed in foster care, over a quarter (27.4 per cent) stated that they had been placed in more than one foster home, and had been placed in up to four foster homes.

Table 9: Removed to foster care

	No	%
Yes	62	2.8
No	398	82.4
N/R	23	4.8
Total	**483**	**100.0**

As with institutions, the length of time spent in foster care varied from one to sixteen years. Table 10 shows that over a third of respondents (35.5 per cent) who were placed in foster homes spent between one to ten years there. In addition, less than a tenth of all respondents (6.5 per cent) spent more than 16 years in foster care. The duration of time spent in foster care does not necessarily indicate stability or a stable home since over a quarter of respondents had been placed in more than one foster home.

Table 10: Time spent in foster care

	No	%
0 - 1 year	7	11.3
2 - 5 years	3	4.8
6 - 10 years	12	19.4
11 - 15 years	3	4.8
More than 16 years	4	6.5
N/R	33	53.2
Total	***62**	**100.0**

* 62 respondents were removed to foster homes

In addition, a very small proportion of respondents (3.5 per cent) stated that they had been adopted. Of those who were adopted, almost half (47 per cent) were adopted by non-Aboriginal parents.

A significantly larger proportion of respondents (85.1 per cent - see Table 11) stated that they had been placed in missions. Again the length of time spent in missions varied from between one year to more than sixteen years.

Table 11: Removed to missions

	No	%
Yes	411	85.1
No	56	11.6
N/R	16	3.3
Total	**483**	**100.0**

Table 12: Time spent in missions

	No	%
0 - 1 year	8	1.9
2 - 5 years	45	10.9
6 - 10 years	93	22.6
11 - 15 years	80	19.5
More than 16 years	26	6.3
N/R	159	38.8
Total	**411**	**100.0**

*411 respondents were placed in missions

Over one third of respondents had spent between one to ten years in missions (35.4 per cent), while a quarter (25.8 per cent) had spent more than eleven years in missions.

Two brief observations are made in summarising the findings so far. With respect to the place or places to which they had been removed, be it foster care, missions or government institutions, the proportion of respondents who did not answer the question is small. That is, the level of non-response is relatively low. This contrasts with questions regarding time, the age of removal, or the length of time spent in institutions where the rate of non-response to is relatively high. As shown in the above figures, the rate of non-response to the length of time spent in missions (38.8 per cent), foster care (53.2 per cent) and government institutions (64 per cent) is consistently high.

This supports the hypothesis that questions regarding age of removal and the institution to which the respondent was removed are based on the assumption that respondents both know and can accurately recollect specified events that occurred in the past.

Moreover, questions concerning length of time spent in institutions relate to both memory and knowledge. That is, while respondents stated that they had been removed and placed in one or more of the above institutions, they nonetheless did not state how long that they spent at a given institution. Possible explanations are that since respondents were placed repeatedly in any combination of the above, they were unable to accurately assess the length of time spent in each.

This is not surprising given their age at the time of removal. In addition, the question is somewhat ambiguous in that it did not specifically query the length spent on each occasion at each of the above institutions.

4. Experiences of Physical and Sexual Abuse

All respondents were asked whether they had been abused, the nature of that abuse, location and length of time that they had been abused.

Almost two thirds (62.1 per cent - Table 3) stated that they had been physically abused. Over three quarters (81.9 per cent - Table 4) stated that they had been abused at a mission, while a substantially smaller proportion stated that they had been abused in foster care (6.7 per cent) and/or at government institutions (7.3 per cent).

Table 13: Experience of physical abuse

	No	%
Yes	300	62.1
No	136	28.2
N/R	47	9.7
Total	**483**	**100.0**

Table 14: Location of physical abuse

	No	%
Adoptive home	6	1.9
Foster care	21	6.7
Government	23	7.3
Institution		
Mission	258	81.9
Other	2	0.6
N/R	5	1.6
Total	**315**	**100.0**

* Total is 315 not 300, because 3 respondents ticked more than one box, and 12 who had ticked "no" in table 13 then answered this question.

All respondents were asked about the length of time that they had been physically abused, and once again in relation to a question concerning time, a relatively smaller proportion answered. Less than a tenth (8.3 per cent) stated that they had been physically abused for six or more years. A substantial proportion (90.5 per cent) did not answer, and it is likely that respondents could not recollect the extent of the period of physical abuse and/or were uncomfortable about stating its duration.

The proportion who stated that they had been sexually abused (13.3 per cent - Table 15) is smaller than those who had been physically abused (62.1 per cent).

Table 15: Experience of sexual abuse

	No	%
Yes	64	13.3
No	357	73.9
N/R	62	12.8
Total	**483**	**100.0**

Of those who said they were sexually abused, over two thirds of respondents (67.2 per cent - Table 16) stated that they had been sexually abused at a mission. A smaller proportion stated that they had been abused when placed in foster care (13.4 per cent).

The rate of non-response regarding sexual abuse (12.8 per cent) is higher than that for physical abuse (9.7 per cent). This suggests that respondents were more prepared to disclose that they had been physically abused, than to disclose that they had been sexually abused.

Table 16: Location of sexual abuse

	No	%
Adoptive home	5	7.5
Foster care	9	13.4
Institution	4	5.9
Mission	45	67.2
Other	3	4.5
N/R	1	1.5
Total	**67**	**100.0**

* Total is 67, not 64 because 3 respondents ticked more than one box

Again, when respondents were asked about the length of time that they had been sexually abused, the majority (85 per cent) declined to answer the question. A number of explanations are posited. It is likely that respondents were unable to recollect the length of time during which they were abused, and it is also possible that respondents found the question threatening in that it brought to the surface memories that they had repressed. In addition, respondents may have been concerned that disclosure could result in their identification.

Rates of non-response to the principal issue of abuse experience, physical (9.7 per cent) and sexual (12.8 per cent) is low notably, particularly when compared to rates of non-response to questions regarding age of removal and length of time spent in institutions. This could be attributed to the comparatively slow diminution of the stigma or shame attached to the individual subjected to such abuse at a time when there is a general and growing acceptance that such abuse is a characteristic of institutionalised life.

With respect to sexual and physical abuse, two findings warrant further consideration. Of all respondents, 62 (see Table 9) stated that they had been removed to foster care, and nine of them (see Table 16) stated they had been sexually abused. Thus less than fifth of all respondents (14.5 per cent) who had been sexually abused were abused in foster care. Of the 411 respondents (see Table 11) who stated that they had been placed in missions, 45 stated that they had been sexually abused. This constitutes about a tenth (10.9 per cent). Thus a greater proportion (14.5 per cent) of those who were placed in foster care were sexually abused than those placed in missions (10.9 per cent).

In addition, the findings indicate that almost two thirds of those who were placed in missions (62.8 per cent) were physically abused. Of the 411 respondents who were placed in missions (see Table 11) 258 stated that they had been physically abused (see Table 14). This constitutes 62.8 per cent. A smaller proportion of those placed in other types of care stated that they had been physically abused. Approximately a third of those placed in foster care (33.8 per cent) and government institutions (30.7 per cent) stated that they had been physically abused.

5. Possible consequences of removal

It has been posited that the forcible removal of children from their parents has contributed or resulted in a range of dysfunctions including susceptibility to offending behaviour, substance abuse, psychological problems and a relatively poor ability to sustain interpersonal relationships. Responses of survey participants to these issues are described below.

Table 17: Physical problems

	No	%
Yes	113	23.4
No	177	36.6
N/R	193	40.0
Total	**483**	**100.0**

Almost a quarter of respondents (23.4 per cent) stated that they had physical problems. Over a third of respondents did not answer this question, and it is possible that they were either unsure of what was meant by the question, or did not wish to present themselves as someone who had such difficulties. It is posited that non-response in this section is related to attitudes towards personal difficulties and vulnerabilities, rather than memory and knowledge.

Table 18: Mental problems

	No	%
Yes	68	14.1
No	234	48.4
N/R	181	37.5
Total	**483**	**100.0**

A smaller proportion (14.1 per cent) stated that they had mental problems. Again, the proportion who did not respond is high (37.5 per cent). Respondents were possibly unwilling to present themselves as suffering from psychological problems or mental illness.

Less than one fifth (16.4 per cent) stated that they had abused substances. When asked how long they had abused substances, the majority of respondents (90 per cent) chose not to answer the question. It is possible that respondents were embarrassed or ashamed about the length of time that they had sustained such a habit, and it is likely that respondents were unable to recollect when they had commenced such behaviour.

Table 19: Substance abuse

	No	%
Yes	79	16.4
No	216	44.7
N/R	188	38.9
Total	**483**	**100.0**

About one quarter of respondents (25.3 per cent - Table 20) had been imprisoned, and of these almost half (49.2 per cent) had spent up to five years in prison. Almost a tenth (9 per cent) had spent more than eleven years in prison.

Table 20: Sent to prison

	No	%
Yes	122	25.3
No	193	40.0
N/R	168	34.7
Total	**483**	**100.0**

Again, the rate of non-response is high (34.7 per cent), and it is likely that some respondents did not wish to admit that they had been imprisoned.

Table 21: Time in prison

	No	%
0 - 1 year	38	31.1
2 - 5 years	22	18.1
6 - 10 years	13	10.7
11 - 15 years	5	4.1
More than 16 years	6	4.9
N/R	38	31.1
Total	**122**	**100.0**

With respect to personal relationships, about two thirds (65 per cent) classified their relationship with their children as "good" (see Table 22).

Table 22 Relationships with children

	No	%
Good	314	65.0
Bad	9	1.9
Unknown - none	23	4.8
N/R	137	28.3
Total	**483**	**100.0**

However, while less than a third classified their relationship with their parents as good, a significant proportion (43.6 per cent) stated that they did not have a relationship with their parents (see Table 23).

Table 23: Relationships with parents

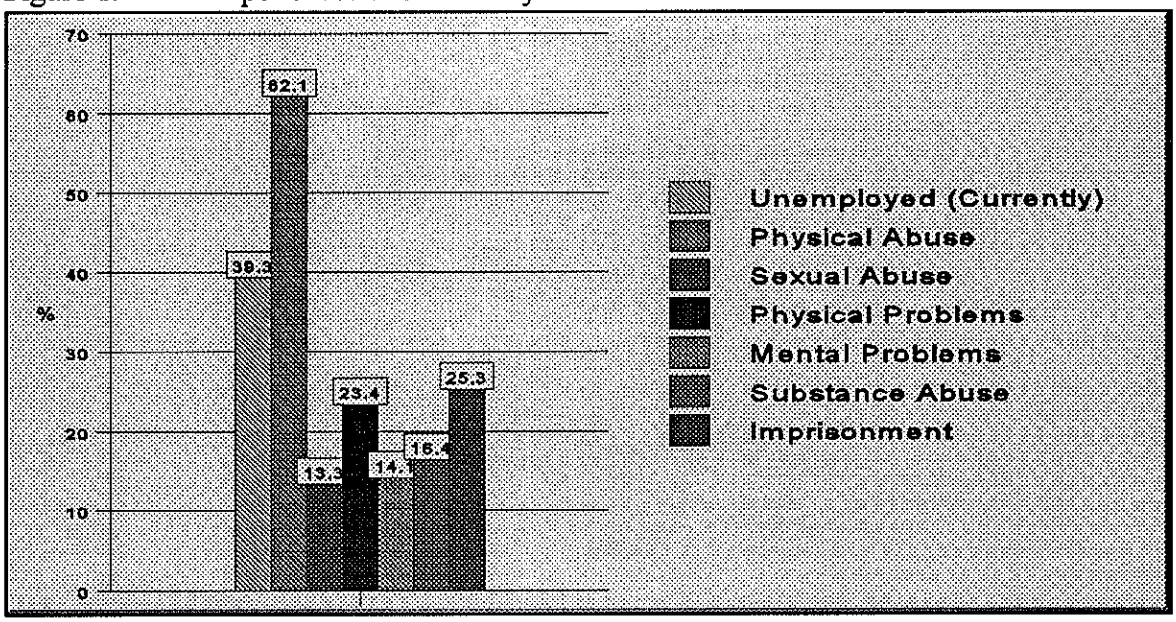
	No	%
Good	125	25.9
Bad	72	15.0
Unknown - none	211	43.6
N/R	75	15.5
Total	**483**	**100.0**

In addition, about one tenth (8.3 per cent) stated they had been physically abused by their spouse. Again the proportion of respondents who did not answer the question is high (61.5 per cent), and it is likely that respondents found the question threatening, and/or did not wish to reveal that they had been abused by their spouse. A very small proportion stated that they had abused their spouse (1.7 per cent), and again the majority did not respond (63.5 per cent).

Summary

While such a small sample cannot be said to reveal a comprehensive picture of the experiences of those who had been forcibly removed from their parents, it nonetheless offers a glimpse into such lives.

Figure 1. Experiences of the forciby removed



The findings of this empirical study indicate that respondents' lives comprised a pattern of constant and repeated dislocations. They were moved from their homes with their families and relatives to missions, foster homes and adoptive parents of a different culture to other missions, foster homes and government institutions.

The dislocations that characterised their early childhood and adolescence further led or contributed to their marginalisation from the wider community, evidenced by imprisonment, substance abuse as well as physical and mental problems.

In conclusion, it should be reiterated that the picture presented here of a range of problems and dysfunctions associated with the removal of children and other family members is probably somewhat understated. This flows from the methodology used in the study. However, even allowing for the limitations of this empirical study, there is no doubting the devastating experiences and impact of the policies of assimilation which led to the Aboriginal children being removed from their families.

Mandy's Story

I was born on the 25 May 1965, in Collie. Before I was two years of age I was separated from my mother and father and sent to Sister Kate's Children's Home.

I stayed at Sister Kate's Children's Home until I was 14 years of age. While I was at Sister Kate's Children's Home I had a number of problems. The worst of all was the sexual abuse I was subjected to. There was a worker at Sister Kate's who used to touch me over my private parts. The worst time was when I used to go on holidays away from Sister Kate's with a white family in Queens Park. The man of the house used to subject me to sexual abuse, which involved more than just touching. I don't really want to go into it any further except to say that when I told the superintendent of Sister Kate's and the Community Welfare Officer they said I was making up rumours and I wasn't to be believed. To this day I can't go back to Queens Park because the man that committed sexual abuse on me is still alive and lives there.

When I was 14 years of age I left Sister Kate's Children's Home. I was basically kicked out because I was becoming very unsettled and the cottage parents had just recently been married and didn't really want me around. For a little while I was out on the streets. I was homeless. I then went to live with my mother near the Midland abattoirs. We were living in tents. That didn't last very long because I didn't really know my mother. I didn't feel comfortable living in the environment she was living in. I had no affiliation with my Aboriginal culture.

At 14 and a half years of age I was raped while I was at a party. Out of that rape I had my first child. I was raped on other occasions, including by an uncle. I was very unsettled during my late teens and in my early 20s. I had a number of relationships but none of them lasted. Two of the relationships bore children but they ended because of domestic violence perpetrated against me.

My youngest son was born on the 27 November, 1995, through a de facto relationship. That de facto relationship is still on-going, although there has been some problems of domestic violence perpetrated by my de facto husband against me and my second youngest daughter. My de facto husband is now attending Relationships Australia in Fremantle for counselling in this regard. There has been no instances of domestic violence by him against me or any of the children for approximately five weeks. My youngest child was never hit by his father.

Almost immediately after giving birth to my youngest child, all four children contracted chicken pox. My de facto husband's step-mother and father assisted by caring for my youngest child for approximately three weeks, whilst all the children overcame chicken pox. My youngest child was returned home.

After that the step-mother became very possessive towards my young child and was constantly coming over to our home and ringing, telling me how to look after the baby, not withstanding that I had successfully raised three other children

without outside interference. She also insisted on my youngest child living with her most of the time. As my de facto husband had a close relationship with his step-mother and his father, I did nothing to discourage them in the interests of avoiding family conflict.

In about March, 1996, there was an incident of domestic violence when my de facto husband hit me. I went with the children to a refuge. My youngest child was living with my de facto's step-mother and father at their insistence. My de facto and his parents are non-Aboriginal. I did not object to her looking after him on a short term basis in the interest of avoiding conflict in the family.

My de facto husband and I reconciled in about mid March 1996, and my three other children and I came back to live in the house. With the assistance of Family and Children's Services, my de facto husband got in contact with Relationships Australia about the domestic violence incident. Family and Children's Services suggested to me that they thought I might be suffering from post-natal depression and sent me to a psychiatrist and psychologist for assessment. No diagnosis of post-natal depression or any other abnormal mental or emotional state was made.

My de facto husband and I then told his parents we wanted our baby to be returned to us. An argument then took place between my de facto husband and his step-mother. His step-mother then obtained a restraining order against my de facto husband which prevented us having access with our baby, except as organised by Family and Children's Services. My de facto husband and I, being a family unit, felt unable to have access independently. Supervised access has only occurred once when the step-mother was present. Once again, she began telling us what to do for my baby. I found it very upsetting and I felt like a criminal for seeing my own son, even though the other three children were continuing to live perfectly happily with my de facto husband and myself (apart from fretting for their brother) and that no proceedings have been instituted for care and protection or for custody and guardianship.

My child should be with me. I don't want my child taken away from me as I was taken away from my mother, which I believe has caused a lot of the problems that I have faced throughout my life. I have an identity crisis. I don't feel comfortable living in an Aboriginal culture or in the white culture. My life since I was removed from my mother, to quite recently, has been very upsetting and distressing. I have been subjected to sexual abuse on a number of occasions and domestic violence.

I believe that the government and Sister Kate's have a lot to answer for. They have no right to take children away from their parents. The Department has no right to take my baby away from me. It is just so cruel.

CHAPTER 4

THE EFFECTS (DAMAGES, LOSSES) IDENTIFIED - THE REMEDIES SOUGHT

The Effects

The findings of the empirical study presented in the preceding chapter and other evidence collected by the ALSWA on the impact of the assimilation policies and removal practices, is consistent with the research on the effects of removing children from their families.[50] As previously stated, the effects are wide ranging. They include:

- psychological effects such as problems with identity, adjustment, mental illness, increased incidences of self-injury and suicide; and
- social and cultural effects resulting from lack of education, problems with identity and "fitting in", lack of access to culture and heritage, problems with parenting, and contact with the criminal justice system.

The RCIADIC[51] and *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*[52] ("The Mental Illness Inquiry") discuss the impact caused by the past policies and practices of assimilation which entailed that lead to the forced removal of Aboriginal children from their families.

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50 Refer to ALSWA, *Telling Our Story, op.cit.*, pp28-59.

51 Johnston, E., *National Report of the Royal Commission into Aboriginal Deaths in Custody, Vol. 2*, AGPS, Canberra, 1991, pp111-123, 131-138.

52 HREOC, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, AGPS, Canberra, 1993, pp692-704.

Of the 99 deaths considered by the RCIADIC:

> *43 had experienced separation from their families through intervention of the State or by mission organisations or other institutions. In Western Australia, 19 of the 31 persons who died in custody had spent time as a child separated from their family in an institution, mission or fostered with white families.*[53]

Commissioner Dodson in his report as part of the RCIADIC found that the assimilation policy, with its removal of children from parents to institutions, was the cause of many current problems in Aboriginal society. The Commissioner further reported that the policies and practices of the Department for Community Services continued to keep Aboriginal people "marginalised and oppressed" and prevented empowerment of Aboriginal people.[54]

The "Mental Illness Inquiry" received evidence from many witnesses which revealed the extent of the mental distress and trauma experienced by those Aboriginal people removed from their families and communities. Professor Reser of the Department of Psychology at James Cook University told the Inquiry that:

> *If you talk to Aboriginal people, the themes [that] will come up again and again are the kidnapping of children, dispossession, economic discrimination, political discrimination. I have no doubt that these factors together have eroded the wellbeing of most Aboriginal individuals ... such as they are more vulnerable to a variety of stresses and that would probably lead to high psychiatric morbidity.*[55]

Doctor Ernest Hunter, a psychiatrist with Sydney Aboriginal Medical Service and Fellow of the National Drug and Alcohol Research Centre in oral evidence to the "Mental Illness Inquiry" stated:

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53 ALSWA, *op.cit.*, p45. Also refer to Johnston, E., *op.cit.*, *Vol 1*, p66.

54 Dodson, P., *Regional Report of Inquiry into Underlying Issues in Western Australia of the Royal Commission into Aboriginal Deaths in Custody, Vol. 1*, AGPS, Canberra, 1991, p49.

55 HREOC, *op.cit.*, 1993, p.696.

We are seeing trans-generational patterns occurring in Aboriginal society, in terms of the impact on people raised in institutions who then have to confront dilemmas of parenting down the line ... [Clinical] interventions need to take account of that long-term cycle.[56]

The effects on individuals, families and communities which emanated from the impact of removing Aboriginal children from their families and culture should not be under-estimated. Many of those interviewed by the ALSWA have expressed great difficulty in coping with society. As previously stated, the dislocations experienced in early childhood and adolescence have had enduring effects which have exacerbated the marginalisation of Aboriginals and perpetuated a number of social, cultural and health problems. Professor of Politics at Macquarie University, Colin Tatz, has remarked:

The greatest single source of Aboriginal bitterness today remains the forced removal of family members, all done by way of fostering, adoption, or institutionalisation 'for their betterment'.[57]

In the case of *In the Marriage of B and R*[58] the Full Court of the Family Court of Australia recognised the devastating effects of placing Aboriginal children in non-Aboriginal environments. Their Honours, Fogarty, Kay and O'Ryan, JJ, stated that it is now beyond controversy that there is a:

... devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment.[59]

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56 *Ibid.*

57 Tatz, C., "Australia's Genocide: They Soon Forget Their Offspring", *Social Education*, 55(2), 1991, p97 at p98.

58 19 Fam LR 594.

59 *Ibid*, at 602.

Further, their Honours remark that the systematic policy

> *of removing Aboriginal children and especially part Aboriginal children, usually of tender years, from their parents and placing them in institutions or in other white care ... left many Aboriginals in childhood, adolescence and adulthood adrift in a white society which treated them as inferior and in which they lost fundamental connections with family and culture.*[60]

It is not surprising that the effects and impact of the removal policies and practices has led to significant psychological, social and cultural problems. Professor Beverley Raphael (at the time, Head of the Department of Psychiatry, University of Queensland)[61] has stated that many Aboriginal people who were removed to missions and other institutional and foster care environments have displayed symptoms and behaviour similar to holocaust victims.[62] It is only to be expected that people will suffer from significant mental trauma and other negative effects if they were:

- removed from family and culture at an early age;
- encouraged to "forget" about family and Aboriginal culture and to "assimilate" into white society; and
- exposed to the "real world" after years of living in the "protected" mission/institutional environment without the necessary life skills and family connections.

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60 *Ibid.*

61 Also co-author on report of Aboriginal Mental Health. Refer to Swan, P., and Raphael, B., *"Ways Forward": National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health*, Parts 1 and 2, AGPS, Canberra, 1995.

62 Speaking at the State Mental Health Conference, Perth, 20 November, 1995.

The effects (damage, losses) of being separated from family, as identified here can also be classified as the losses people have endured. They include:

- sustained anguish and grief resulting from separation;
- loss of family;
- deprivation of a loving childhood;
- loss of cultural and spiritual training;
- problems with identity and adjustment;
- loss of self-esteem and dignity;
- difficulty in forming intimate relationships;
- loss of linkage with culture and land;
- loss of parental skills;
- loss of ability to impart culture to children;
- loss of necessary life skills which has led to problems in regards to employment, further education and training;
- major mood fluctuations and depression; and
- physical, mental and emotional health problems including increased incidences of suicide, self-injury, and alcohol and other substance abuses.

Many of the losses mentioned have been played out by Aboriginal people being grossly over-represented in the criminal justice system and their children in the juvenile justice system and the child welfare system. There a is continuous poverty cycle that many Aboriginal people find themselves in and it exacerbates the losses that they have endured because of the assimilation policies and resulting removal practices.

Remedies for the Effects (Damages, Losses)

For some Aboriginal people there is little that can be done to rectify the wrongs of the past and the continuing impact of those wrongs. However, even these people believe that for justice to be done and seen to be done, the National Inquiry must make recommendations that focus on tangible remedies for the effects (damage, losses) they have endured and continue to endure.

People who, often under great distress, gave their personal histories to the ALSWA suggested a variety of recommendations which governments should implement to address the pain and suffering and the present plight of many Aboriginal people who were removed from their families. It is less than accurate to say that Aboriginal people interviewed suggested certain recommendations that governments should put into action; rather they demand action by governments. The people who gave their personal histories to the ALSWA want the governments and the whole Australian community to respond to the impact and effects of the assimilation policies and removal practices. Responses and action they want include:

- apologies by the State and Commonwealth governments in parliament on behalf of the people of Western Australia and Australia, acknowledging the devastating impact on individuals, their families and the Aboriginal communities of the assimilation policies and practices of removing Aboriginal children from their families.
- public apology by churches acknowledging their part in the removal practices and recognising that they were wrong;
- provision of funds for family reunions and tracing family histories;
- provision for more adequate and secure housing;
- improvement in health services, especially mental health services and provision of culturally appropriate counselling;
- provision of services to Aboriginal elderly, especially as they have the longest exposure to assimilation policies and removal practices;
- provision of improved educational systems especially for younger Aborigines to enable them to retain their self-esteem and help the Aboriginal population move out of the poverty cycle;
- provision of improved service delivery by local government to their Aboriginal constituents; and
- provision of monetary compensation.

Aboriginal people interviewed by the ALSWA also want governments to alleviate the unacceptable over-representation of adult Aborigines in the criminal justice system. The majority of Aboriginal people who were interviewed expressed great concern for the next generation of Aboriginal people, that is, the children and youth of today. Aboriginal people want governments

to enact legislation, policies and practices which will reduce the shameful over-representation of Aborigines in the juvenile justice system and the child welfare system.

It should be strongly stated that the Aboriginal people interviewed by the ALSWA want to have control over the implementation of the remedies they have recommended. They want to determine how the remedies should be made operative. They want to determine the most appropriate services for their people.

The demand for monetary compensation and action to alleviate the problems created by contacts with the criminal justice system and child welfare system were the strongest demands raised by the majority of people interviewed by the ALSWA. However, the other remedies mentioned also keenly sought and should not be disregarded by the National Inquiry. They address many of the underlying issues highlighted by the RCIADIC as to the reasons for, or causes of the desperate plight of Aboriginal people today.

The issues discussed and the recommendations made in the remaining sections of this submission have been guided by the suggestions, demands and recommendations of those people who gave their personal histories to the ALSWA. The content of the remaining parts of the submission and the final form of the recommendations have been compiled after much research. However, the underlying and major influence in this submission has been the instructions given to the ALSWA by its clients, which is the reason why this submission and its recommendations are very wide-ranging. Aboriginal people have told us that it is not possible to delineate between those Aboriginal people who have been affected by the assimilation policies and removal practices of the past, and those who have not. There is no delineation; either they were removed, family members were removed, or communities were dislocated. All Aboriginal people in Western Australia have been affected in some way. Therefore the National Inquiry has to take a wide-ranging and detailed approach to its terms of reference.

Finally, the overwhelming majority of those interviewed by the ALSWA instruct the ALSWA to stress to the National Inquiry that:

- monetary compensation is imperative if justice is to be observed;
- culturally appropriate counselling services must be provided; and
- Aboriginal people and communities must have responsibility for determining the best way for the delivery of services to them and for the caring of their children.

PART C

Patricia's Story

I was born in February 1944, at Ivanhoe Station in the East Kimberley. My mother is Aboriginal. I didn't know my father but according to the Native Welfare files he is a white man.

When I was six years old I was removed from my mother. I wasn't speaking much English. I was very scared and felt lonely when I was removed from my mother and placed at Forrest River Mission at Wyndham. I didn't know anybody there.

I didn't know why the Native Welfare people removed me from my mother. My mother told me later that they took me away because I was classed as a "half-caste".

At the mission I was put into a dormitory. The children who came from stations or were taken away from their mothers were classed as "half-castes". We were locked up at nights and certain areas of the mission compound were out of bounds to us. The boys were separated from the girls at all times, except at school, church and meal times. We had no shoes or socks. We relied on donations for things or we went without.

The food that we received was not too bad but it was not enough. I remember that sometimes we would beg people who lived outside the mission compound for food. Other times we resorted to stealing from the kitchen or vegetable garden. If we were caught we were punished by being hit with a strap.

There were very strict rules at the mission. We had to do our chores and if we did anything that we were not supposed to do we were physically punished. We were made to attend church in the mornings and evenings, except on Saturday mornings.

As I was very young when I was taken to the mission, I grew accustomed to mission life. Because nobody spoke my dialect I had to quickly adapt to speaking the mission dialect which was spoken by the people living outside the compound. We also had other children attending the school. My own language and ties to my family on the station was severed.

During the whole time I was at the mission I used to wonder about my mother and family. I missed them terribly and used to cry a lot for them. I thought they had forgotten me. In the end mission life became the norm for me. I couldn't forget my family but I placed them at the back of my mind.

During school holidays we were made to help out in the mission garden, hospital or the missionary quarters. We did domestic duties like cleaning, washing and ironing. On the weekends we would go into the bush and play around.

When I was around 13 I left the mission and was sent down to Perth to receive a high school education. I was sent to Alvan House in Mount Lawley. The first year of my stay there was hard as the education system was very different to what we were used to at the mission. It also felt very strange being near the city and also attending Mount Lawley High School. I felt very scared and lonely again. I wanted to go back to the mission. I met other girls there mainly from the south west and some from missions. Most of them had families coming to visit them. This made me envious of them and I sort of went in to a shell. I was frightened of the situation. All the time I was thinking 'does my mother know where I am'? After I left school I obtained a job a the Native Welfare Department. I regret now that I didn't make more effort to find my mother during this time. I didn't know about the policy of removing children from their families. I felt uncertain as to what questions to ask the Native Welfare Department. I also felt that I should carry on with life.

I eventually got married and had three children. My husband was employed by the Native Welfare Department. As part of his work he used to travel up north. I asked him to look up my mother. She was still living in Kununurra. When I was ten I was told that my mother had died. I wouldn't believe them. I knew my mother was alive.

They made arrangements for our mother to visit us in Perth. The first visit was very hard as my mother still spoke her dialect and I was unable to talk back to her. There was a lot I wanted to ask her but communication was difficult. We were strangers. I was happy to see her of course, but all that I could do was cry and cry. Most of the time I cried by myself and this feeling, this strange feeling I was thinking 'this is my mother, but I don't feel anything - no love, no mother-daughter bond, nothing, just nothing. This stranger, this mother was my mother for goodness sakes'. Love was lost and the in between years were too much, which put a barrier between us.

After a few more visits we were able to talk a little and get to know each other again. However, the mother-daughter bond was not there. This is very hurtful. I didn't know whether to blame my mother for not trying to find me or blame the government authorities or myself. This feeling has never left me. Of course now though, I think it was the government's fault. They are the ones who removed me from my mother.

I have one brother. He sometimes rings me. Last time he rang was in 1994 to let me know that our mother was getting old and was going blind and deaf. That was the last Christmas she came to visit us. There is no chance we will ever be able to form that mother-daughter bond before my mother passes away.

Because I was removed I lost the culture that I was born into. I now know a lot more about the policies that led to me being removed from my mother. I feel very bitter towards the government and authorities to allow it to happen. All I can say for myself and my fellow Aborigines who went through this is that the government should be answerable for the genocide of our people.

It is much, much too late for reconciliation with my family. The government must be made aware that they robbed us of our culture and identities.

Confusion and uncertainty will remain with me until I die. I get very angry. How could the government authorities dare put me and others through this and just leave us on the shelf and forget about the injustices that have been done to us.

Although I have been lucky to remain happily married and have three wonderful children, I feel very sad that I have not been able to impart my culture to my children. Also my children will never know their grandmother and that really breaks my heart.

All my family ties and culture have been broken down or taken away. My thoughts are "where or who do I belong?, where do I fit in now"?

CHAPTER 5

REPARATION AND LEGAL ISSUES

Introduction

One of the terms of reference of the National Inquiry is to "examine the principles relevant to determining the justification for compensation for persons and communities affected by such separations [removal of children from family]". It is submitted that compensation in this context should, and probably is, intended to include the more encompassing term "reparation". Reparation includes all types of redress - restitution, compensation and rehabilitation. It involves material and non-material redress.[63] This submission will utilise reparation and the terms that cover aspects of reparation.

It is not difficult to justify reparation for persons or communities affected by the assimilation policies and removal practices if one examines the variety of problems suffered by children removed from their parents, parents of the children removed, and sometimes Aboriginal communities. It is submitted that principles to justify reparation can be drawn from domestic and international law, notions of justice and morality and the reconciliation process between Aboriginal and non-Aboriginal Australia.

This chapter will consider whether an action can be brought by a child removed from his/her family or the parents of the child, and against whom such an action could be brought. Causes of action such as breach of fiduciary duty, breach of statutory duty, wrongful imprisonment, Beaudesert/misfeasance in public office plus breaches of constitutional rights and possible action based on acts of genocide will be discussed. The issue of damages and limitation periods will be examined.

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[63] Refer to van Boven, T., (Special Rapporteur of the United Nations), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report* (*"van Boven's Report"*), UN Doc. E/CN. 4/Sub. 2/1993/8, 2 July, 1993, at p7.

It should be noted that this section is not intended to be a detailed legal discourse. It is only intended to raise legal issues in a manner that assists the discussion on principles relevant to determining justification for reparation. This section is not meant to be a comprehensive legal opinion on whether people who gave their personal histories to the ALSWA are able to instigate legal action and the probability of their success. Nothing said here is meant to prejudice possible legal action by those affected by the assimilation policies and removal practices.

Reparation for victims of gross human rights violations under international law and reparation awarded under the domestic law of other nations will be discussed. The report by Theo van Boven, a member of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission) of the United Nations Commission on Human Rights, on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, will be reviewed.[64] Further, the legal obligation of governments to provide adequate service delivery to Aboriginal people and communities as part of the reparation process will be discussed.

The Causes of Action

1. Fiduciary duty

As far as the children were concerned, once they were removed the relationship between them and the State fell within the classic fiduciary category of guardian and ward.[65] Arguably the relationship arose earlier under those statutes making State officials the guardian of all Aboriginal children; they had such duties to all Aboriginal children, whether removed or not. This submission argues that the duties are of the State. At common law the Crown has jurisdiction, *parens patriae*, over those who are unable to care for themselves.[66]

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64 *Ibid.*

65 *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 141 per Dawson, J.; *Bennett v The Minster for Community Welfare* (1992) 167 CLR 408 at 426 per McHugh, J.; and *KM v HM* (1992) 96 DLR (4th) 289 at 323-328.

66 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 258-259 (*"Marion's Case"*).

Institutions or foster parents may also owe a fiduciary duty to those children who were placed under their care. Through welfare legislation, they were made guardians of the children in their care, or by analogy, the guardian/ward or parent/child categories because of their day to day control and responsibility over their charges.

In *KM v HM*,[67] La Forest J noted that the "inherent purpose of the family relationship imposes certain obligations to act in the child's best interest".[68] This is consistent with the comment made by McTiernan J concerning the court's *parens patriae* jurisdiction over infants in that it is essentially parental and therefore "the main consideration to be acted upon in its exercise is the benefit or welfare of the child".[69]

Kirby P's judgment in *Williams v The Minister, Aboriginal Land Rights Act 1983*[70] suggests there is a positive duty to promote the child's welfare. It is strongly argued that in most cases the removal of Aboriginal children from their families was not in the best interests of the children. Once removed, the welfare of the child was only seen in respect to the dominant "white" culture without taking adequate consideration of the welfare needs of Aboriginal children.

2. Breach of statutory duty

A departure from a duty imposed by statute may result in an action being brought for breach of statutory duty.[71] An action for breach of statutory duty may present a number of difficulties. It is not intended to outline these difficulties here, except to draw the readers' attention to the protective provisions under the *Native Welfare Act 1963* (WA) (Section 16) and the *Aboriginal Affairs Planning Authority Act 1972* (WA) (Section 17). However, the protective provisions will

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67 *op.cit.*

68 *Ibid*, at 325.

69 *Carseldine v Director, Department of Children's Services* (1974) 133 CLR 345 at 351 quoting *R v Gyngall* [1893] 2 Qb 232.

70 In *Williams v Minister, Aboriginal Land Rights Act 1983*, (1994) 35 NSWLR 495 at 511.

71 *Board of Fire Commissioners of NSW v Ardouin* (1962-1963) 109 CLR 105 at 108-110, and *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397.

not be a defence to an otherwise well-founded claim if the public official's actions and/or decisions were motivated solely or predominately by a wrong or indirect motive. This is even if the defendants had a genuine, but mistaken, belief that they were acting within the jurisdiction of the powers conferred by the relevant Act.[72] It is submitted that the actions in removing children from their families with the intention to obliterating racial identity (i.e. genocide) would be unlawful as ultra vires the protective purposes for which the various statutes were enacted. Further, the wording of the protective provisions in the *Native Welfare Act 1983* (WA) and the *Aboriginal Affairs Planning Authority Act 1972* (WA) do not appear to include the Crown, however the Crown cannot shield itself behind the protective provisions.[73]

3. Negligence

The ordinary principles of negligence apply. To determine whether there is a common law duty of care, one looks to the relationship between the plaintiff and the defendant in order to see whether there is sufficient proximity, whether damage was suffered, whether damages were reasonably foreseeable and, arguably, one also looks to see whether it is just and reasonable to impose a duty of care. It will suffice for the purpose of this section to submit that an action in negligence against the Chief Protectors, Commissions and the State, would be open to many children who were removed from their families. It is also submitted, that the policy/operational distinction will not prevent an action in negligence.[74]

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72 *Webster and Anor v Lampard* (1993) 177 CLR 598.

73 Refer to *Bropho v State of Western Australia and Anor* (1990) 171 CLR 1 for the High Court of Australia's approach to statutory interpretation and binding of the Crown to provisions of a statute.

74 The general view is that a public authority is not under a duty of care in relation to policy decisions (i.e. those decisions dictated by financial, economic, social or political factors or constraints) but operational for individual decisions (i.e. whether children are separated, where to place the child and the supervision of those to whose care the child is entrusted). Refer to *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004, *X (Minors) v Bedfordshire CC* [1995] 3 WLR 152, and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

4. Wrongful imprisonment

The establishing of an action for wrongful imprisonment also depends upon the concept of genocide and/or breach of constitutional prohibition. Wrongful imprisonment essentially consists of a wrongful total restraint of the liberty of the plaintiff. There is no doubt that once the children were removed from their parents, they were required to remain in institutions and with the individuals with whom they were placed. Further, the relevant statutes had a number of punitive provisions relating to Aboriginal people who escaped from institutions, and one assumes that the children and/or their parents were in many cases made aware of this.

5. Beaudesert/misfeasance in public office

Possible action under this heading can be dealt with briefly. Both the actions said to exist in *Beaudesert Shire Council v Smith*,[75] and the tort of misfeasance in public office have been effectively ruled out by the decision in *Northern Territory of Australia v Mengel*.[76]

6. Breach of constitutional rights

In the cases of *Kruger v Commonwealth* and *Bray v Commonwealth*,[77] which were argued before the Full Court of the High Court in mid February 1996, the plaintiffs claimed declaratory relief and damages against the Commonwealth for removal from their community as children under the *Aboriginals Ordinance 1918* (NT). There was also a claim for such relief by the mother of a child removed from her under the *Aboriginal Ordinance 1918* (NT).[78] The proceedings challenge the constitutional validity of the *Aboriginal Ordinance 1918* (NT) and particularly Sections 6, 7 and

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75 (1966) 120 CLR 145.

76 (1995) 129 ALR 1.

77 No. M21 of 1995, (filed in the High Court of Australia, Melbourne Office of the Registry) and No. D5 of 1995 (filed in the High Court of Australia, Darwin Office of the Registry) respectively, argued before the High Court in Canberra in mid February 1996.

78 The plaintiffs also argued because of the alleged constitutional invalidity of their removal and detention, they were wrongfully imprisoned.

16 which were very similar to the Western Australian native welfare legislative scheme as outlined in chapter 2.

The plaintiffs in *Kruger* and *Bray* argued that the *Aboriginal Ordinance 1918* (NT) was constitutionally invalid by reason that:

> *(i)* *(A)* *it was contrary to an implied constitutional right to freedom from and/or immunity from removal and subsequent detention without due process of law in the exercise of the judicial power of the Commonwealth conferred in accordance with Ch.III of the Constitution or of judicial power under laws of the Commonwealth;*
>
> *(B)* *it purported to confer judicial power of the Commonwealth -*
>
> *(1)* *on persons who were not appointed under or obliged or entitled to exercise the judicial power of the Commonwealth in accordance with Ch.III of the Constitution or judicial power under laws of the Constitution;*
>
> *(2)* *other than on Courts established under or in accordance with Ch.II of the Constitution or under laws of the Commonwealth;*
>
> *(ii)* *it was contrary to an implied constitutional right to and/or guarantee of legal equality including equality before and under, and equal protection of, the law, and in particular, laws of the Commonwealth and laws made pursuant to or under the authority of laws of the Commonwealth;*
>
> *(iii)* *it was contrary to an implied constitutional right and/or guarantee of freedom of movement and association;*
>
> *(iv)* *it was contrary to an implied constitutional right to freedom from and/or immunity from any law, purported law or executive act:*
>
> *(A)* *providing for or having a purpose, the effect or the likely effect of the destruction in whole or in part of a racial or ethnic group, or the language and culture of such a group;*
>
> *(B)* *subjecting the children of a racial or ethnic group, solely by reason of their membership of that group, to the legal disability of removal and detention away from the group; or*
>
> *(C)* *constituting or authorising the crime against humanity of genocide by, inter alia, providing for, constituting or authorising:*

(i) *the removal and transfer of children of a racial or ethnic group in a manner which was calculated to bring about the group's physical destruction in whole or in part;*

(ii) *actions which had the purpose, the effect or the likely effect of causing serious mental harm to members of a racial or ethnic group; and*

(iii) *the deliberate infliction on a racial or ethnic group of conditions of life calculated to bring about its physical destruction in whole or in part;*

(v) *the Aboriginals Ordinance, and, insofar as they purported to authorise the enactment or amendment of the Aboriginals Ordinance or provision thereof, the Administration Act, the Acceptance Act and the Northern Australia Act, were not laws for the government of the Northern Territory.*

(vi) *it was a law for prohibiting the free exercise of a religion contrary to Section 116 of the Constitution (original emphasis).*[79]

The plaintiffs sought damages both with respect to the losses they had suffered in personal, cultural, spiritual and financial terms and in terms of their possible entitlements to participate in land claims.

It is not intended here to discuss the merits of the plaintiffs' case as far as the constitutional arguments are concerned, or whether the breach of a constitutional right would sound in damages. What can be said is that Aboriginal people throughout Australia who were removed from their families, keenly await the outcome of the *Kruger* and *Bray* cases. Further, even if the High Court decides in favour of the Commonwealth, the moral obligation on governments to award reparation for the losses suffered by Aboriginal people and communities by the assimilation policies and removal practices is not eliminated. In fact, it could be argued that possible lack of legal redress through the domestic court system only reinforces the need for governments to set up a scheme to award reparation to those affected by the assimilation policies and removal practices.[80]

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79 In No. M21 of 1995 (*op.cit.*) and No. D5 of 1995 (*op.cit.*), Plaintiffs' Submissions, pp5-7.

80 The Australian Section of the International Commission of Jurists applied for *amicus curia* status to intervene to support the plaintiffs and assist the Court in the *Kruger* and *Bray* cases. Their application was rejected. Their written submissions, which were never put before the Court, strongly supported the plaintiffs' case and reinforced the constitutional argument. With the kind permission

7. Genocide

JH Wootton, QC, Commissioner of the RCIADIC stated:

> *in its crudest form the policy of assimilation fell within the modern definition of genocide, and in particular the attempt to "solve the Aboriginal problem" by the taking away of children and merging them into white society fit within that definition.*[81]

In the Marriage of B and R,[82] their Honours, in discussing the harmful effects of placing Aboriginal children in non-Aboriginal environments, applied to such conduct Deane and Gaurdron, JJ "utterable shame" passage from *Mabo v Queensland (No. 2).*[83] This goes close to taking judicial notice of a policy of genocide from an arm of the judiciary that constantly deals with family break-ups. Their Honours stated that:

> *In Mabo v Queensland (No. 2) (1992) 175 CLR 1; 107 ALR 1 Deane and Gaudron, J.J. spoke of the dispossession of Aboriginals from their land 'as a conflagration of oppression and conflict which was, over the (19th) Century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame' (at CLR 104); and that it represented 'the darkest aspect of the history of this nation' (at CLR 109). There can, in our view, be little doubt that on a more directly personal level the policy of Colonial, and later State, administrations in Australia to systematically remove Aboriginal children from their parents and place them in institutions or other care and the consequences of that can be described in equally strong terms.*[84]

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of the Australian Section of the International Commission of Jurists, the text of their submissions is reproduced in Appendix A.

81 Wootton, J.H., *op.cit.*, p35.

82 19 Fam LR 594.

83 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 104. ("*Mabo No. 2*").

84 *op.cit*, at 602.

The jurist Raphael Lemkin, developed the term "genocide" in 1944 for acts aimed at destroying a racial, religious or national group.[85] However:

> *[T]he fact of genocide is as old as humanity. To this day there has been no society protected by its structure from committing that crime. Every case of genocide is a product of history and bears the stamp of the society which has given birth to it.*[86]

Lemkin identified a number of particular forms of genocide such as "cultural genocide" (i.e. prohibition of local languages and education) and "biological genocide" (i.e. ensuring a lower birth rate in the dominated group).[87] Lemkin stated that genocide included:

> *Deliberate separation of families for depopulation purposes subordinated to the criminal intent to destroy or to cripple permanently a human group. The acts are directed as such, and individuals are selected for destruction only because they belong to these groups.*[88]

Yoram Dinstein states that the essence of genocide is not the actual destruction of a group, but the intent to destroy the group (in whole or in part). Thus the intention to destroy is crucial. He adds:

> *the murder of a single individual may be characterised as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belongs ...*[89]

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85 Lemkin, R., "Genocide as a Crime under International Law" *American Journal of International Law* 41, 1947, p145 at p147.

86 Satre, J.P., cited in Thornberry, P., *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991, at p60.

87 Lemkin, R., *op.cit.*, p147.

88 *Ibid.*

89 Dinstein, Y., "International Criminal Law" 5 *Israel Yearbook on Human Rights*, 55 1975, quoted in Steiner, H.J., and Alston, P., *International Human Rights in Context: Law, Politics, Morals*, Clarendon Press, Oxford, 1996, p1028.

On 9 December 1948, the General Assembly of the United Nations passed a resolution adopting a *Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").*[90] Australia ratified the Convention on the 8 July, 1949.[91] The *Genocide Convention* attained international legal status upon the 20th ratification on the 12 January 1951. Article II of the *Genocide Convention* defines genocide as:

> *any of the following acts committed with intent to destroy, in whole or in part, any national, ethnical, racial or religious group, as such:*
>
> *(a) killing members of the group;*
> *(b) causing serious bodily or mental harm to members of the group;*
> *(c) deliberately afflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *(d) imposing measures intended to prevent births within the group; and*
> ***(e) forcibly transferring children of the group to another group*** (emphasis added).

Article III of the *Genocide Convention* sets forth various forms of participation in genocide that shall be punishable. These include not only genocide, but conspiracy to commit genocide, direct and public assignment to commit genocide, attempt to commit genocide and complicity in genocide. Article IV provides that persons committing genocide or any other acts enumerated in Article III shall be punished, whether there are constitutionally responsible rulers, public officials or private individuals. Article V provides that the ratifying parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the *Genocide Convention* and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

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[90] United Nations General Assembly Resolution 260(III).

[91] The Commonwealth Parliament's approval was given under the *Genocide Convention Act 1949* (Cth).

The acts of the successive State governments, government departments and departmental officials authorised by and carried out under the various Native Welfare Acts constituted genocide both within the meaning of the *Genocide Convention* and the term "cultural genocide" and "biological genocide" as used by Lemkin. This is quite clear from the 1937 speech made by A.O. Neville, Chief Protector of Aborigines in Western Australia and other public officials as cited in Chapter 2. Statements made on other occasions by Neville also underline his intentions which come within the definition of genocide:

> *Mr Neville holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying out. The pure-blooded Aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of twenty and upwards. That showed the magnitude of the problem.*
>
> *In order to secure this complete segregation of the children of pure blacks, and preventing them ever getting a taste of camp life, the children were left with their mothers until they were but two years old. After that they were taken from their mother and reared in accordance with white ideas.*[92]

There was an attempt to destroy the racial group in whole or in part and to that end, children of the Aboriginal racial group were forcibly transferred to the non-Aboriginal group. The intention was to remove "half-caste" children from the influence of Aboriginal families and Aboriginal reserves as early as possible. Once children were removed, their parents were discouraged from making contact with them[93] and to avoid contact with their relatives.[94] There was also an endeavour to prevent Aboriginal women from having children to non-Aboriginal males.[95]

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92 *The Telegraph*, 5 May, 1937.

93 File note dated 3 May 1966 on Native Welfare file stated that parents had been discouraged by authorities at Sister Kates Children's Home from endeavouring to take their son away from Sister Kate's back to their home.

94 A Native Welfare Department report dated 23 February 1971, on Native Welfare file, stated that the only drawback to the girls' development was contact with her relatives.

95 A warrant dated 1940 for the removal of a woman to a native settlement stated "by removing this woman to the settlement we should be able to assure ourselves that she will have no further intercourse with white men".

The removal of Aboriginal children from their families also falls within the scope of customary international law of genocide. There is conjecture as to when the international norm prohibiting genocide first existed. It may be accepted that the prohibition on genocide did not achieve the status of a norm of customary international law prior to the 11 December 1946[96] or the 9 December 1949.[97] However, it should be noted that the United States Court of Appeal in *Hugo Princz v Federal Republic of Germany*[98] stated that genocide was a crime under customary international law prior to the outbreak of World War II.[99] Brennan J in *Polyukhovich v The Commonwealth*[100] determined that the crime of genocide only acquired international customary law status after World War II. It can also be argued that the crime of genocide reached customary international law status prior to the end of World War II because it was considered that an international treaty on genocide did not need to create a crime of genocide but rather should aim to prevent and punish perpetrators of the crime.[101] In any case, the prohibition on genocide is a *jus cogens*, and this must at all material times have been prohibited under international law.[102]

Jus cogens has been defined as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of the subsequent customary rule of contrary affect".[103] A principle of *jus cogens* cannot be derogated from, even by legislation, executive action or agreement.[104]

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96 That is, when United Nations General Assembly Resolution 96(1) "affirming" the status of genocide as a crime under international law was passed.

97 That is, when the United Nations General Assembly Resolution 260 (III), approved the adoption of the *Genocide Convention.*

98 26 F. 3d 1116 at 65, 1 July 1944 (US App.).

99 It is difficult to pinpoint the crime of genocide under international law prior to the late 1930s.

100 (1991) 172 CLR 501 at 587.

101 Lemkin, R., *op.cit*, p150.

102 *Ibid*, at 147.

103 Browne, I., *Principles of Public International Law*, Clarendon Press, Oxford, 4th ed., 1990, p513. Article 53 of the *Vienna Convention on the Law of Treaty 1969.*

104 Meron, T., "Hierarchy of International Human Rights" *American Journal International Law*, 80, 1986, p1 at pp19-20.

In fact the principle of genocide has also been recognised as an obligation *erga omnes* - that is, an obligation owed to the international community at large. It should be added that the prohibition on genocide has also been recognised as an obligation *erga omnes*. [105]

Thus, the *jus cogens* and the *erga omnes* status of prohibition on genocide is one of at least two ways, and possibly three, in which the international law relating to genocide may have found its way into Australia domestic law, creating a cause of action. The *erga omnes* status of genocide can be used to argue incorporation of genocide into the common law which gives rise to an action for damages. There is some international authority for the proposition that violations of international obligations resulting in harm create a duty to make appropriate reparations.[106]

If it is argued that the customary law prohibiting genocide has been incorporated into common law, it could be argued that the common law prohibiting genocide is able to be modified by statutes. However, one could equally argue that as a matter of interpretation there is nothing in the relevant statutes discussed in chapter 2 of this submission authorising genocide.

It should be noted that in *Coe v Commonwealth*[107] Mason, CJ., refused to strike out a claim based on alleged acts of genocide on the basis that no action of the kind could be maintained, although he did strike out the relevant paragraph in the statement of claim on the basis that the pleading did not sufficiently identify the provisions or principles of law applicable at the time when the acts alleged were committed. The particular difficulty was that many of the acts took place in the late 18th and early 19th centuries. This suggests that a genocide claim might survive a strike out application.

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105 *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJR 15; *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* [1970] ICJR 3 at 32.

106 See *Simpson v Attorney-General* [1994] 3 NZLR 667 at 699.

107 (1993) 68 ALJR at 115-116.

Another somewhat unlikely means of incorporating the international law of genocide into domestic law would be by reference to the *Genocide Convention Act 1949* (Cth). The Act is brief, and the only effective provision (apart from Section 5 which deals with Territories) is Section 4 which provides "approval is hereby given to the depositing with the Secretary General of the United Nations of an instrument of ratification of the Genocide Convention by Australia". The curious thing about the Act is that there is of course no restraint on ratification by the executive, and no need for legislation to enable ratification of an international convention.

There appear to be two possibilities with reference to the *Genocide Convention Act 1949* (Cth). The first is that the *Genocide Convention* was considered to be of such importance that the Parliament of the Commonwealth wished to show its support in an unequivocal way, but did not see any need for provisions implementing it as part of domestic law. Alternatively, the *Genocide Convention Act 1949* (Cth) could be seen as legislative adoption of the *Genocide Convention* as part of domestic law to the extent that it was not already adopted.[108] It might be suggested that article (IV) of the *Genocide Convention* assists one to form to the view that Parliament intended the Act to incorporate the law of genocide as part of the domestic law of Australia. The other possible view is that Parliament may have assumed that anything that could possibly constitute genocide was already contrary to the various criminal laws of Australia.

The obvious advantage of pursing an argument that the *Genocide Convention Act 1949* (Cth) itself incorporated the law of genocide as part of the domestic law of Australia is that it is a Commonwealth Act and by virtue of Section 109 of the Australian Constitution it will entirely invalidate any inconsistent State laws. If one could demonstrate that the various native welfare acts were framed and administered so as to "breed out" the Aboriginal people, and the information collected by the ALSWA in fact supports that this was the case, then those statutes would become inoperative as from 1949, together with the provisions providing for immunity

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[108] The difficulty with the second view is that the Act does not expressly say so, rather the wording is close to that of the Commonwealth Act considered in *Bradley v Commonwealth (1973) 128 CLR* 557 which "approved" a treaty. The Court held that this was not incorporation of the treaty as part of the domestic law of Australia.

from suit. Because of the invalidating effect of inconsistent Commonwealth legislation, the National Inquiry should consider making appropriate representations to the Commonwealth government to do what the Attorney-General and Minister of External Affairs (Dr. Evatt) indicated would be done in 1949, when he said:

> ... each signatory will be bound ... to legislate in order to give the convention effect. In Australia, such action will be taken directly by this Parliament, and we shall also act by arrangement with the States for the punishment of the crime of genocide[109].

Appropriate punishment could well include a measure of damages. Legislation retrospective to 1949 could open up again some of the difficulties discussed in *Polyukhovic v Commonwealth*,[110] although it would be arguable that, since the *Genocide Convention 1949 Act* (Cth) had created the crime, only the quantum of sentence would be truly retrospective. Kelsen states that the rule against retrospective legislation "is not valid at all within international law and is valid within national law only, with important exceptions".[111]

The third manner of incorporation is by development of the common law in the manner described in *Minister for Immigration and Ethnic Affairs v Teoh* by Mason CJ and Dean J.[112] Their Honours outlined the circumstances in which a treaty could assist in the development of common law.[113] It appears that a convention which "declares universal fundamental rights" is particularly considered to be a legitimate guide to development of the law. The Courts should be circumspect in dealing with laws which Parliament itself has not seen fit to incorporate into domestic law, but by reason of the *Genocide Convention Act 1949* (Cth) there would appear to be no need for circumspection on that ground in this case. Further, it is suggested that the relationship of the

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109 *Hansard*, Commonwealth Parliament, 30 June, 1949, p1880.

110 *op.cit.*

111 Kelsen, H., "Will the Judgment in Nuremberg Constitute a Precedent?", *The International Law Quarterly*, 1949, p153 at p164.

112 (1994-1995) 183 CLR 273 at 288.

113 *Ibid.*

existing principles of domestic law to the relevant international norm must be considered. In relation to genocide, one could argue that there is already a very substantial body of law providing remedies for harms, physical or mental, negligently or deliberately inflicted. The categories of conduct characterised as genocide are clearly harm, generally both to the individual and to the group at which it is ultimately aimed, and it would appear to be filling a relatively small gap in the law to suggest that such harms when directed at a particular end, should be actionable at the suit of at least the individuals directly affected (and possibly, at the suit of members of the group at which the genocide is aimed).

8. Damages

As recorded in chapters 3 and 4 of this submission, children removed from their parents suffered a variety of harms. This was also the case for parents of children removed and in some cases Aboriginal communities and/or the Aboriginal community.

(a) Damage Suffered by the Child

At common law, damages are awarded so as to place the plaintiff whose rights have been violated in the same position so far as money can, as if the plaintiff had not suffered a violation of rights. Note that the orthodox position in tort law is that mental suffering caused by grief, fear and anguish is not compensable; recovery in tort requires a recognised psychiatric illness. The classic statement is still that of Lord Wensleydale in *Lynch v Knight:*[114] "mental pain or anxiety the law cannot value, and does not pretend to redress, when the wrongful act complained of causes that alone".[115]

It is obvious from this submission that the damage caused by removal from family is profound and extends into all aspects of the lives of Aborigines. However, despite this, individuals seeking to bring an action in tort may have problems establishing a recognisable psychiatric illness or

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[114] (1861) 9 HLC 577.

[115] *Ibid*, at 598.

syndrome. Not only may such a syndrome prove difficult to establish, it is submitted that it is not desirable that the individuals removed as children be subjected to such examinations, nor is it desirable that real lives and real problems of Aboriginal people be reduced and categorised into recognisable illness and syndromes.

There are some legal indications of dissatisfaction with the requirement that recognised psychiatric illness be proved. Kirby P in *Coates v GIO of NSW*,[116] in obiter attributed the requirement to "Nineteenth Century notions of psychological illness and an abiding suspicion of such claims",[117] which "may work an injustice upon Australian litigants". In the area of work-related stress, illness following continuous stress rather than identifiable "shock" has been held compensable, although with no very clear discussion of principle.[118] There is also some suggestion that equitable compensation may provide a remedy, with a punitive element, for breach of fiduciary obligations without "damage", in the tort sense, being present.[119] However, whilst the weight of authority supports such a requirement, the legal system cannot adequately compensate individuals for harm suffered as a result of removal. Nonetheless, in determining how Aboriginal people may be compensated, it is useful to examine principles used in assessing damages in tort law, which include economic and non-economic loss.

Damages seek to compensate for both economic and non-economic loss.

(i) economic loss

Damages for economic loss would include compensation for expenses incurred, anticipated needs and loss of earning capacity. Where psychological and emotional problems incurred as a result of removal as a child, have been the subject of treatment, the cost of any treatment incurred may be claimed. Where removal as a child has resulted in a continuing need such as counselling or

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116 (1995) 36 NSWLR 7.

117 *Ibid*, at 12.

118 *Gillespie v Commonwealth* (1991) 104 ACTR1; and *Woodrow v Commonwealth* (1993) 45 FLR 52.

119 For example, refer to the Canadian decision of *Norberg v Wynnib* [1923] 4 WWR 577.

treatment for alcohol or drug abuse, compensation should meet this need. If such effects have impaired the earning capacity of the person, for example, by resulting in a poor education or dependence on alcohol, this also may be claimed as economic loss. In *A v D*[120] sexual abuse held back the schooling of the applicant child and therefore interfered with her subsequent employment. Criminal injuries compensation was awarded for loss of earning capacity.

(ii) non-economic loss

Included in damages for non-economic loss are damages for pain and suffering and loss of amenities and enjoyment of life. Clearly such damages are appropriate for Aborigines removed from their families as children.[121] As previously mentioned, commonly stated effects of removal include inter alia:

- problems of identity and adjustment;
- mental illness and increased incidences of self-injury and suicide;
- feelings of enormous grief at separation;
- deprivation of a loving childhood;
- loss of culture;
- difficulty in forming close relationships; and
- major mood fluctuations and depression.

Cultural deprivation has been held to be a loss which attracts damages. The Supreme Court of South Australia has held that the loss of ability to take part in cultural activities of an Aboriginal plaintiff community was a substantial factor in assessment of damages for loss of amenities. [122] The Supreme Court of the Northern Territory has held that loss of cultural fulfilment also forms a substantial part of damages awarded for pain and suffering and loss of amenities.[123]

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120 (1994) 73 A Crim R 56.

121 *The Hague Convention on the Civil Aspects of Child Abductions 1980* recognises the harm caused by a child being removed from their parents and being removed from a home State.

122 *Napaluma v Baker* (1982) 29 SASR 192.

123 *Dickson v Davies* (1982) 17 NTR 31.

The breakdown of a personal family relationship and the loss of the chance of forming such a relationship may also be a loss which results in damages. As part of the damages awarded for loss of amenities of life, compensation has been awarded for breakdown of a marriage.[124] There is no reason in policy for not extending this to the breakdown of other family relationships including that of parent and child. Further, even if an extension cannot be made, one of the effects of the removal of Aboriginal children is the difficulties some Aborigines now have in forming or sustaining intimate relationships.

Note also that compensation should also be provided for damage suffered as a result of the environment into which Aboriginal children were placed, and practices maintained in such institutions. It is also useful to look at criminal injuries compensation schemes for some guidance on how victims of crime are compensated. Such schemes seek to compensate for injury including mental and nervous shock suffered as a result of a crime. Compensation is generally assessed in a similar manner to common law.

Under Section 7(1) of the *Criminal Injuries Compensation Act 1985* (WA), any person who has suffered injury or loss in consequence of the commission of an offence may apply for compensation. Further, where the death of a person has occurred in consequence of the commission of an offence, any close relative of the deceased who has suffered any loss can also apply for compensation (Section 7(2)(b)). "Close relative" is defined in Section 3(1) to include relations up to two generations away from the deceased, defacto partners, step-sons/daughters and step-fathers/mothers. In seeking compensation, Section 3(1) defines loss to include:

(i) expenses actually and reasonably incurred by the application or by a person responsible for the maintenance of the applicant;
(ii) loss arising from damage to items of the personal apparel of the applicant; and
(iii) loss of earnings suffered by the applicant.

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124 *Hird v Gibson* (1974) QdR 14; and *Hilbrands v Vorillas* (1988) Tas R (nc) 20.

Where an application is made by a close relative of the deceased person, loss includes any circumstances for which damages can be awarded under the *Fatal Accidents Act 1959* (WA) (including medical and funeral expenses).

(b) Parents

Compensation must also provide for damage suffered by parents whose children were removed. The common law has recognised the damage suffered by parents whose children have been killed or injured. In *Day Franceshi v Storrier,*[125] the plaintiff was awarded $25,000.00 for the psychological and emotional effects of her three children being seriously injured by an out-of-control car. In *Woods v Lowns,*[126] the plaintiff was awarded $50,000.00 for the nervous shock suffered on hearing of injury to her son.

Under Criminal Injuries Compensation Schemes, to be entitled to claim compensation for "mental shock" or "nervous shock" a person need not be the person upon whom the crime was committed. Members of the victim's family are also entitled to claim compensation where psychological harm is suffered.[127]

Under the *Fatal Accidents Act 1959* (WA), a relative of a deceased person, whose death was caused by a wrongful act, neglect or default may bring an action for damages in court.[128] Under the *Workers' Compensation and Rehabilitation Act 1981* (WA) a payment of compensation may be awarded to a dependant in respect of a person under legal disability or a person who has died.[129] By analogy, it could be argued that relatives who have been denied a familial/dependent relationship with a person who was forcibly removed, should be entitled to compensation under a similar legislative or other scheme. The argument could be made by the child who has lost the

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125 (1988) Australian Torts Reports 80-176.

126 (1995) 36 NSWLR 344.

127 See for example *Delaney v Alan* (1980) 24 SASR 443.

128 Refer to *Fatal Accidents Act 1959* (WA) Section 6.

129 Refer to *Workers' Compensation and Rehabilitation Act 1981* (WA), Section 84F and Schedule 1.

dependant relationship with the parent, or the parent who, in normal circumstances, may in their old age have depended on their children.

9. Limitation Periods

It is not proposed here to make submissions on possible limitation problems presented by Section 6 of the *Crown Suits Act 1947* (WA) and Sections 38 and 47A of the *Limitations Act 1936* (WA) except to make two points. It is submitted that if an action is brought directly in the High Court, say for a claim for damages for a breach of a constitutional right, guarantee, immunity or freedom, the action cannot be statute barred.[130] Further, it is argued that if an action is commenced in the High Court of Australia, Section 47A of the *Limitations Act 1936* (WA) which refers to "actions" commenced in the Supreme and lower Courts only, would be avoided and potentially the personal immunity provisions of the various statutes may be avoided. Whether the *Crown Suits Act 1947* (WA) can also be avoided by the same reasoning is not so clear.[131]

Second, and most importantly, although certain statutes may prevent bringing of actions, they do not deny the existence of the cause of action. If there is a cause of action resulting from the past government policies and practices which have had a severe and continuing effect on Aboriginal people, it can be strongly argued that there is a moral obligation on governments to award ex-gratia compensation and/or remove limitation barriers.[132] It could be further argued that, considering the harm that has been suffered by Aboriginal people as a result of past government policies and practices in the area of assimilation and removal of children from their families, it is immoral for the Crown to hide behind the shoulder of legal technicalities. In *van Boven's Report* it is submitted that "the principle should prevail that claims relating to reparations for gross

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130 This was the argument made by the plaintiffs in the *Kruger* and *Bray* case. The plaintiffs also argued that no limitation statute applied to the jurisdiction of the High Court of Australia.

131 Note the decision in *Williams v The Minister, Aboriginal Land Rights Act 1983 & Ors*, *op.cit.*, whereby it was held that a claim for equitable compensation for breach of fiduciary duty was not barred by the *Limitation Act 1969* (NSW). Whether the same would be held under the *Limitation Act 1936* (WA) is somewhat problematic.

132 See *van Boven Report, op.cit.*, pp53-54.

violations of human rights shall not be subject to a statute of limitation".[133] If the legal system is not to be modified in order to allow the cause of action to proceed, schemes and structures should be established which will allow compensation or reparation to be awarded to those who have suffered harm and other negative effects.

International Law

Legal academic, Diane Orentlicher comments that:

> *[I]nternational law has long recognised that human rights guarantees rest, above all, on a foundation of law - in particular, on the assurance of an effective legal response when violations occur.*
>
> ...
>
> *The principle underlying these duties is straight forward: the only way to assure that rights are protected is to maintain effective legal safeguards against their breach. In particular, those who commit atrocious human rights crimes must be punished, and victims must be assured appropriate redress.*[134]

Legal accountability under international law for gross violations of human rights involves criminal and civil liability. In this submission the emphasis is on civil redress rather than criminal punishment. However, many of those interviewed by the ALSWA did request that a recommendation be made that governments investigate abuses, especially sexual abuse, of Aboriginal people resident in missions, institutions and/or foster care, and that criminal charges be laid where appropriate. The emphasis here is on civil redress because that is the focus of the requests by those who gave their personal histories to the ALSWA. Further, the principle focus of civil redress "is the victim, and its paramount aim is reparation".[135]

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133 *Ibid.*, at 54.

134 Orentlicher, D.F., "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in Henkin, L., and Hargrove, J.L., (eds), *Human Rights: An Agenda for the Next Century*, The American Society of International Law, Washington DC, 1994, at p425-426. Also refer to Orentlicher, D.F., "Selling Account: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal*, 100, 1991, p2537.

135 Orentlicher, D.F., *op.cit*, 1994, p427. The principle justification for criminal punishment is the deterrence rationale. Of course, civil redress also serves a deterrent function but that is not its main focus. In regards to criminal liability and punishment under international law refer to Orentlicher,

The assimilation policies which result in the removal of Aboriginal children from their families, their culture and land, restricting their movement and freedom of association, and in many cases being subjected to physical, mental and sexual abuse amount to "gross violations" of human rights. The *van Boven Report* comments that "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale", or the "deportation or forcible transfer of population" amounts to a gross violation of human rights.[136]

van Boven adds:

> *... it is submitted that, while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide, slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender (emphasis added).*[137]

There is no doubt that Aboriginal children removed from their families and their parents had their human rights violated. Also it is strongly argued, at least for the children, that they were subjected to gross violations of human rights.

A number of international human rights instruments create a duty to make appropriate reparations for violations of international human rights. For example, article 8 of the UDHR, which was adopted by the General Assembly of the United Nations in 1948[138] states: "*everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law*". Although the *UDHR* is not strictly speaking binding international law, its provisions have been the object of sustained legislation[139] and many

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136 *van Boven's Report, op.cit.*, at p6.

137 *Ibid*, pp7-8.

138 United Nations General Assembly Resolution 172 A(III), 20 December, 1948.

139 Refer to Rodley, N., *The Treatment of Prisoners under International Law*, Clarendon Press, Oxford, 1987, p6.

of its clauses have been translated into other UN instruments, such as the *ICESCR* and the *ICCPR*.[140]

Article 2(3) of the ICCPR which was signed by Australia on 13 August, 1980, and came into force on 30 November 1980, expands on the principle established in the UDHR, states that each State party undertakes:

> *(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding the violation has been committed by persons acting in an official capacity;*
>
> *(b) To ensure that any person claiming such a remedy shall have his right there to determine by competent judicial, administrative or legislative authorities or any other competent authority provided by the legal system of the State, and to develop the possibilities of judicial remedy.*
>
> *(c) To ensure that the competent authorities shall enforce such remedies when granted.*[141]

The *Convention on the Elimination of All Forms of Racial Discrimination* which was ratified by Australia on the 30 September 1975, and entered into force on 30 October 1975, obliges State parties under article 6 to "reassure ... just and adequate reparation or satisfaction for any damage suffered as a result of racial discrimination". The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which was ratified by Australia on 10 December 1955, and entered into force for Australia on 8 August 1989, provides under article 14(1) that victims of torture shall have redress and "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". Further, in the event of death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.[142] In regards to *CROC* which Australia ratified on 17 December, 1990, and

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140 United Nations General Assembly Resolution 2200 A(XXI) 16 December, 1966.

141 Under the *First Optional Protocol* to the *ICCPR*, which Australia acceded to in 1991, the United Nations Human Rights Committee, established under article 28 of the *ICCPR*, may receive and consider communications from individuals claiming to be victims of violations of any of the rights protected under the *ICCPR*. However, the individual making the complaint must exhaust all available domestic remedies first. This requirement is found under article 2 of the *First Optional Protocol* of the *ICCPR*.

142 Also refer to article 11 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

entered into force in Australia on 16 January, 1991, article 39 provides for all state parties to ensure that appropriate measures are taken to promote "physical and psychological recovery and social integration of a child victim ...".[143]

The *Genocide Convention* provides that State signatories ensure that persons who commit genocide or participate in the various forms of genocide as prescribed in article III should be punished. There is no reason why punishment should not include reparation by the perpetrators of genocide to the victims. An example of this is Germany's reparations to victims of Nazi atrocities, which included genocide against the Jewish race.[144] It has been argued that:

> *Compensation for survivors of victims of genocide, ... finds it roots in the UN General Assembly Resolution 194(III) of December 11, 1948, which bases the right of refugees to compensation for loss or damage to their property on "principles of international law". This policy of the UN has been recited and reaffirmed every year by the General Assembly of the United Nations. The point is that there are financial responsibilities of the countries of origin, both to their own citizens now turned refugees and toward the countries of asylum saddled with the burden of caring for those refugees. The term "refugee" under the 1951 Convention Relating to the Status of Refugees refers to any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". It is submitted that the survivor of a victim of genocide falls within this definition of "refugee", and under UN Resolution 194 (III), paragraph 11, is entitled to compensation for "loss of or damage to property which, under principles of international law or in equity, would be made good by the Governments or authorities responsible". Unfortunately, neither the UN Human Rights Commission or the States involved have concerned themselves with the refugees' right to compensation.*[145]

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143 Other international instruments, for which Australia is not a signatory, that contain special provisions which provide individuals with an "effective remedy" by competent national tribunals for acts violating human rights include the International Labour Organisation's *Convention concerning Indigenous and Tribal People in Independent Countries* (articles 15(2), 16(4) and 16(5), *American Convention on Human Rights* (articles 63(1) and 68), *European Convention for the Protection of Human Rights and Fundamental Freedoms, African Charter on Human and Peoples Rights* (article 21(2)) and the *Declaration on the Protection of All Persons from Enforced Disappearance* (article 19).

144 Orentlicher, D.F., *op.cit.*, 1994, at 456.

145 Freedman, W., *Genocide: A People's Will to Live*, William S. Hein and Co. Inc, Buffalo New York, 1991, p82.

It could be argued that Australia has an obligation under a number of international human rights instruments to ensure that Aboriginal people who have been, and continue to be affected by the assimilation policies and removal practices, are given the opportunity to make claims of compensation for harm and damage brought about by such policies and practices. Some may argue that this should not be the case because during most of the period of systematic removal of Aboriginal children from their families, the majority, if not all of the human rights instruments mentioned above, were not in existence or Australia was not a party to them. Whilst this argument may hold credence to those who wish to avoid responsibility to award reparation to those affected by the removal of Aboriginal people from their families, such a view cannot prevail. The moral obligation toward reparation is overwhelming and the fact remains that the international community, which has qualified its requirements in the international human rights instruments, and to which Australia has agreed, has prohibited the practice of systematically removing Aboriginal children from their families. People continue to suffer as a result of the assimilation policies and removal practices which are now prohibited by international instruments to which Australia is a party.

The United Nations Human Rights Committee which was established in 1977 in accordance with article 28 of the *ICCPR* to examine State parties' compliance with the *ICCPR*, and decide on individual complaints made under the first optional protocol to the *ICCPR*, has given a strong lead regarding remedies and the awarding of compensation for violations of articles of the *ICCPR*. Some examples are *Mbeng v Zaire*,[146] *Acostas v Uruguay*[147] and *Venezuela v Peru*.[148]

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146 (1983) Communication No. 16/1977, reported in United Nations Human Rights Committee, *Selective Decisions of the Human Rights Committee*, United Nations, New York, Vol. 2, 1980, p76.

147 (1983) Communication No. 110/1981, Reported in *Ibid*, p148.

148 UN Doc. CCPR/C/48/D/309/1988, 10 August, 1993, Communication No. 30/1988.

The position at international law regarding the need to provide reparation for victims of human rights abuses is encapsulated in the following passage from the judgment of the Inter-American Court of Human Rights in *Velàsquez Rodríguez*:[149]

> 25. *It is a principle of international law, which jurisprudence has considered "even a general principle of law", that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand is the most usual way of doing so.*

A more recent judgment of the Inter-American Court of Human Rights elaborates on the issue of providing compensation for violations of human rights under the *American Convention on Human Rights*. In the case of *Aloeboetoe et al v Suriname,*[150] the Inter-American Commission of Human Rights brought an action against the government of the Suriname based on the death of seven Saramaccan Maroon Boatmen by a squad of Surinamese soldiers in southern Suriname. An important part of the decision by the court was that, in addition to awarding compensation for the actual deaths of the victims, the victims' heirs were entitled to "moral" compensation for emotional suffering endured by the victims before they were killed. However, the court awarded "moral" damages to the victims' parents who are not the legal successors, by reason that:

> *it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their children.*[151]

This statement by the court parallels the suffering of those who were interviewed by the ALSWA. Parents who had their children removed did not only suffer, and continue to suffer, because they were denied their rights to be parents of their children but also because they were worried about the safety and care of their children. Some of the people interviewed, who were removed and

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149 "Venezuela v Peru", *Human Rights Law Journal* 127, 1990, p127 at 129.

150 Judgment of 10 September, 1993, Inter-Am. Ct.H.R. (1993).

151 *Ibid*, para 76.

now are parents, said that they find it difficult to cope with the torment that their children are enduring by their incarceration in juvenile detention centres.

In the *Aloeboetoe case* the inter-American court of human rights recognised and gave credit to the customary family law of the Maroon people in respect to fundamental intimate relations. The Maroons practised polygamy, and as such the court awarded compensation to each wife of the married victims.[152] However, it should be noted that the court was not prepared to accept the claim by the inter-American Commission of Human Rights that the tribal community from which their victims came were entitled to compensation because they had also suffered harm by virtue of the victims' murders.[153]

The court ordered that the Suriname government were under an obligation to provide education to the children of the victims until they reach a certain age. To enforce this obligation the court ordered the re-opening of a school at a medical dispensary in the village where the majority of the victims' families resided.[154]

The European Court of Human Rights has awarded compensation for damage (pecuniary and non-pecuniary) and reimbursement of costs and expenses pursuant to article 50 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms,* which is to "afford just satisfaction to the victim".[155]

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152 *Ibid*, paras 62-63; 98.

153 *Ibid*, paras 83-84.

154 *Ibid*, para 96. As part of the reparation package the court ordered that the Suriname government create two non-taxable trust funds at the Suriname Trust Bank in Paramaribo - one for the children and the other for the adults, established a fiduciary duty to minister the funds as trustee, a one time $4,000.00 to cover start-up costs of the fiduciary committee and the court stated that they would supervise compliance with their decision. For further comment on the *Aloeboetoe case* refer to Padilla, D.J., "Reparation in Aloeboetoe v Suriname" *Human Rights Quarterly*, 17, 1995, p541.

155 *van Boven's Report, op.cit.*, p34.

Some nations have awarded civil redress for violations of human rights without needing to resort to international law or international conventions. This has been more prevalent in countries where human rights are guaranteed by written constitutions. The leading case is *Maharaj v Attorney-General of Trinidad Tobago (No. 2)*.[156] The constitution of Trinidad and Tobago provides recognition for protection of fundamental human rights and freedoms based on the view that these are already secure to the people by existing law. Lord Diplock, delivering the judgment of the majority stated:

> *... that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction, and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing laws of torts provides a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to.*[157]

In responding to arguments that the awarding of compensation would contravene the principle of judicial immunity, Lord Diplock said:

> *the claim for redress under section 6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability; ... it is a liability in the public law of the State, not the judge himself, which has been created by sections 6(10) and (20) of the Constitution.*[158]

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156 [1979] AC 385.

157 *Ibid*, p396-397.

158 *Ibid*, at 399.

The United States District Court in the District of Hawaii in the case of *Celsa Hilao et al v The State of Ferdinand E Marcos*[159] ordered the estate of the former Philippinian President Ferdinand Marcos to pay approximately $770 million in compensatory damages to ten thousand Filipino dissidents said to have suffered torture and other atrocities under Marcos' rule. The court entered final judgment in favour of 135 mainly selected class claims and the plaintiff class, with damages also awarded to the heirs and beneficiaries of the plaintiff class and the plaintiff sub-class of all current citizens of the Republic of the Philippines. The court also gave judgment for exemplary damages, to make an example "for the public good" to the order of $1,197, 227, 417.90 to be divided pro-rata amongst all members of the plaintiff class. The damages awarded fell in line with those recommended by a Special Court Judiciary Officer. The Judiciary Officer had arrived at the recommendation of compensation of around $767 million after sampling 137 victims. The atrocities allegedly took place between 1972 and 1986, when former President Marcos was over-thrown in a popular revolt.[160]

Some national governments have sought to provide reparations to victims of human rights violations. As previously stated, Germany has provided reparation to victims of Nazi atrocities. The Aylwin government of Chile established a National Commission for Truth and Reconciliation, whose principle task was to investigate "a series of violations of human rights perpetrated in Chile between 11 September 1973, and 11 March 1990".[161]

The United Nations has made some attempts to address the issue of reparation for violations of human rights. For example, in 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*[162] which establishes standards relating to the redress for individuals and groups of individuals who have suffered as a result of human rights violations. The Declaration recommended redress through restitution and/or compensation, including material, medical, psychological and social assistance

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159 In the United States District Court District of Hawaii, MDL No. 840, CA No. 86-0390 - 18 January, 1995.

160 Refer to *The Washington Post*, 19 January, 1995.

161 Orentlicher, D.F., *op.cit*, 1994, at pp456-457.

162 United Nations General Assembly Resolution 40/34, 29 November, 1985.

and support.[163] One of the other major initiatives undertaken by the United Nations is the previously mentioned study by Theo van Boven.[164]

van Boven's Report

van Boven was requested to explore the possibility of developing basic principles and guidelines with respect to the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The report should be of particular use to the National Inquiry, particularly the final remarks, conclusions and recommendations, which includes van Boven's proposed basic principles and guidelines for reparation in relation to victims of gross violations of human rights. The ALSWA urges the National Inquiry to accept these principles and guidelines. It strongly urges the various levels of government in Australia to act on the principles and guidelines. These basic principles and guidelines for making reparation to victims of gross violation of human rights are reproduced here:

General Principles

1. *Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of populations; and systematic discrimination, in particular based on race or gender.*

2. *Every State [van Boven states that where the general principles refer to States, they also apply, as appropriate to other entities exercising effective power] has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions.*

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163 *Ibid*, paras 8 and 19.

164 *van Boven's Report, op.cit.*

3. *Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.*

4. *Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.*

5. *Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators. Impunity is in conflict with this principle.*

6. *Reparation may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims.*

7. *In addition to providing reparation to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation. Special measures should be taken for the purpose of affording opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.*

Forms of Reparations

8. *Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property.*

9. *Compensation shall be provided for any economically assessable damage resulting from human rights violations, such as:*

   (a) Physical or mental harm;
   (b) Pain, suffering and emotional distress;
   (c) Lost opportunities, including education;
   (d) Loss of earnings and earning capacity;
   (e) Reasonable medical and other expenses of rehabilitation;
   (f) Harm to property or business, including loss profits;
   (g) Harm to reputation or dignity;
   (h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

10. *Rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.*

11. *Satisfaction and guarantees of non-repetition shall be provided, including:*

(a) Cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth;
(c) A declaratory judgment in favour of the victim;
(d) Apology, including public acknowledgment of the facts and acceptance of responsibility;
(e) Bringing to justice the persons responsible for the violations;
(f) Commemorations and paying tribute to the victims;
(g) Inclusion of an accurate record of human rights violations in educational curricula and materials;
(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;
(ii) Restricting the jurisdiction of military tribunals;
(iii) Strengthening the independence of the judiciary;
(iv) Protecting the legal profession and human rights workers;
(v) Providing human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials (emphasis original).

Procedures and Mechanisms

12. *Every State shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law.*

13. *The legal system, especially in civil, administrative and procedural matters, must be adapted so as to ensure that the right to reparation is readily accessible, not unreasonably impaired and takes into account the potential vulnerability of the victims.*

14. *Every State shall make known, through the media and other appropriate mechanisms, the available procedures for reparations.*

15. *Statues of limitations shall not apply in respect to periods during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations.*

16. *No one may be coerced to waive claims for reparations.*

17. *Every State shall make readily available all evidence in its possession concerning human rights violations.*

18. *Administrative or judicial tribunals responsible for affording reparations should take into account that records or other tangible evidence may be limited or unavailable. In the absence of other evidence, reparations should be based on the testimony of victims, family members, medical and mental health professionals.*

19. *Every State shall protect victims, their relatives and friends, and witnesses from intimidation and reprisals.*

20. *Decisions relating to reparations for victims of violations of human rights shall be implemented in a diligent and prompt manner. In this respect follow-up, appeal or review procedures should be devised.*[165]

This submission endorses the principles regarding reparation proposed by van Boven. Many of the specific recommendations made by those interviewed by the ALSWA are consistent with van Boven's proposals.

van Boven's Report - Rehabilitation

Before concluding this comment on *van Boven's Report*, attention is drawn to the issue of rehabilitation. As stated above, van Boven recommends that reparation include rehabilitation measures, such as "legal, medical, psychological and other care and services". The next part of this submission, Part D, looks at the issue of delivery service to Aboriginal people.

Apart from, or notwithstanding the moral obligation to look at the improvement of the delivery of services to Aboriginal people affected by the assimilation policies and removal practices, there is also a legal basis for such improvements. Irrespective of the obligation under the international

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165 *van Boven's Report, op.cit.*, pp56-58.

law relating to reparation for victims of gross violation of human rights, governments, particularly the State government, have obligations deriving from the principle of fiduciary duties and requirements under international conventions and anti-discrimination legislation to ensure "proper" delivery of services to Aboriginal people and communities. A brief presentation of these arguments is provided.

1. Fiduciary Duty

It is settled law in the United States and Canada that the Crown owes a fiduciary obligation to indigenous people. Although the fiduciary relationship in most of the cases in the United States and Canada appear to arise only in relation to proprietary interests,[166] the Supreme Court of Canada, in the case of *KM v HM*[167] held that non-economic interests, such as a continuing parent-child relationship, are capable of protection by the existence of a fiduciary duty.[168]

In Australia, in *Mabo No. 2*[169] Toohey J undertook a broad analysis of the doctrine of fiduciary obligation. He came to the view that the right of the Crown in right of Queensland to alienate land the subject of traditional interests, and the corresponding vulnerability of the Meriam people, could give rise to a fiduciary obligation on the part of the Crown.[170]

Toohey J held that if the relationship between the Crown and the Meriam people with respect to traditional title was insufficient to give rise to a fiduciary obligation, such an obligation could arise from:

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166 Refer to *Guerin v The Queen* (1984) 2 SCR 335; *Cherokee Nation v Georgia* 30 US 1 (1831), *United States v Mitchell II* 103 S Ct 2961 (1983).

167 *op.cit.*

168 *Ibid*, 325. Also refer to United States Court of Appeal decision of *White v Califano* (1978) 581 F2d 647.

169 *op.cit.*

170 *Ibid*, at 203.

> *both the course of dealings by the Queensland government with respect to the islands since annexation ... and the exercise of control over or regulation of the islanders themselves by welfare legislation.*[171] (emphasis added)

His Honour's reference to "welfare legislation" is consistent with the recognition by Mason CJ in *Coe v Commonwealth*[172] that in some circumstances a fiduciary relationship may arise out of a representation or out of an undertaking.

Historically, the State of Western Australia has exercised considerable power over Aboriginal people and land creating a relationship of trust and vulnerability between itself and the Aboriginal inhabitants. The paternalistic nature of the restrictions and conditions which governed Aborigines under the *Aborigines Act 1905* (WA) and its successors show that the State assumed the role of guardian in respect to the whole of the Aboriginal people, not just the infant members of that group. For example, in addition to the general duty "of promoting the welfare of the Aborigine", the Aborigines Department had a duty to provide food, clothing, medicines and medical attendance, when they would otherwise be destitute, provide medication to Aboriginal children, and provide general assistance for the preservation and welfare of the Aborigines.[173] There was also the power of removal and confinement,[174] legal guardianship,[175] supervision of all employment,[176] management of property,[177] and administration of Aboriginal estates.[178] The *Native Administration Act* 1936 (WA) gave control over marriages[179] and prohibited tribal practices.[180]

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171 *Ibid.*

172 *op.cit.*, at 116.

173 *Aborigines Act 1905* (WA), Section 4.

174 *Ibid*, Section 12.

175 *Ibid*, Section 8.

176 *Ibid*, Sections 17-33.

177 *Ibid*, Section 34.

178 *Ibid*, Section 35.

179 *Native Administration Act 1936* (WA), Section 45.

180 *Ibid*, Section 66.

The Aboriginal Affairs Planning Authority which came into effect in 1972 and which now is called AAD, still continues to have significant powers and control of Aboriginal people in this State. The AAD has the duty of promoting "the well-being of persons of Aboriginal descent in Western Australia"[181] and it has been given "all such powers, rights and privileges as may be reasonable necessary to enable it to carry out its duties and functions".[182] The State, therefore, in Western Australia, still continues to owe fiduciary obligations to Aboriginal people which creates a legal basis for the improvement of service delivery to Aboriginal people. In any case, pursuant to the *Aboriginal Affairs Planning Authority Act 1972* (WA) the State has a statutory duty in the promotion of economic, social and cultural needs of Aboriginal people in Western Australia.

2. International Conventions

The necessity to provide an adequate standard of living is recognised as a fundamental human right under the *ICESCR*. Articles 11, 12 and 13 of the *ICESCR* protect the right to adequate housing, health and education respectively. Article 11 provides that States Parties must recognise the rights of all to an adequate standard of living and the continuous improvement of living conditions. It puts an onus on States Parties to take the necessary steps to ensure realisation of this right. Article 12 encompasses the right of everyone to the highest attainable standard of physical and mental health, and lists steps to be taken by States Parties to realise this right. Article 13 promotes the right of everyone to education, presents the social value of education and enumerates basic principles to be applied by the States Parties to promote access to education. Thus the Commonwealth government has an obligation as a signatory to the *ICESCR* to ensure that it and the State governments provide adequate housing, health and educational services to Aborigines and their communities.

Pursuant to the *Convention on the Elimination of All Forms of Racial Discrimination,* Australia is obligated under Article 2(e) of the Convention to ensure economic, social and cultural rights, in particular:

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[181] *Aboriginal Affairs Planning Authority Act 1972* (WA), Section 12.

[182] *Ibid*, Section 14(1).

(i) *The rights to work, to free choice or employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;*

(ii) *The right to form and join trade unions:*
(iii) *The right to housing;*
(iv) *The right to public health, medical care, social security and social services;*
(v) *The right to education and training.*[183]

3. Anti-Discrimination Legislation

In addition to obligations arising from international conventions, the Commonwealth and State governments must ensure that there is adequate delivery of services to Aboriginal people in order to comply with the *Equal Opportunity Act 1984* (WA)[184] and the *Racial Discrimination Act 1975* (Cth).[185] These Acts prohibit, amongst other things, discrimination in the area of service delivery on the basis of race. It is important that State and Commonwealth governments provide genuine equality in the delivery of services to Aboriginal people. This will require delivery of services in a more culturally appropriate way to Aboriginal people rather than mainstream delivery of services that is determined by the needs of the non-Aboriginal community.

4. Concluding Comment on Rehabilitation - Delivery of Services

In order for the Commonwealth and State governments to meet their legal obligations in the delivery of services to Aboriginal people and communities, they must involve Aboriginal people in the decision-making process. Both the Commonwealth and State governments should adopt the recommendations made in Part D of this submission.

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183 Reference should also be made to the International Labour Organisation's *Convention Concerning Indigenous and Tribal People in Independent Countries* (1989) No. 169 and the United Nations *Draft Declaration on the Rights of Indigenous Peoples.*

184 Refer to Sections 2, 36 and 46 of the *Equal Opportunity Act 1984* (WA).

185 Refer to Sections 9, 10, 12 and 13 of the *Racial Discrimination Act* 1975 (Cth).

Regardless of any legal obligation on the part of governments to improve the delivery of services to Aboriginal people and communities, there is a moral obligation to do so. It is not possible or realistic to delineate between those Aboriginal people who were directly affected by the past assimilation policies and removal practices from those who were not. Thus, if the Commonwealth and State governments are to improve the delivery of services to those affected by past assimilation policies and removal practices, they need to look at the delivery of services to all Aborigines in Western Australia. Improvements in delivery of service is crucial if reparation for the gross violation of human rights suffered by Aboriginal people under the assimilation policies and removal practices is to be more than token.

Recommendation 1

That the Commonwealth and State governments accept the proposed basic principles and guidelines contained in the Final Report of Mr van Boven of the United Nations on the study concerning the right to reparation, (restitution, compensation, and rehabilitation) for victims of gross violations of the human rights and fundamental freedoms.

Recommendation 2

That the Commonwealth and State governments give effect to the proposed basic principles and guidelines recommended by van Boven to justify and award reparation to persons, families and communities affected by the separation of Aboriginal children from their families.

Recommendation 3

That the State government make a public statement in Parliament acknowledging the devastating impact of the policies and practices of removing Aboriginal children from their families on individuals, their families and the Aboriginal community, and express regret, and apologise on behalf of the people of Western Australia.

Recommendation 4

That those religious denominations involved in assisting in the removal of Aboriginal children from their families make a similar apology as stated in recommendation 3.

Recommendation 5

That the Commonwealth government make a similar statement as suggested in recommendation 3.

Recommendation 6

That the Commonwealth and State governments fund appropriate Aboriginal organisations to assist affected individuals and families to locate lost family members and enable reunions to take place.

Recommendation 7

That the State government ensure that all native welfare files and Aboriginal child welfare files become the property of the relevant individuals or their successors. An Aboriginal Task Force be established to determine the most appropriate way to transfer ownership and to assist individuals to decide what and how much of the file they wish to see.

Recommendation 8

That religious and other charitable organisations involved in the removal and control of Aboriginal children removed from their families ensure that all related files and records become the property of the relevant individuals or their successors.

Recommendation 9

That the State government introduce legislation to amend the following Acts of Parliament to enable action to be commenced to provide legal redress for injuries, pain and suffering caused:

- **sections 38 and 47A of the *Limitation Act 1935* (WA);**
- **section 6 of the *Crown Suits Act 1947* (WA);**
- **section 16 of the *Native Welfare Act 1963* (WA); and**
- **section 17 of the *Aboriginal Affairs Planning Authority Act 1972* (WA).**

Recommendation 10

That the State government establish a Task Force to investigate allegations of abuse of Aboriginal people resident in government institutions, missions, orphanages, and/or foster care, which may justify the bringing of criminal charges, and report to the Director of Public Prosecutions.

Recommendation 11

That the Commonwealth and State governments commit to proper and substantial levels of monetary compensation to be paid to all individuals, families and communities affected by the removal of Aboriginal children from their families under the assimilation policies.

Recommendation 12

That the Commonwealth and State governments establish a Task Force which has a majority of Aboriginal representation to develop a non-technical, expeditious and effective mechanism to distribute monetary compensation to all individuals, families and communities affected by the removal of Aboriginal children from their families under the assimilation policies.

Recommendation 13

That the Commonwealth government enact legislation which enshrines the Convention on the Prevention and Punishment of the Crime of Genocide into the domestic law of Australia.

PART D

Mary's Story

I was born in 1958 at Three Springs. About six months later I was removed from my parents. I was still being breast fed at the time.

The Native Welfare Department removed me. I don't know why they removed me. Later on my mum told me that it was because we were living in a tent. Until I was about 15 years of age I never knew anything about my past, or who my parents were. I didn't even know I was Aboriginal.

I am not really sure where I was removed to initially, but I ended up at New Norcia Mission.

At New Norcia Mission we slept in dormitories. My elder sisters were there but I was separated from them. The only time we saw our brothers was when they were playing footy. We had to sneak to the gates to talk to them. If we got caught we were punished.

If we wet the bed we were dragged out of bed and made to have a bath. It would be two o'clock in the morning, sometimes. It was very, very cold.

The education I received was a joke. It really amounted to just religious education and more religious education.

The food we used to have was revolting. It used to consist of dry bread with sheep head soup, stale biscuits and fruit which often had maggots in them.

We used to pray in the morning before breakfast, after breakfast, at morning tea, lunch time, afternoon tea, tea time and before we went to bed. We were told that if we didn't pray the devil would get us. We learned to pray in Latin as well. They used to flog us to make sure that we prayed and learnt Latin.

We used to have to learn Latin and religion but we were never told anything about our Aboriginal culture, or that we were actually Aboriginal.

The nuns used to treat us pretty badly at the mission and when they punished us, they really punished us. I remember once I ran away to the shops with some other girls. They booked up food at the store under their father's name. When we got back to the mission we had our head shaved bald. At other times when we did something wrong they used to hit us over the head with a key ring which contained twenty keys.

Before breakfast we had to kneel outside on the gravel. One of my older sisters used to pick me up and put me on her back because she felt sorry for me. When she did that and she was caught she used to be belted with a strap. Once they split the skin open on her head when they hit her with the key rings.

I remember I used to cry a lot of the time at night time and I used to try and sneak into bed with my sister. I had to be very careful because if I got caught I used to get belted, and my sister did too.

I left the mission just after I was 15 years of age. I felt a lot of hatred towards the world. I have particular hatred even now against the church. I also hate the government. It is just not fair that I don't know anything about Aboriginal people. I was so scared to associate with my people because I never grew up to learn about my culture.

I am now on medication for all my problems, depression, stress, the fear of being alone. I often have suicidal thoughts.

Besides the doctor trying to treat me with pills I have never received any help with what has happened to me. No one seems to really care.

CHAPTER 6

HOUSING

Introduction

> *Adequate housing is one of the basic foundations of living. Without it, health, social relationships and personal safety cannot be secured. Inadequate housing is also linked to a range of other social problems such as unemployment, substance abuse and violence. The social and symbolic meaning of the 'home' as the centre of family life is well understood; therefore the absence of a 'home' has enormous personal and social consequences.*
>
> *Aboriginal fringe-dwellers are the most stark reminder we have of the situation of homeless Aboriginal people. The RCIADIC found that many of those who had died in custody were homeless.*
>
> *Problems such as homelessness, over-crowding, poor maintenance of housing stock, inappropriate design and poor community planning was frequently encountered by the Task Force.*
>
> *The Task Force also found considerable frustration and anger among Aboriginal people about their difficulties of finding access to adequate housing, which is culturally appropriate and designed to suit environmental conditions.*[186]

The Western Australian government's own Task Force on Aboriginal social justice accurately links the need for adequate housing with individual well-being and family cohesion, and further notes the difficultly Aboriginal people have in obtaining housing of a satisfactory standard. The importance of housing to an individual's life and to family cohesion cannot be underestimated. Without housing an individual's educational, economic and socio-cultural development are severely curtailed and, family cohesion and ability to care for children are severely inhibited. Many clients of the ALSWA who have given histories of their removal from their families, indicate that they suffered a lack of family cohesion because of inadequate housing.

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[186] Government of Western Australia Task Force on Aboriginal Social Justice, *Report of the Task Force*, Western Australian Government Printer, Perth, Vol. 2, 1994, pp475-476.

Sarah's Story[187]

> *It is really awful. It is so difficult to try to bring up my children and send them to school when I am moving from one place to another. Since I was kicked out of Homeswest accommodation I haven't been able to find any accommodation. I live on Social Security and I have two children who are in high school. It is hard enough for our children to stay at school but when they have to move from school to school because we need to move and have a roof over our heads, it is very unsettling for them. That's why I have only got the two older boys. My daughter who is only ten lives with an aunty of mine in Bunbury. I wanted to look after her but some social worker from the Department of Community Development said that it was best if we stayed in one place for my daughter's development. I was too scared to argue with the social worker because I know what the department can be like. Even though the department has changed its name it is still the same Department of Native Welfare for me. They are the ones who took me away from my parents. At least my daughter is with my aunty rather than complete strangers. I want to care for my daughter, I don't want other people to do it.*
>
> *I have tried to get new accommodation from Homeswest but they just won't listen. They said that I have got to pay the money back that I owe them for rent. I am not sure of the exact amount but it is over $2,000.00 at least. Where am I going to find that money?*

As the purpose of the National Inquiry is to investigate the separation of Aboriginal and Torres Strait Islander children from their families and the continuing effects of that separation, it is imperative to examine the current policies, practices and attitudes of government and non-government bodies, and individuals, which continue to contribute to the fragmentation of Aboriginal families. The National Inquiry must thoroughly investigate the difficulties experienced by Aboriginal people in Western Australia in obtaining and maintaining access to adequate housing, and the effects of the problem on individual well-being, family cohesion and the ability of parents and grandparents to care for their children and grandchildren. Inadequate housing is closely linked to and/or a cause of many of the other underlying problems Aboriginal people face today.

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187 "Taken away", aged approximately 1 year, 1953.

Aboriginal people have problems in obtaining adequate housing in a number of ways. Firstly, the most significant influences are the philosophy, policies and practices of Homeswest. Secondly, the difficulty in obtaining access to adequate private rental accommodation disadvantages Aboriginal people. Thirdly, the practice of allocating housing to Aboriginal communities, often in remote and fringe areas of the State further disadvantages them. There is little doubt that the delivery of housing for Aboriginal people needs a major overhaul and review. Housing is an important pre-condition for the economic and socio-cultural development of Aboriginal people, and affects their ability to care for children and family cohesion.

Legislation and Commonwealth/State Agreements

1. Housing Act 1980 (WA)

Homeswest, pursuant to Section 11 of the *Housing Act 1980* (WA) has responsibility for the implementation of the Act, subject to the control and direction of the Minister. The objects of the Act are set out in Section 4. These are:

- the improvement of existing housing conditions;
- the provision of housing and land for housing;
- provision of assistance to enable persons to obtain accommodation or improve their standard of accommodation;
- the encouragement of the development and re-development of land for housing and related purposes; and
- the carrying into effect of agreements and arrangements entered into with the Commonwealth with respect to housing.

2. Housing Agreement (Commonwealth and State) Act 1990 (WA)

The *Housing Agreement (Commonwealth and State) Act 1990* (WA) ratifies the Commonwealth/State Housing Agreement (CSHA), the purpose of which is to ensure that every person in Australia has access to secure, adequate and appropriate housing at a price within his or her capacity to pay.

Pursuant to Recital (D) of the CSHA:

> *(i) the primary principle is to ensure that every person in Australia has access to secure adequate and appropriate housing;*
> *(ii) all assistance provided will also reflect that the primary consideration shall be the needs of people;*
> *(iii) in determining eligibility, the assistance shall seek to provide access to housing for those unable to obtain adequate and appropriate housing from the private sector or other sources outside the agreement;*
> *(iv) assistance shall be available to all sections of the community irrespective of age, sex, marital status, race, religion, disability or life situation;*
> *(v) priority in granting assistance shall be determined by the need for assistance;*
> *(vi) any limits on eligibility for assistance shall be based primarily on financial circumstances, being the level of income, value of assets and income from them, the number of dependent children, and costs arising from disability or other special circumstances.*[188]

The objective of the agreement is the provision by the States, with financial assistance from the Commonwealth government, of housing assistance in accordance with the principles.[189]

Pursuant to Clause 19(d) of the CSHA, the State undertakes to ensure maximum choice of home purchasing assistance with no class of person to be excluded for consideration. Further, under Clause 25, the conditions of eligibility of persons for rental housing assistance are to be determined in accordance with Recital (D) principles. This means that priority is determined by need and no class of person is excluded from consideration.

In Part 10 of the CSHA there is to be a Commonwealth/State housing assistance plan which, among other things, is to include an assessment of housing needs and allocation of priorities and targets. Under Part 12 of the CSHA, there is provision for specific housing assistance and the Commonwealth Minister is authorised to make grants to States for expenditure on specific projects including rental assistance for Aborigines.[190]

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188 CSHA, Recital (D).

189 Clause 6 of CSHA.

190 Refer to Clause 30 of the CSHA.

Where the State does not use the funds allocated by the Commonwealth government for the purposes under the agreement, it is to repay them.[191] The same obligation applies where the Commonwealth grants are not matched by States as provided for under the CSHA.[192]

It is submitted that Homeswest is falling short of its responsibilities as the body corporate established by the State and in its responsibility for the implementation of the *Housing Act 1980* (WA) and the CSHA. This is especially so regarding the eviction of, and threatened eviction of Aboriginal tenants of Homeswest properties, and the failure to provide adequate housing for Aboriginal communities.[193]

3. Residential Tenancies Act 1987 (WA)

This Act governs the relationship between tenants and landlords in rental property in Western Australia. There are a number of rights and obligations bestowed on both the landlord and the tenant pursuant to the Act. In respect to evictions by Homeswest, Sections 62, 64 and 73 of the *Residential Tenancies Act 1987* (WA) are the most commonly used. These sections deal with breach by tenants and termination of agreement by owners.

The power for the Small Disputes Division of the Local Court to terminate a tenancy is contained in Section 71 of the *Residential Tenancies Act* (WA). This section only requires the court to look narrowly at the question of whether the breach of the tenancy is sufficient to justify termination. A wider consideration of the tenant's circumstances is not required, and in practice is not undertaken by the court. The corresponding section in the *Residential Tenancies Act 1987* (NSW) provides that "having considered all the circumstances of the case it is appropriate" to order termination of the tenancy. A Supreme Court decision in New South Wales has confirmed that such wording in the New South Wales legislation requires a court or tribunal to consider all the social, health, family and other circumstances before being satisfied that a termination of the

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191 Clause 34 of the CSHA.

192 Clause 35 of the CSHA.

193 Besides funding from the CSHA funds, there is also an Aboriginal housing grant fund.

tenancy should occur.[194] It is not sufficient in New South Wales for a court or tribunal simply to consider the circumstances surrounding the breach of the tenancy itself.

Representations to the Western Australian government from the ALSWA in September 1995, when the *Residential Tenancies Act 1987* (WA) was being amended in Parliament, that similar provisions to those in New South Wales be incorporated in the Western Australian Act, were rejected by the government.

Homeswest

1. Culture of Homeswest

The culture of Homeswest has been described "as the last of the hierarchal old style bureaucracies, defensive of its role and actions, and protective of its power and influence".[195] McCahon in researching the issue of Homeswest and discrimination states:

> *repeatedly, I was told of Homeswest's inability to communicate, as an organisation and via its officers, to its clients. This was seen as especially true of its relationship with its Aboriginal clients. One respondent spoke of identifying the difficulties of Aboriginal clients, in a remote area of Western Australia, to be aware of policy changes and procedural requirements. This lack of awareness was so much so that it held up staff and office resources sorting out problems that effective communication by field officers, or plain English or Aboriginal language information sheets could have solved. To address this he lobbied Homeswest to provide information via their local Aboriginal language radio station. This was achieved, but took two years, amongst much obstruction.*[196]

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194 *Swain and Anor v Residential Tenancies Tribunal of NSW and Anor,* Unreported decision, date of judgment 22 March 1995.

195 McCahon, J., *Indirect Discrimination and Public Housing*, Unpublished legal research paper, Murdoch University, Perth, 1996, citing Jack Mansveld, Sussex Street Community Law Centre and manager previously employed at Homeswest, p.3.

196 *Ibid*, pp3-4.

Similar observations were stated in a report to the Commissioner of Equal Opportunity on discrimination by Homeswest pursuant to Section 80 of the *Equal Opportunity Act 1984* (WA).[197] In part the reports states:

> *31. One of the more surprising discoveries during the course of the inquiry has been the state of the written policies of the Housing Services Directorate. It is no exaggeration to describe that state as chaotic.*
>
> *I have been advised that an officer within the Policy and Planning Directorate is, albeit on a part-time basis, undertaking a review of all such policies. This is a massive undertaking, and clearly ought to receive on an urgent basis the full-time attention of at least one officer, and probably more ...*
>
> *32. ...*
>
> *33. The policy circulars of the Housing Services Directorate number approximately 600. They have accumulated for approximately 15 years and have simply been placed in chronological order in files within each region. In the Mirrabooka region, which is probably typical, the files containing the circulars are four in number, each of which is of a formidable depth. There is no index available in the Mirrabooka region, although one exists in the Head Office. No system of cross-referencing between circulars exists and almost never is there any indication as to whether an old circular has been superseded.*
>
> *It is apparent that the circulars have been issued as and when issues have arisen. Some circulars contain polices central to important issues such as criteria for allocations of properties to Aboriginals, while others relate to quite minor or short-term subjects.*
>
> *34. The result is that there is no clear, easily accessible and coherent set of policies which are to be applied by staff when, for example, allocating properties or considering evictions. It is freely acknowledged by Homeswest staff, including Regional Managers and Accommodation Managers, that they are not familiar with all the circulars in the policy files. A number of staff have indicated ignorance of the contents of some important circulars when shown them, which is hardly surprising.*
>
> *35. Staff state that their knowledge of policies is based on long experience within the organisation. None, or almost none, of the Accommodation Managers, who were all appointed following the re-structuring, came*

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[197] Walker, S.A., *Report to the Commissioner for Equal Opportunity on Discrimination by Homeswest*, EOC, Perth, 1989.

from outside Homeswest. Staff also indicate they if they are unsure of a certain policy they simply ask another long-serving staff member for advice.

36. *The result of all this is great inconsistency in decision-making between regional offices, between branch offices and regional offices, and even within the one office. Many interviewees have given examples of inconsistent and contradictory statements on such topics as allocation of apartments to Aboriginal people. One important function of the Regional Co-ordination Office within the Directorate is to attempt to iron out these inconsistencies. This is no easy task, given that the current policies are so inaccessible.*

37. *Homeswest staff in the regions do not appear to be perturbed by this lack of clarity concerning housing policies. Some staff members have even commented, that "we do what we like and call it policy", or have spoken of "picking up" the policies from general contacts with the Head Office.*

38. *The state of written policies concerning provision of rental accommodation is clearly most unsatisfactory. It should be remedied as soon as possible. More resources need to be allocated to the task, without delay.*

39. *The written policy circulars of the Housing Services Directorate do not accurately reflect practices. The reasons for that include the large measures of discretion contained within many policy circulars, and the difficulty of locating current policies.*[198]

The ALSWA acknowledges that Walker's report is now six years old and some of the problems he has highlighted may have been addressed. There is now a comprehensive policy manual. However, the ALSWA submits that there is much confusion among Homeswest staff in regards to policy and treatment of Aboriginal clients. There is still enormous discretion at regional level for officers to decide how to implement policy and some still "do as they like and call it policy". Eviction is supposed to be a last resort under Homeswest policy. However, the threat of eviction through the issue of termination notices which initiate the court process to obtain an order for eviction, is often the first method used to address a perceived deficiency in a tenancy by Homeswest. Further, Homeswest is as expressed by McCahon, still unacceptably bureaucratic, defensive and protective.

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[198] *Ibid*, pp13-15.

Recommendation 14

That the State government establish an independent permanent body with significant Aboriginal representation to provide a new management/personnel plan together with a new set of written policies which reflect the cultural and familial imperatives of Aboriginal people throughout the State and which are also based on a recognition of the needs of Aboriginal people which flow from dispossession and removal.

Walker expressed great concern with the so-called "social mix" policy. While this policy officially no longer exists, Walker was of the view that "the sentiment behind it is still brought into play by many allocating officers".[199] The policy was designed to control the placement of Aboriginal clients so that they group together in certain areas. Walker writes that many Homeswest staff assert:

> *That it is only Aboriginal people with histories of prior tenancy problems (including allegation of anti-social behaviour, or records of rental arrears or tenant liability) who are dealt with [via the social mix policy] ... Almost invariably however the same officers have conceded on further questioning that the question of Aboriginality is considered in all cases when a decision is being made whether to allocate a particular property to an applicant who happens to be Aboriginal. This occurs even when the Aboriginal applicant has no prior history and nothing adverse is known or alleged against him or her. Even in such cases, the Aboriginal person is treated differently, and less favourably than another person [emphasis original].*[200]

Walker further writes that the decision by some Homeswest officers that a property may not be suitable for an Aboriginal applicant for reasons such as "anticipated racism by neighbours" without allowing the applicant to decide otherwise:

> *is a practice which treats Aboriginal applicants differently from non-Aboriginal applicants. And not only differently, but less favourably. The Aboriginal applicant may have to wait for the next vacant property, and be delayed in obtaining housing. And even if, as can happen in large regions, an alternative*

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199 *Ibid*, p17.

200 *Ibid*, pp17-18.

property can be offered straight away, it is likely to be a different type of property, so that the Aboriginal applicant is restricted in the range of available housing.[201]

Walker was of the view that the "social mix" policy was in clear contravention of Section 47 of the *Equal Opportunity Act 1984* (WA) which states that it is unlawful for a person to discriminate against another person on grounds of race in the area of accommodation.[202] The response from Bob Thomas, the Acting Director, Housing Services to Kate Hulse, Director of Policy and Planning at Homeswest to Walker's report, would suggest that Homeswest believes that in order to avoid accusation of discrimination it needs only remove reference to race in its documentation and policy.[203]

A senior regional Homeswest officer stated to the staff at the Aboriginal Medical Service in January, 1996, that it is very difficult for Homeswest to place Aboriginal families in certain areas of Perth such as Karrinyup, Doubleview and Innaloo because of the entrenched racism which they face from non-Aboriginal neighbours. That officer requested that Homeswest not be asked to put Aboriginal families in these areas. Homeswest does not place Aboriginal families in these areas because every complaint made by a neighbour, even where frivolous or racially based, must be fully investigated by Homeswest, and the tenancy becomes 'too hard' to manage. The ALSWA believes that the better approach would be a robust defence of Aboriginal tenants by Homeswest rather than to accept the racism which Aboriginal people face, and the provision of meaningful forms of support for Aboriginal families in such areas.

Concerted campaigns by neighbours in such areas may well end up with the Aboriginal family being evicted if they refuse to accept a transfer to another area. A transfer to another area may result in a poorer standard of housing or inappropriate or less suitable location. Families evicted have no guarantee that they will be re-housed elsewhere. It is totally unacceptable for Homeswest

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201 *Ibid*, pp18-19.

202 Section 47.

203 Memorandum from Bob Thomas: Report to the Commission for Equal Opportunity on Discrimination by Homeswest, dated February 9, 1990; and McCahon, J., *op.cit*, p14.

to be operating a practice which effectively removes Aboriginal people from certain areas of metropolitan Perth.

Recommendation 15

That the Minister for Housing ensure there is no "social mix policy" officially or unofficially in existence at Homeswest and no policy or practice which treats Aboriginal people less favourably in the allocation of housing and decisions regarding transfers and evictions.

Homeswest appears to recognise that there is a community perception that its policies are racist. An internal Homeswest note warned staff that:

> *It is important whilst at court to stick to the "facts" relating to the anti-social complaints. Although this is a traumatic time and experience, you must try and remain calm and above all, remember not to give answers that may be seen to be racist [emphasis added].*[204]

Perceptions of a racist attitude within Homeswest are not surprising when Aboriginal tenants receive letters which contain the following text:

> *I have received a recent report from a resident in your neighbourhood about firstly a missing basketball stand found and retrieved by Police in your yard. This incident occurred on 17th May, 1994.*
>
> *There have also been a number of other articles gone missing and it seems to have happened since your family has moved into the area.*
>
> *Whilst I am not accusing you or your family as the perpetrators, I have nevertheless read your file and know only too well the reasons for your vacation of the property.*
>
> *I now officially give you written warning that we, at Homeswest, will not stand for any acts of anti-social behaviour from within your family members/visitors.*[205]

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[204] Homeswest file note for ALSWA client, dated sometime in early 1995.

[205] Letter from Homeswest to client, dated 20 May, 1994.

One family suffered an eviction because of complaints by neighbours that the tenants were behaving anti-socially. The Homeswest file notes records as part of such complaints:

- *As far as their colour is concerned it has no bearing on the matter except for the fact the children (a lot of them) concerned do not seem to go to school at all - and the adults do not even seem to have employment - hence they sleep during the day;*

- *I along with many others are of the opinion that these particular people are not suitable nor are they prepared to live as normal inner city dwellers;*

- *The family who appears to be the actual tenants seem to be nice people, but unfortunately when friends and relatives arrive and stay ... then the noise starts up again;*

- *Our home has been broken into 5 times in the past 4 years - last week being the most recent. Three of five times are known to be Aboriginal origin. I refuse to sit back and be told we are being Racially Discriminative. As far as I can see the people being discriminated against are us ...;*

- *... getting abusive phone calls from unknown Aboriginals - can tell by voice ...; and*

- *I asked a child ... whether she had seen anyone in ... yard. We are not accusing these people but they always seem to have many visitors during the day and night and there is always someone sitting out the front.*

Homeswest, unfortunately, appears to have little or no understanding of the cultural needs of its Aboriginal clients and adheres to a "white middle class" standard when assessing what constitutes a breach of a tenancy, particularly relating to yard standards, or the number of visitors a family is allowed, or the number of children who may be under one roof.

Homeswest must become sensitised to the cultural obligations placed on Aboriginal people to house their families. Thus, Homeswest must not use over-crowding to jeopardise tenancies. Other solutions can be found. Further, Homeswest should design homes that are more culturally appropriate to the family obligations of Aboriginal tenants. In many cases this will involve larger homes.

Recommendation 16

That Homeswest policy be amended so that overcrowding due to Aboriginal familial obligations cannot be a ground for any action against a tenant.

Recommendation 17

That Homeswest consult with Aboriginal communities and organisations and employ Aboriginal cultural advisors to assist in designing and building a range of culturally appropriate accommodation.

Homeswest must change its policies and general culture.

> *... in order to ensure Homeswest provides services to people in a just, effective and non-discriminatory manner Homeswest must incorporate Aboriginal terms of reference into its policies and practices. ... Education must be a two way process and that staff development and training in cultural awareness should be provided for staff to ensure consistent and non-discriminatory decision making and practices.*[206]

Homeswest considers providing a house to be of last resort. It sees itself as a "landlord not a welfare agency".[207] This prevailing corporate culture is contrary to the obligation of Homeswest under the CSHA which, as previously mentioned, states, "the primary principle is to ensure every person in Australia has access to secure, adequate and appropriate housing".[208] The culture of Homeswest appears to be a hybrid of rationalist corporatisation and insular public service bureaucracy.[209] This prevailing cultural philosophy of Homeswest seems to inhibit its staff's

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206 Tenants Advice Service (WA) and Department of Housing and Regional Development, *Pilot Tenant Education Project: Needs Analysis*, Tenants Advice Service (WA) and Department of Housing and Regional Development, Perth, 1995, p13.

207 Policy Advisor/Officer currently employed at Homeswest, cited in MaCahon, J., *op.cit*, p5.

208 CSHA, Recital (D)(i).

209 McCahon, J., *op.cit.*, p5.

understanding of the cultural values of Aboriginal people, produces refusals to house tenancies and evictions of Aboriginal people which often has dire consequences for Aboriginal families.

The PAMS and the ALSWA have seen many cases where detailed medical opinion recommending housing for reasons of poor health has either been ignored by Homeswest, or is given very little weight. The decision-making processes on allocating family housing or on an eviction process for debt (often less than $400.00) as presently pursued takes no meaningful account of such detailed medical information.

The medical practitioners at the PAMS have observed that consideration of such medical evidence is treated very differently by Homeswest for non-Aboriginal people. Whereas a short letter from a general practitioner in private practice setting out in general terms the health requirements of a non-Aboriginal person results in almost immediate action to address that persons needs, the experience at PAMS is that very detailed and explicit reports on Aboriginal families are ignored.

The PAMS has reported that it has prepared and submitted to Homeswest 109 detailed and explicit medical reports on behalf of clients between October 1995 and March 1996. Of 109 reports written, 74 per cent were unsuccessful in their application for housing or request for a housing transfer for family health reasons. A further 15 per cent of such reports on behalf of clients were still in progress. Only 14 per cent had been accepted by Homeswest.

The current policies as applied, result in persons and families being refused housing assistance though the medical and social implications for them are very serious, simply because Homeswest views the recovery of all previous or current debts as of paramount importance.

Furthermore there have been recent incidents where children are removed from their families as a direct result of that family homelessness.

The application of policies to recover debts even where this results in homelessness, or is preventing homeless persons and families from being housed, are totally unacceptable and perpetuate a situation which will result in more children being removed from the care of their families by government agencies.

Recommendation 18

That Homeswest increase its employment of Aboriginal staff at all levels.

Recommendation 19

That Homeswest ensure all staff at all levels undergo a properly accredited Aboriginal cultural awareness program designed and run by Aborigines.

Recommendation 20

That Homeswest give paramount consideration to the health condition of an applicant or tenant in the allocation of assistance or in the making of decisions concerning the continuity of an existing tenancy.

Recommendation 21

That Homeswest change its policy so that in addition to the health condition of an applicant or tenant, decision-makers must also consider the social, familial and personal circumstances of an applicant or tenant (including their age, the best interests of any children, their financial circumstances and the consequences of a refusal to assist or house the applicant or tenant) as being more important and having greater weight in the decision-making process than consideration of any debt the applicant or tenant may have to Homeswest.

2. Emergency Housing

Within Homeswest there is an Emergency Housing Office whose stated objective is to "assist in overcoming the immediate housing needs of homeless people on a short term basis...."[210] However, this policy does not fit very well with other policies of Homeswest that effectively exclude people who have:

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[210] Walker, S.A., *op.cit*, pp12-13.

- a current debt to Homeswest;
- those applicants whose hardship is allegedly the result of their 'own actions'; and
- alleged previous history of "anti-social behaviour".[211]

These exclusions are most unfortunate and contradict the stated objective of the Emergency Housing Office and the objects of Homeswest as provided in the *Housing Act 1980* (WA). Also the exclusions which result from Homeswest's policy are not compatible with Homeswest's role as "houser of last resort".

Aboriginal people in Western Australia suffer more from poverty and homelessness than do non-Aboriginal people. Homeswest policy regarding emergency housing heavily excludes many Aboriginal people. The exclusionary policy has requirements or conditions enabling a substantially higher proportion of non-Aborigines compared with Aborigines to comply with because of the higher degrees of poverty, unemployment and ill-health prevalent in the Aboriginal community.[212] Walker submits that these exclusionary policies constitute discrimination on the grounds of race pursuant to Section 36(2) of the *Equal Opportunity Act 1984* (WA).[213]

It should be noted that the exclusionary policy implemented by the Emergency Housing Office and therefore including Homeswest, has had serious ramifications for many Aboriginal people. The PAMS has dealt with a number of clients with severe medical problems and need a stable home environment as part of their medical treatment, but have been refused emergency assistance from Homeswest because of debts and rental arrears. This is clearly unacceptable when Homeswest's own policy states that health conditions over-ride any other consideration in the allocation of emergency housing.

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211 *Ibid*, p25.

212 *Ibid*, p26.

213 *Equal Opportunity Act 1984* (WA)
36(1) ...
(2) For the purposes of this Act, a person (in this subsection referred to as the "discriminator') discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of race if the discriminator requires the aggrieved person to comply with a requirement or condition:
(a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the aggrieved person does not or is not able to comply with.

Recommendation 22

That Homeswest abandon the policy which excludes from Emergency Housing Office assistance, applicants who:

(i) have a current debt to Homeswest;

(ii) allegedly have created or contributed to their own hardship; or

(iii) have an alleged previous history of "anti-social" behaviour.

3. Tenant Liability, Rent Arrears and Bankruptcy

Access to emergency housing, a priority transfer or rental assistance is often refused by Homeswest if the client has an existing debt to Homeswest. The requirement is that a debt be paid before a service is provided. If a client has previously been housed by Homeswest, but ceases to be a tenant for a time and then requests re-housing, it can be refused unless 100 per cent rental arrears and 50 per cent of tenant liability debt is paid.[214]

Based on anecdotal information and general questions from Homeswest and welfare agencies, Walker opined that this policy detrimentally affects a higher proportion of Aboriginal than non-Aboriginal applicants. Further, even in the area of non-emergency housing, Walker thought this policy was not reasonable and thus constituted discrimination under the *Equal Opportunity Act 1984* (WA). While Walker acknowledges that Homeswest has a desire to maximise scarce resources and thus requires previous tenants to pay their debts, that desire "must not exclude from welfare housing that part of the client group whose need may be greater".[215] Further he states that:

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214 Homeswest, *Homeswest Rental Policy Manual, Allocations Policy*, Homeswest, Perth, 1995, para. 59.

215 Walker, S.A., *op.cit*, p27.

- many people who are excluded by present policy have nowhere else to go and this in some instances had serious health ramifications;
- applicants who have tenant liability and rent arrears could remain housed on condition that those liabilities and arrears were gradually deducted at source from social security payments; and
- assessments of tenant liability are not always consistent so that "preclusion of a needy person from housing on such a foundation is especially undesirable".[216]

In the experiences of the PAMS and ALSWA, the policies placing the recovery of debt as paramount are still being rigorously applied. The resulting homelessness from the application of such policies is causing family breakup among Aboriginal families and is therefore creating a situation where children are being removed into the care of other agencies.

Recommendation 23

That Homeswest eliminate the policy which prevents housing of an applicant until they have paid 100 per cent of rental arrears and 50 per cent of tenant liability.

Recommendation 24

That Homeswest establish a "Tenancy Assistance Committee" which includes Aboriginal financial planners and cultural advisors who will assist Aboriginal tenants meet their financial and other commitments to Homeswest.

Homeswest policy on bankruptcy states:

> *applicants with an indebtedness to Homeswest because of bankruptcy will be required to repay their debt if further assistance is to be obtained, at the discretion of regional management.*[217]

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216 *Ibid*, pp27-28.

217 Homeswest, Homeswest Rental Policy Manual, Tenancies, Homeswest, Perth, para. 86.

The Homeswest Customer Service Newsletter for applicants and tenants for the month of May 1995, states:

> *... now, if you have a debt to Homeswest and you make an application for bankruptcy, you will have to repay the money that you owe if you want any more help with a place to rent or rental board. If you do owe Homeswest money, the best thing to do is to make an arrangement to pay the money in affordable instalments.*

This policy has had a serious effect on some of ALSWA clients. One such client is Sarah Ryan. Her situation is outlined in the following extractions from of a letter written by the ALSWA to the State Ombudsman on the 30th August, 1995:

> *In May 1995 Ms Ryan applied to Homeswest for priority assistance in the Armadale area. In May 1995 Ms Ryan moved to Narrogin with her defacto partner John Jones and four young children. When Ms Ryan applied to Homeswest for priority assistance, she with her defacto and four children were living at her sister's two bedroom Homeswest house at 20 Collie Street, Narrogin. This house was occupied by Sarah's sister Joanne Ryan, her defacto partner and their own four children. When Ms Ryan applied to Homeswest for priority housing there were 4 adults and 7 young children living in two bedroom accommodation. The children's ages ranged from 13 to 4 months.*
>
> ...
>
> *Homeswest declined Ms Ryan's application for priority assistance. Homeswest states Ms Ryan will not be granted priority assistance because of debts owed to Homeswest ... Homeswest acknowledged that Ms Ryan's debts had been discharged by operation of the Bankruptcy Act. Despite the debts being discharged due to bankruptcy being declared Homeswest refused to consider any application by Ms Ryan until the said debts were repaid.*
>
> ...
>
> *... Homeswest states applications with indebtedness to Homeswest because of Bankruptcy will be required to repay the debt if further assistance is to be obtained.*
>
> ...
>
> *A petition for bankruptcy from Ms Ryan was accepted by the Registrar of Bankruptcy on the 24th of April 1995 thereby discharging all previous debts.*

As a result of Homeswest's decision to refuse priority housing Ms Ryan initiated an appeal. On the 10th of July 1995 at the Homeswest offices Ms Ryan and myself [ALS solicitor] appeared before the Regional Appeals Committee. The Committee was informed by Ms Ryan that she was on sole parent benefits of $326.00 a fortnight. Ms Ryan informed the Committee she was paying $100.00 week in rent to her sister, the tenant of the house. Ms Ryan on the 10th of July 1995 had been living with her sister, her sister's defacto and their children at 20 Collie Street for 3 months. Ms Ryan informed the Committee she and her three children in addition to her 12 year old nephew who she is guardian of had been living in a sleepout room the entire 3 months with no heating or privacy. Ms Ryan informed the Appeals Committee during her stay at 20 Collie Street a number of adults would frequently visit the house and while visiting would consume alcohol to excess. Some of the adults who visited Ms Ryan's sister at 10 Bandak Street had prior convictions for sexual assault. Ms Ryan informed the Appeals Committee throughout the time she was at 20 Collie Street she and her four children lived in the sleepout room which was drafty and cold. There was only a small bar heater to supply warmth. As a result of the cold and crowded conditions of the house the children's health suffered. On the 10th of July Ms Ryan's youngest child was 6 months old. The week prior to the 10th of July the power was turned off. (As you would be aware July is in the middle of winter which in Narrogin can be very cold). Ms Ryan informed the Committee the situation was extremely bad and in all the circumstances asked that she be granted priority assistance.

The Homeswest representative on the appeals committee stated priority assistance would not be given as Ms Ryan had declared bankruptcy on at least two occasions and on declaration of bankruptcy owed Homeswest money. The Homeswest representative stated although bankruptcy discharged debts Homeswest had implemented a new policy whereby if bankruptcy is declared and monies were owed to Homeswest people would not be rehoused until the debts were repaid. The Homeswest representative stated that in Narrogin if priority assistance were not granted the minimum period to wait for a house would be 12 months. The Homeswest representative stated despite the circumstances of over crowding and no power, priority assistance for housing would not be given. The Homeswest representative stated that if the children went to the father and he applied for priority assistance if the father was not bankrupt (having declared bankruptcy owing money to Homeswest) he would be in a much better situation to be granted priority assistance than Ms Ryan. It is because of the conditions Ms Ryan and her children found themselves in (due to living in an overcrowded unheated house) and the resulting stress that Ms Ryan and her defacto separated.

I don't have to point out that Homeswest policy as it stands could force mothers and children to return to live with abusive and violent spouses.

The Homeswest representative said despite the situation Ms Ryan and her children were in (which he accepted was completely unsatisfactory) Homeswest were landlords with it being another government agency's responsibility to

ensure the children were cared for and in suitable accommodation. The Homeswest representative on the Appeals Committee stated there was no way Homeswest would grant Ms Ryan priority assistance. The Homeswest representative agreed with me that Ms Ryan was being punished for her bad behaviour i.e. declaring bankruptcy when she owed Homeswest money.

The Homeswest representative stated whether or not he sympathised with the situation of Ms Ryan's children it was not Homeswest's responsibility but some other government agency ...

This bankruptcy policy as adopted by Homeswest gives no consideration to the housing needs of the applicants and their families, and no consideration is taken of an applicant's personal family, economic, social, or any other special circumstances. The refusal to take into consideration the needs of any children involved is most disturbing and contravenes the CROC to which Australia is a party.

The ALSWA submits that the Homeswest policy is a fundamental breach of the *Bankruptcy Act 1966* (Cth). The *Bankruptcy Act 1966* (Cth) in summary provides as follows:

- a creditor cannot utilise any remedy to obtain repayment of a debt provable in bankruptcy;
- all the assets and property of the bankrupt to vest in the trustee in bankruptcy;
- the creditors are required to prove their debts to the trustee, who then determines the pro-rata payment to creditors from the available assets of the bankrupt estate; and
- the bankrupt is not permitted to enter into arrangements to pay any creditor in preference to others.

Under the terms of Homeswest policy, where an applicant has been declared bankrupt and one of the provable debts in the bankruptcy was a debt to Homeswest, the policy makes him or her totally ineligible to obtain housing from the public sector unless all money owed to Homeswest which is provable in the bankruptcy, is fully paid.

The ALSWA submits that the current Homeswest policy is in direct conflict with the obligations placed upon creditors under the *Bankruptcy Act 1966* (Cth). The application of this policy may also place persons in bankruptcy with whom Homeswest enters into an arrangement, in breach

discretion of the trustee.[218] However, even assuming that the Homeswest policy does not contravene the *Bankruptcy Act 1966* (Cth), the ALSWA maintains that the Homeswest policy regarding bankrupt clients must be in breach of the principles set out in the CSHA.

As previously mentioned, under clause 25 of the CSHA, the conditions of eligibility of persons for rental assistance shall be determined by the State in accordance with the principles of Recital (D), so that priority in granting assistance is determined by the need for assistance.

Pursuant to Clause 39(1), the principles set out in Recital (D) which have also been previously stated cannot be varied. The Homeswest policy clearly indicates that the only considerations in respect of the allocation of housing to a bankrupt person are:

- the subjective assessment of Homeswest officers in looking behind the bankruptcy of a person to determine if the bankruptcy "appear(s) to have been made for the purposes of avoiding a Homeswest debt"; and
- in the case where "an applicant is determined to have applied for bankruptcy as a means of avoiding a debt repayment to Homeswest", the recovery of the debt.

A bankrupt person with debts to Homeswest which have been provable in the bankruptcy, and who has been deemed to have entered bankruptcy to avoid debt repayments to Homeswest, will not be offered housing assistance until the debts are repaid. There is therefore no assessment of the needs of the individual applicant as required by Recital (D) of the CSHA.

Accordingly, in our view, the Homeswest Bankruptcy policy completely displaces the principles and the considerations which the CSHA requires Homeswest to take into account when allocating housing. Under the CSHA it is not permissible to use considerations other than those in Recital (D) when allocating housing, and it is certainly not permissible to displace the principles in Recital (D) completely.

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[218] Correspondence to the ALSWA from the State Minister of Aboriginal Affairs and the then Minister for Housing, dated 7 August, 1995, the then Commonwealth Minister of Justice, dated 22 August, 1995, and the then Commonwealth Minister for Housing and Regional Development were not in agreement with the ALSWA submission in respect to Homeswest policy breaching the *Bankruptcy Act 1966* (Cth).

Recommendation 25

That Homeswest abandon their policy concerning tenants who have been declared bankrupt.

4. Evictions

Homeswest policy requires that eviction of tenants, "as a last resort", should take place for failure to pay rent, damage to property, "substantiated" complaints of anti-social behaviour, and the like. The process for eviction action by Homeswest officers has been summarised in the document by the Anti-64 Coalition, *No Just Cause*:[219]

1. *Discuss the situation with the customer, counsel them on the problem and identify options to remedy the situation. This could be in relation to arrears, anti-social behaviour, illegal occupancy or standards. This contact should be in person or by telephone. Where appropriate, the customer should be referred to other agencies who may be able to provide support or counselling.*

2. *If there is no improvement following consultation, written confirmation of the problem is mailed to the customer. This notice gives the customer between seven and fourteen days to improve the situation.*

3. *If there is no measurable improvement within fourteen days, issue a "Breach of Tenancy Notice". This notice informs the customer that they are in breach of their Tenancy Agreement and gives a further fourteen days to redress the situation.*

4. *If there is still no measurable improvement within a further fourteen days, seek a "Termination Order". This document must be signed by the Regional Manager who will ensure that all that could be done to retrieve the tenancy has been done including referral to the Special Housing Assistance program if appropriate, and that Homeswest policy has been correctly applied.*

5. *Having exhausted all options, seek eviction as a last resort. This requires a Local Court appearance, usually by the Regional Recovery Officer. Both parties present their case to the Magistrate. If the Magistrate rules in Homeswest's favour, a Court Order is issued cancelling the tenancy and ordering the tenant to vacate within "x" days.*

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[219] Ninyette, R., *No Just Cause*: *Homeswest's Abuse of Western Australian Evictions Laws*, Anti-Section 64 Coalition, Perth, 1995.

6. *For all action other than that under Section 64 [of the Residential Tenancies Act 1987 (WA)], the Regional Recovery Officer or Area Manager then prepares a submission to have their actions ratified by the Director Rental Operations and Homeswest Executive. Evictions under Section 64 must be presented to the Board of Commissioners. This should occur when the account is, at most, six to eight weeks in arrears.*

7. *Once this approval is received by the Region, the order is handed to the bailiff for execution. The order is current for three months and must be executed within this time.*

8. *Once the bailiff has advised of the date of execution, the Region should fax a copy of the Executive/Board Submission, together with a covering memorandum, showing the current status of the account (including details of payments made since the Board Submission) to Rental Operations for approval of the Hon. Minister for Housing.*

9. *No eviction is to proceed without the Hon. Minister's approval and formal advice to the Director Rental Operations. The Board will be advised of evictions through a regular Board Schedule.*

10. *This entire process, from the account initially falling into arrears until the execution of the warrant, can take from between three to six months.*[220]

The eviction process followed by Homeswest officers is of major concern to Aboriginal people. There appears to be too much discretionary decision making allowed on the part of Homeswest officers. For example, how is improvement in anti-social behaviour or standard, for example, to be measured? This is of particular concern as there is no standard of anti-social behaviour as such, and discussions with Homeswest officially suggests the standard is set from a white middle class perspective without considering the social and cultural needs and requirements of Aboriginal families. Although Homeswest states that they would only act on "substantiated" complaints of anti-social behaviour, what "substantiated" means is not defined. In any case, the complaints do not have to be substantiated in a court setting because Homeswest has been using anti-social behaviour as a ground to evict under Section 64 of the *Residential Tenancies Act 1987* (WA) which does not require evidence to be presented it to the court. Sixty days notice can be given and then the eviction occurs.

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220 *Ibid*, pp5-6.

Homeswest has indicated that Section 64 terminations are now to be limited in their use to anti-social behaviour where the neighbours are too frightened to give evidence.[221] However, this is not justifiable because Homeswest has the ability to summons witnesses to give evidence in court proceedings. Nowhere else in the legal proceedings is it possible for a witness not to be called due to "intimidation".[222]

5. Residential Tenancies Act 1987 (WA)

As mentioned above, Section 64 of the *Residential Tenancies Act 1987* (WA) can be used to evict a tenant without the need to give reasons. All that needs to be given is 60 days notice to vacate. When this period lapses, Homeswest can apply under Section 71 for an order for possession of the premises. A Magistrate, pursuant to Section 71, can only look at whether the documents were served on the tenant in the correct form and whether time has lapsed. If these requirements have been satisfied, termination must occur. Therefore, the tenant has no opportunity to fight a Section 64 notice if it is done in the correct manner.

Sections 73 and 62 of the *Residential Tenancies Act 1987* (WA) are also used to evict public housing tenants. Section 73 is used when a tenant has caused or permitted, serious damage to the premises or injury or is likely to do so. Section 62 is often utilised when the tenant has breached a term of the agreement and a breach has not been remedied. There must be a notice served on the tenant that termination is to occur and the notice must specify the breach and require remedy in fourteen days or in the case of rent arrears, seven days. The Magistrate, at his or her discretion, is to hear from both parties to the dispute. Thus it is most favourable for the tenant to be given a notice of termination pursuant to Section 62 where grounds have to be specified which is not the case under Section 64. In practice there is often totally inadequate specification of the breach the tenant is supposed to remedy. Homeswest has been recalcitrant in many cases in refusing to provide meaningful particulars of the alleged breach, even when requested on several occasions.

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221 Memorandum to Regional Managers from Jim Ryan, Director of Housing Services, Homeswest, 16 April, 1993.

222 Ninyette, R., *op.cit.*, p13.

Recommendation 26

That the State government introduce amending legislation to prohibit the use of Section 64 of the Residential Tenancies Act 1987 (WA) by public housing authorities, and amend Section 71 of the Act so that an order for termination of a tenancy can only be made if, having considered all the circumstances of the case, it is appropriate to do so.

Recommendation 27

That the State government legislate to create an Administrative Appeals Tribunal for merit based review of decisions including the decisions of Homeswest officers which affect tenants.

Recommendation 28

That the State government establish an independent committee with Aboriginal representation to monitor and investigate the decision making process of Homeswest in regards to evictions.

6. Case Studies[223]

The following case studies of denial of accommodation or transfer and evictions of Aborigines by Homeswest is illustrative of the type of cases and hardship many Aborigines face at the hands of Homeswest. The studies are presented in summary form, with the complete chronologies attached in Appendix B.

(a) Tenant A

The tenant is a 63 year old Aboriginal female. She has serious health problems including insulin dependent diabetes and requires a huge dose of insulin each day. She also has aortic valve stenosis, ischaemic heart disease, suffers from arthritis in the hip and legs and from bronchitis. From April 1964 the tenant was the recipient of an invalid pension from the Department of Social Security. She is now recipient of an age pension.

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[223] Tenant names, street numbers and street names have been changed.

The tenant's intellectually disabled adult son always resides with her as he is unable to care for himself. From 16 September 1976 he has been the recipient of an invalid pension. At times he becomes seriously ill. The tenant also has two of her grandsons living with her, as they have done since they were infants.

Tenant A's dealings with Homeswest (refer to Case Study A) clearly indicate the attitudes of this authority towards Aboriginal people. Her health needs were not considered when she was initially relocated, and totally ignored when her plight was explained, not only by herself, but also two medical practitioners. It was not until the office of the Minister for Housing interviewed on her behalf that Tenant A was transferred to a less isolated property. The whole convoluted process of her transfer took six months and pleas from other concerned authorities, during which time she was unable to easily access the medical treatment she required.

Even after her transfer, her health needs were not considered important. After several requests by herself and other interested parties, Homeswest did not provide heating in the property for over twelve months. Tenant A's tenancy culminated in an eviction order which was referred to the Equal Opportunity Commission, which recommends conciliation proceedings. The result of these proceedings is that Homeswest has undertaken to maintain her present property while searching for more suitable accommodation.

(b) Tenant B

The tenant is a 39 year old Aboriginal female. Prior to being evicted, she was a Homeswest tenant of 17 years standing. She has been in a de-facto relationship for over 20 years and her de facto partner is the father of all of her seven children.

As a condition of the tenancy by the subject of this report, was that her de facto and the father of all of her children was not to stay at the property. The tenant had been transferred many times previously by Homeswest, but had only been evicted from the last house she occupied prior to the property the subject of this case study. It seems that there was no court order evicting the tenant from that property, but the tenant had been told by the police to leave the house and considered herself evicted.

A majority of the nuclear family has spent time in custody, and when the tenant was being evicted from this tenancy her four eldest children, all of whom are male, were in custody. She was living with her 3 youngest children, their 15 year old daughter, 9 year old daughter and 8 year old son. Her elder sons actually had their own properties to live in at the time, but as the tenant put it:

> *the kids had their own home to go to but they used to prefer staying at my house although I didn't really want them there.*

The tenant has also spent a considerable amount of time over the years as a homeless person, often sleeping in parks when she did not have a house.

The tenant has long-standing and multiple chronic health problems, which have necessitated much surgery over the years. She has severe rheumatic heart disease complicated by pulmonary hypertension and chronic obstructive lung disease. She has cerebrovascular disease complicated by the effect of a stroke. She requires extensive medication almost constantly and artificial assistance in her breathing. She suffers from left sided weakness resulting from the stroke and reduced physical endurance and fatigue generally.

Tenant B, a long-standing Homeswest tenant, entered into a lease with Homeswest in 1993. In 1994 she was informed of complaints against her and her children, but explained that she considered they had been wrongly accused. She was served notice of a breach, however this notice did not explain the alleged breach in any detail. Upon requesting information from Homeswest, she was informed that visitors to her property were creating problems and that their behaviour was her responsibility.

She was then served with a Section 64 notice of termination, but was imprisoned as a result of inability to pay a surety before any action could be taken. She was released, and was faced with an eviction order which was upheld in the Local Court. Tenant B appealed to the Supreme Court on the ground that she had not been offered procedural fairness in that Section 64 does not state grounds for eviction, and she was therefore not able to defend herself.

This ground was reinforced by opinion from Queen's Counsel employed by the Crown Solicitors and it was agreed that the parties meet and agree on a standard procedure to be followed before evictions were ordered so that procedural fairness provisions would be satisfied. The eviction action was discontinued, and Tenant B is now waiting for a transfer to another property.

The tenant experienced difficulties in controlling visitors to her property and the behaviour of her elder children at times. The tenant still is in a stable de facto relationship with the father of all her children and his behaviour is not the cause for concern that it once was, not least because of his much reduced intake of alcohol. Because of the tenant's health, she required him to assist her to do nearly all household chores.

As far as the help that the Department for Community Development were going to give the tenant in handling the tenancy the subject of this case study, the tenant feels that their assistance was practically non-existent. She recalls that the Department for Community Development representative met with her on one occasion and that was when she was in Royal Perth Hospital. The tenant states:

> *Craig said that he was sorry that he couldn't get to see me before but that he had been away on leave. He never mentioned my problems at the house but I suppose that was because I was in hospital.*

Another representative of the Department for Community Development did visit the tenant on one occasion only. The tenant remembers that they stood in the hallway of the house for five to ten minutes and probably talked about the noise, although he did mention about helping her sort out her finances and budget. He didn't leave any contact number or any other documents, or ask the tenant to call him or keep in touch.

The tenant was able to fulfill her various financial obligations as she willingly took advantage of the bill paying service where money was taken out of her pension to cover her bills.

The tenant agrees that there had been a party at her house the night before the property inspection on 11 March and that she allowed the Homeswest representatives onto the property despite their having arrived without any prior warning.

The tenant does not deny that the police attended her property on several occasions but adds that it was usually when she herself had called them to remove people who were either not welcome in the first place, or who had refused to leave when she had asked them to.

Throughout the history of all her tenancies with Homeswest, the tenant feels that she was put into houses that were previously occupied by Aboriginal tenants and that because of this the neighbours either had pre-conceived ideas about how they would behave, prejudices or failed to differentiate between the previous tenants and herself and her family.

The tenant feels that she was blamed for actions of the university students living next door to her and the actions of other Aboriginals that lived behind and close by to her.

(c) Tenant C

The tenant is a 28 year old Aboriginal female. Her immediate family comes from around the Mt. Magnet area and they are of the Yamatji race. The family has lived in the Perth Metropolitan area since the tenant was about three years old.

She has three children aged nine and under. Since 1990 she has been a single supporting mother. The children are from a de facto relationship which commenced when she was 13 years old. Her mother is still living, and she has a sister and a brother who all live in the northern suburbs of Perth and retain a relationship with her.

Other family members have had a controversial relationship with Homeswest, and in particular with the Accommodation and Regional Manager at the applicable Homeswest offices. She originally lived with her mother and two young children and applied for separate Homeswest housing in 1989. In her initial request for housing, she asked that she be provided accommodation that could house herself and her children as well as the children's paternal grandmother who had

a long history of alcohol abuse and who was very sick at that time. This was to allow the children to have a relationship with the elderly relative before she died. Homeswest housed the tenant and her children but told the tenant that her mother-in-law would need to seek her own accommodation.

The tenancy agreement commenced in late October 1990. The de facto relationship that the tenant had been in prior to the commencement of the tenancy was characterised by physical abuse of her by the de factor partner, especially when he was drunk.

A letter from the Aboriginal Housing Board to Homeswest shows that the tenant had an application for housing with Homeswest in 1987, but that she was taken off the waiting list because she failed to return a written survey posted out to her by Homeswest.

The main points of contention between Homeswest and the tenant was the lack of maintenance of the property and a dispute over water debts. Tenant C complained of leaking taps, and felt unsafe in her home as she felt there was inadequate maintenance to locks, and she was constantly being abused by her previous partner. To compound matters, her rent fell into arrears due to a misunderstanding with the payment authority to pay the rent.

She received a Notice of Breach in the post, but did not have the opportunity to explain the circumstances in person. She eventually decided to leave the property due to the beatings she was receiving from her de facto partners, and requested a transfer. Problems with her ex-partner accelerated, and Homeswest sent her a warning letter. A second letter followed, stating that the eviction process was in motion.

Tenant C sustained serious injuries from the beatings as well as bouts of self-mutilation brought about by frustration and depression. Eventually she was served with a Section 64 notice, which was suspended for 14 days so that she could apply for a restraining order against her ex-partner.

The tenant was disappointed at the failure by both Homeswest and the police to help her address the problems that plagued her tenancy. The police to her knowledge, never charged her ex de facto, and did not have anything other than a temporary effect in stopping him coming into the

house and bashing her. Homeswest refused to transfer her, ostensibly because she still had an outstanding water debt. It seems also that the thought of transferring her was never really seriously entertained by the Homeswest office from the time they started eviction action. She was unable to lock the house, and therefore could not secure herself or the property. Requests to Homeswest to repair the locks were either ignored or failed to effect workmanlike repairs.

The tenant feels that the fact that Homeswest housed her ex de facto in a unit in Greenwood merely adds salt to her wounds. She thinks that he obtained accommodation relatively close to her on the premise that this would allow him to have access to his children. He never, in fact, took the children out in a way that is generally considered to constitute access. His stated attitude to her was, "this is my kid's house and I will come when I like". Although her ex de facto never physically assaulted the children to her knowledge, the two elder children were terrified of him.

One complaint to Homeswest was that the tenant's children had asked an elderly man if they could use the phone at 3am which frightened him. It was actually the tenant's young niece and nephew who had asked to use the phone and they went there to call the police under the instructions of a friend of the tenant's. This was the same night that her ex de facto had visited the property with three of his friends and one of them had held her arms behind her back while her ex de facto punched the tenant.

At one stage in early January of 1995, the tenant was staying in Victoria Park, too scared to return to the tenancy while her ex de facto was staying with another woman.

The tenant felt that only two white families had made any effort to be friendly during her tenancy, and that all the complaints would always come through one particular member of the neighbourhood who was overtly racist and who had stormed into her house uninvited on several occasions.

The tenant's mother recalls the Homeswest manager telling her that he was under pressure to rectify the situation where there were four Aboriginal families living in close proximity.

The negotiation regarding a transfer seems to have been an empty representation. The letter to the tenant dated November 23 1994, one day after the Manager of Rental Services had told the parliamentary officer in his memorandum that negotiations as to a transfer were continuing, makes no mention of the transfer. The Manager of Rental Services also failed to follow up verbal representations about housing the tenant in a safe house.

The tenant feels that she was never given specifics about the complaints that neighbours made against her and felt that her relationship with them (except for one person in the street) was amicable.

7. Aboriginal Housing Board

The Aboriginal Housing Board was established in 1978 as an advisory body to the Minister of Housing and to the State Housing Commission (now Homeswest) with respect to housing matters. The Aboriginal Housing Board has communities of Aboriginal people operating within designated towns, to consult on allocation of properties to individual Aboriginal people. Homeswest has a number of properties that in turn are "tagged" or "grant" which are perceived to be under the control of the Aboriginal Housing Board. The balance of Homeswest property is referred to as Commonwealth/State properties.[224]

Walker did not favourably view the present Aboriginal Housing Board structure and function. Many Aboriginal applicants take longer to be housed than non-Aboriginal applicants for a number of reasons including, the view that Aboriginals already have their own houses (under the Aboriginal Housing Board) and therefore should not have equal access to Commonwealth and State stock. Walker believes that there are real dangers in maintaining a separate pool of Aboriginal Housing Board housing because there is a continuing tendency "to want to allocate Aboriginals to 'their own house'", limit their access to all other properties and decide what is "good for them".[225]

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224 Walker, S.A., *op.cit*, pp8-9.

225 *Ibid*, pp33-34.

The ALSWA is in agreement with some of the sentiments of Walker in regard to a separate pool of Aboriginal Housing Board housing. However, the ALSWA submits, as previously stated, that there is a need for more culturally appropriate housing for Aboriginal people. This is necessary because the housing needs of many Aboriginal people are different to non-Aboriginal people. However, there is a need to change the attitude that Walker identifies. Aboriginal people should still be able to apply for housing from the "main pool" as any other person can, they should not be limited to "certain houses or areas" and Aboriginal people should determine what kind of housing is most appropriate to their needs.

Recommendation 29

That all Homeswest staff at all levels receive policy directives and in-service training to ensure that there is no tendency (in attitude and practice) to allocate Aborigines only to certain "designated" properties and limit access to all other properties.

Walker also highlighted the practice of taking advice from Aboriginal Housing Board and staff members of local communities on whether to allocate a particular property to a particular Aboriginal applicant. Walker believes this is not necessary, and it leaves room for allegations of "nepotism and unfair treatment of certain families".[226] In Walker's view "the next applicant on the list should be offered a property. If the next applicant on the list is Aboriginal, that should make no difference".[227]

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[226] *Ibid*, p34.

[227] *Ibid*.

Recommendation 30

That the State government establish an independent Aboriginal Task Force to review policies, practices and culture of the Aboriginal Housing Board to ensure that all Aboriginal applicants are treated fairly and according to a standard merit and needs criteria.

8. Race Discrimination Commissioner

Homeswest policies and practices which have had a major impact on Aboriginal applicants and tenants needs to be thoroughly investigated. It is necessary for the Race Discrimination Commissioner to undertake an inquiry into Homeswest's policies and practices as they relate to Aboriginal people. The Race Discrimination Commissioner has that power to conduct an inquiry pursuant to Section 23 of the *Race Discrimination Act 1975* (Cth).

An inquiry by the Race Discrimination Commissioner is justified for a number of reasons:

- The right to adequate housing is a fundamental human right enshrined in Article 11 of the ICESCR to which Australia is a party; [228]
- In violation of Australia's obligation under CROC Homeswest culture, practices and policies often do not adequately consider the needs of the children; and
- It is arguable that many of the Homeswest polices and practices are in violation of the *Equal Opportunity Act 1984* (WA) and the *Racial Discrimination Act 1975* (Cth). It is submitted that Aboriginal people are adversely affected in a direct and indirect way by the policies and practices of Homeswest to a greater degree than non-Aboriginal people. For example, it could be argued that the so-called "anti-social behaviour" criteria that has been used by Homeswest to evict Aboriginal tenants pursuant to Section 64 of the *Residential*

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[228] The *ICESCR* entered into force in Australia on the 10th March, 1976. Refer to Devereux, A., "Australian and the Right to Adequate Housing", *Federal Law Review*, 20(2), 1991, p223. Article 11(1) reads: *The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.*

Tenancies Act 1987 (WA) amounts to racial discrimination because it does not take into adequate consideration the cultural values of Aboriginal people, and thus makes it more difficult for Aboriginal people to comply with standards than non-Aboriginal people.[229]

Recommendation 31

That the Commonwealth government provide the Race Discrimination Commissioner with adequate funds to conduct an inquiry under the Race Discrimination Act 1975 (Cth) into Homeswest policies and practices as they relate to Aboriginal people.

Private Accommodation

The hardship endured by Aboriginal people due to the policies and practices of Homeswest is made worse by the discrimination Aboriginal people are faced with when applying for private accommodation. There have been numerous incidences of Aboriginal people attending the ALSWA after experiencing overt racism by real estate agents. It is common for the ALSWA to receive complaints of an Aboriginal person attending a real estate agent seeking rental accommodation but being told that no such accommodation is available, and when a non-Aboriginal friend makes the same request for rental accommodation, they are granted the property immediately. There is also the case of Aboriginal clients being ignored or treated very rudely when attending real estate offices.

Many clients have made complaints to the EOC and the HREOC against real estate agents and other private rental providers. However, these often prove unsatisfactory because the time taken to process the complaint is normally very lengthy. In the meantime, many clients have no adequate housing.

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[229] Clients of the ALSWA have taken complaints against Homeswest to the EOC and the HREOC.

Recommendation 32

That the Real Estate Institute of Western Australia engage an Aboriginal team to provide compulsory cultural awareness to actively counter racism and to provide an understanding of Aboriginal people and their needs.

Recommendation 33

That the Real Estate Institute of Western Australia set up an independent appeals board to hear complaints of racism against its members.

Allocation of Housing to Aboriginal Communities

The state of housing of Aboriginal people and Aboriginal communities, especially in remote and fringe areas of the State is totally unacceptable. There are many places in the Pilbara and Kimberley regions where the state of housing can only be described as unacceptable for human habitation. There are communities with incredible over-crowding, families living in torn tents with dirt floors and inoperative sanitation conditions. But it is not only a problem distant from the major urban centres. There are Aboriginal communities on the fringe of Perth who live in totally unacceptable conditions.

Serious questions must be raised as to how government money which is allocated to Aboriginal housing is being spent. For example, the Commonwealth government granted $88 million to the State in 1993/1994 and an additional grant of $17.362 million for Aboriginal Housing Works Programs. However, only $6.95 million was allocated to remote village programs.[230] There is an urgent need for reassessment to be made of State government utilisation of money provided by the Commonwealth for public housing in general, and especially for disadvantaged Aboriginal people and communities. Aboriginal participation should be central to determining the allocation of funding for Aboriginal housing.

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[230] Correspondence with the office of Minister for Aboriginal Affairs, 1995.

Recommendation 34

That the Commonwealth and State Auditor-Generals conduct an immediate audit on the allocation and spending by the Western Australia government of Commonwealth government grants for public housing.

Recommendation 35

That the Commonwealth and State Housing Departments and public housing authorities employ Aboriginal people who have executive level responsibilities in decision-making on issues impacting on Aboriginal people.

Recommendation 36

That the Commonwealth and State governments and relevant departments undertake thorough consultation processes with Aboriginal communities and organisations when allocating government grants and planning strategies in regards to Aboriginal housing.

Conclusion

There is little doubt that the delivery of housing to Aboriginal people in Western Australia needs a major overhaul. It is totally unacceptable that Aboriginal people in Western Australia are left homeless or experience substandard housing. A major review must be undertaken by Homeswest, the private housing industry and those responsible for providing housing to Aboriginal communities, especially in remote areas.

The importance of adequate housing is acknowledged by its recognition as a fundamental human right under international law. This is necessary because 'adequate housing is one of the basic foundations of living', and is crucial to the individual well-being and development and family cohesion of Aboriginal people.

In the context of the National Inquiry, it is very important that appropriate recommendations be made, because the diabolical housing situation that many Aboriginal families find themselves in can lead to the situation that many families have to split up, and Aboriginal parents are unable to be the primary carers of their children.

Dennis's Story

I was born in December 1942 at Halls Creek. I was taken away from my family when I was about two years of age. I may have been a little bit older because I do recall being taken away. I was put on a truck with a heap of other children. We were told that we were going for a ride. We went for a long ride. The next thing I remember is finding myself in a strange place. It was Beagle Bay.

I didn't get to see my parents again until I was eight years old. When I was eight I was taken to Halls Creek by the missionaries. It was pointed out to me that a full-blood Aboriginal woman was my mother.

I stayed with my mother for about four to five days before the missionaries picked me up and took me back to Beagle Bay.

My mother was living in a river bed at Halls Creek. I found it very difficult to get used to her sort of lifestyle because I had been reared up as a white at Beagle Bay where we were given no information about our culture or heritage. In fact I didn't know between the ages of two and eight that I was an Aboriginal. When I saw my mother I wondered why I was brown and she was black. I felt ashamed.

After I had been to Halls Creek to see my mother she came to Beagle Bay the same year to see me. I then didn't get to see her again until I was a man. I would have been around 21 or 22. I never actually got to see my father.

Life at the mission was very strict. We would get up at 6.00 a.m. We would shower then go to Catholic mass. At 6.30 a.m. we would have our breakfast. The food was boiled cabbage and meat. We would then get ready for school. After school we would get to work picking up manure for the garden. We would work in the garden from 3.00 p.m. until 4.30 p.m. We would go back to the dormitories and get ready for tea. We would have tea at 5.00 p.m. At 6.00 p.m. we had to prepare for Benedictine mass. After mass we would play for about an hour. Lights were out at 9.00 p.m.

There were about 24, perhaps more, boys in the dormitory.

If I ever got sick the nuns would look after me, but the treatment was tough in those days.

I was never informed of my Aboriginal background or my family background. As I grew older I considered pure bloods were inferior to brown people. I denied the fact that my mother was a pure blood. I made up stories that she was half-caste.

I left school at 14. After I left school I was taught carpentry by a German brother. Brother Joseph and some other brother taught me painting, plumbing and saddlery skills.

The mission employed me to do general labouring work, like digging ditches and other physical work. I would start work at 8.00 a.m. and I would have a meal at 12.00 p.m. and then work from 1.00 p.m. to 4.00 p.m. I was still living in the dormitory. I was not paid money for the work I performed. A tin of milk was the first payment I received. Towards the end of my time at the mission I started to be paid at around $4.00 to $5.00 per week.

As I grew older I came to distrust people. I still find it difficult to trust people now. I am a loner. If I go to funerals I don't cry. I feel that no one has given a damn about me, why should I cry for others?

As I grew older I considered my culture as an Aboriginal a big joke. I don't believe in Aboriginal culture as a way of life. I was taught the ways of a European in the dormitory. I have no contact with Aboriginal culture. I still feel that way today. I spend most of my time on my own. I have Aboriginal associates but not friends. I may see Aboriginal people occasionally to go fishing or have a drink but that's about all.

I think being removed and being placed in the mission has played a bit part in me not marrying. My relationships have never lasted. I feel that the sooner a relationship is over the better it is for me. I don't give a damn.

I have got to the stage where I don't like crowds. I don't like going with a crowd. It is because I don't trust people. I ask myself "why did it happen in the first place?" I hope eventually that I can put two and two together and come to grips with all of this. I would love to have a happy life with someone else.

I would like to be compensated for the government's wrong doing.

CHAPTER 7

HEALTH

Introduction

It is stating the obvious that many of the Aboriginal children who were removed from their families have had and continue to suffer major physical and mental health problems. For many this is the natural or predictable consequence of severing links with family, culture and land. Thus the issue of health service delivery to Aboriginal people must be a top order priority of the National Inquiry, and in turn, governments.

This chapter does not purport to be a comprehensive analysis of the status of Aboriginal health or the needs of Aboriginal people. It is up to health professionals, in consultation with Aboriginal people to thoroughly investigate the health needs of Aboriginal people. This chapter provides only an over-view on Aboriginal health and health services, and recommendations which are shaped by the views of those who gave their personal histories to the ALSWA.

Despite the myriad of disadvantages, issues and concerns currently confronted by Aboriginal people, some of which have been discussed in this submission, the Task Force on Aboriginal Social Justice reported that:

> *the most fundamental area of disadvantage for Aboriginal people in Western Australia lies in their health status. Improvements in health must be seen as the most important single objective in terms of improving the conditions of Aboriginal people.*[231]

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[231] Government of Western Australia Task Force on Aboriginal Social Justice, *op.cit*, Vol. 1, 1994, p301.

Aboriginal health cannot be seen as standing in isolation; poor health is a consequence of low socio-economic status, poor housing, low educational attainment and a variety of other social factors. It seems very much apparent that without a comprehensive approach, that is without a major and continuing thrust in areas such as basic hygiene, housing and education, many constructive health programs are doomed to failure. This cannot be over-stressed.

The need for a comprehensive approach to Aboriginal health requires Aboriginal empowerment. It is widely held that empowerment is fundamental to achieving improvements in health status. Understanding and addressing relations which facilitate services are as important as the quality or appropriateness of the services provided.[232] Aboriginal self-determination demands that needs, initiatives, strategies and community control be identified and implemented by Aboriginal people as much as possible.

Clearly, without the participation of the client the doctor cannot hope to remedy the illness. While this analogy is simple, it seems to be ignored by bureaucratic administrators and changing governments. Aboriginal participation is required at all levels, from identifying problems, developing remedies, implementing remedies and to administering the whole process.

Programs will succeed through Aboriginal people believing that changes which are undertaken will enhance their lives. Any intervention in Aboriginal lives will be controversial in the context of the coercive past experienced by Aboriginal people. Yet non-Aboriginal bureaucratic structures, models and programs are consistently applied to Aboriginal communities without their participation or consent.

The need for appropriate and acceptable health services is strong, and this is supported by recommendations made by the Australian Medical Association in relation to the health of the Aboriginal community.[233] Much could be gained by developing greater co-operative structures and processes with Aboriginal Medical Services and other Aboriginal organisations involved in health care and promotion.

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[232] Anderson, I., "Powers of Health", *Arena*, June-July, 1994, p33.

[233] Australian Medical Association, *Handbook of Resolutions*, April, 1994, AMA Ltd, Barton, ACT, 1994.

The experience of other countries shows that the health standards of indigenous peoples have improved markedly over time, while those of Australian Aborigines have not when compared to the health of the non-Aboriginal population of Australia.[234]

> *This is to the national shame and is a gross infringement of the rights of indigenous peoples, who should be entitled to enjoy health standards comparable with those of other Australians.*[235]

Local government is a key player in the provision of environmental health and infrastructure to Aboriginal communities. It is interesting to note that in the Health Department's appraisal of current administrative mechanisms contained in the Task Force's Report, local government is not mentioned as a specific player or an institution with which the Health Department regularly liaises or co-operates. For a comprehensive approach to be taken to Aboriginal health all players related to Aboriginal health must participate including local government.

There is a bewildering number of agencies and interested groups involved in Aboriginal health provision. Each of these bodies has its own administrative and co-ordinating body and agenda which has resulted in layers of bureaucratic structures and the duplication of services, some of which may be at odds with each other. Further, by having several sources of funding community agencies confuses accountability. A cynical interpretation of the apparent activity in the field of Aboriginal health may suggest that genuine efforts are a facade and that in reality much of the money may be swallowed up in administrative costs. If there is an element of truth in that opinion, all parties must make amends.

It is essential to establish clear responsibilities and co-operative relationships. Accountability requiring specific identification of responsibilities and co-ordination of activities should be developed. The centralisation of administration is not a requisite for accountability; indeed it may not be desirable in the light of the diversity of Aboriginal groups and needs. However clear lines

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234 Government of Western Australia Task Force on Aboriginal Social Justice, *op.cit.*, Vol. 1, p309.

235 Aboriginal and Torres Strait Islander Commission, *Social Justice for Indigenous Australian 1994-1995*, AGPS, Canberra, 1995, p53.

of accountability are required. Trimming the number of agencies involved, increasing co-operation and establishing a broad based co-ordinating body all appear to be recurrent themes in the voluminous body of literature on the area of Aboriginal health. As that body of literature alarmingly demonstrates, ideas and recommendations on paper are far removed from their implementation.

Recommendation 37

That Commonwealth, State and local governments, in consultation with Aboriginal people, communities and organisations draw up a timetable to improve co-operation, reduce duplication and give more power to Aboriginal people to determine priorities and the appropriate delivery of health services to Aboriginal people.

Recommendation 38

That Commonwealth, State and Local Governments after consultation with Aboriginal communities, make a commitment to the delivery of culturally appropriate health services to Aboriginal communities within a prescribed period.

Commonwealth run indigenous health services were transferred to the Department of Human Services and Health in 1995 under a pledge to make Aboriginal health a priority by ensuring equitable access. In the wake of the federal election, funding and organisation aspects of Aboriginal development in Australia are in a state of flux. It is too early to determine what changes will be undertaken by the Commonwealth Liberal government in the area of health services to Aborigines.

Environmental Health

Environmental health, which is a most basic foundation for health advancement, has not been afforded the importance which is due. The *Report of the Task Force on Aboriginal Social Justice* recommended that "improvement of environmental health conditions, particularly in remote communities, [must] be treated as the single highest priority for the government's program".[236] While substantial responsibilities are placed on local government for the provision of environmental health, these have consistently not been fulfilled. Inadequate funding is one explanation as to why Aboriginal community environmental health remaining at such a dismal level. However, recurring themes of inadequate co-operation, inadequate accountability and absence of responsibility seem to share equal blame. Further, legal arguments over statutory interpretation of issues such as "rateability" inhibit progress in this area. The provision of infrastructure and its maintenance is essential an issue to Aboriginal environmental health as are health promotion and agency co-ordination.

Aboriginal children are often the first victims of poor environmental health. The interaction between malnourishment (a separate Aboriginal health concern) and living in unhygienic environments results in higher levels of disease in many Aboriginal communities:

> *malnourished infants and children are more vulnerable to a wide range of infections, the risk being increase by unhygienic living conditions and high levels of environmental contamination. Many Aboriginal children enter the vicious synergistic cycle of infection-malnutrition, and carry the legacy of impaired growth into early childhood.*[237]

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[236] Government of Western Australian Task Force on Aboriginal Social Justice, *op.cit.*, Vol. 1p323.

[237] Thomson, N., *Overview of Aboriginal Health Status*, Australian Institute of Health, Canberra, 1990, p11.

Gracey and Gee have identified alarmingly consistent trends in Aboriginal child health:

> *despite recent improvements Aboriginal infants are hospitalised much more frequently and for longer than other infants ... Hospitalisation rates reflect many factors including disease incidence and severity but also are affected by isolation, climatic and physical conditions, and access to medical and nursing care. Preventative health programs need to be maintained and intensified in order to improve health standards of young Aborigines and to lessen their need for hospital care.*[238]

Aboriginal children and the future of Aboriginal society, should be afforded the greatest consideration and access to health care, particularly in the context of the traumatic past many Aboriginal children have experienced at the hand of government policies.

Recommendation 39

That Commonwealth, State and Local Governments make a major commitment to improvement in the delivery of culturally appropriate health services to Aboriginal children.

Mental Health

The *Report of the Taskforce on Aboriginal Social Justice* looked at the issue of Aboriginal mental health but failed to examine any of the underlying causes or issues. Without an examination of underlying issues, causes cannot be identified and hence remedies cannot be successfully implemented. Alcohol and drug disorders are similarly identified as serious concerns in Aboriginal society, but causes for abuse are not adequately dealt with. As the WA State Aboriginal Mental Health Conference identified, "since professionals fail to look at the causes of mental health problems, it is inappropriate to try to address the symptoms, even foolhardy".[239]

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238 Gracey, M., and Gee, V., "Hospitalisation of Infants for Infections in Western Australia, 1980-91", *Journal of Paediatrics and Child Health,* 30, 1994, p502.

239 State Aboriginal Mental Health Conference, *Program and Abstracts*, Perth, 19-22 November, 1995, p7.

Aboriginal people have endured and suffered 170 years of trauma and emotional scarring in Western Australia. The socio-political context of Aboriginal mental heath must be recognised to include the impact of colonisation, separation of families and children; the taking away of land, loss of culture and identity, the impact of social inequality, stigma and racism, isolation, incarceration and assimilation. It is important to look to the history and current conditions of Aboriginal Australia in order to understand Aboriginal mental health problems and issues, particularly substance abuse.

Recommendation 40

That the Commonwealth and State Governments ensure the identification of the underlying causes of mental health problems and specifically acknowledge the impact of the assimilation policies and removal practices on the mental health of Aboriginal people.

Recommendation 41

That the Commonwealth and State Governments make a commitment to address the underlying causes of mental health problems of Aboriginal people.

The *National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health* reported that, "[Trauma and grief] were identified as amongst the most serious, distressing and disabling issues faced by Aboriginal people".[240] The Report identifies a number of broad working assumptions that are pre-requisites for addressing Aboriginal mental health issues. These are:

- that the concept of health is holistic, encompassing mental, physical, social, cultural and spiritual;
- that self-determination is central to progress;
- that experiences of loss and trauma are major factors contributing to impairment of health and well-being;
- that the human rights of Aboriginal people must be recognised and respected;

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[240] Swan, P., and Raphael, B., *op.cit.*, Part 1, p3.

- that family and kinship groups are central to Aboriginal health;
- that there is no single Aboriginal group; and
- that racism, stigma, environmental adversity and social disadvantage have a negative on-going impact on Aboriginal health and well-being.[241]

Some of the issues involving mental health of removed children and their families have been discussed in *Telling Our Story*.[242] The *National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health* found that, "a number of studies have identified the importance of childhood and later separations and losses as well as trauma as risk factors for psychiatric morbidity".[243] However, the Report goes on to state that not enough research has been undertaken on patterns of Aboriginal loss, trauma and grief and that further investigation was required in the area. With figures in one study indicating 65 per cent of Aboriginal peoples being separated from one parent and 47 percent being separated from both parents,[244] it would appear that detailed investigation of this area of Aboriginal health is well overdue.

Recommendation 42

That the Commonwealth and State governments guarantee further funding to the National Inquiry or another appropriate body to continue to investigate the mental and other health problems caused by the assimilation policies and removal practices.

There is a real need for appropriate counselling, healing programs and community support for families and kinship groups that have had, and continue to have, children and siblings separated or removed. This need became obvious to those employees of the ALSWA who collected the personal histories from those removed from their families or who have had family members removed from them. Many of those interviewed complained that they have nowhere to go for help. They insisted that conventional counselling and psychiatric services are of no use.

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241 *Ibid*, p1.

242 ALSWA, *Telling Our Story*, *op.cit.*, pp42-44.

243 Swan, P., and Raphael, B., *op.cit.*, Part 1, p44.

244 *Ibid.*

Aboriginal people who were removed from their families strongly hold the view that they need to receive counselling from Aboriginal people who understand their culture and the devastating impact resulting from removal.

Recommendation 43

That the Commonwealth and State Governments provide sufficient funding for the establishment of adequate and culturally appropriate counselling, healing and community services to Aboriginal people.

Alcoholism is a significant manifestation of Aboriginal mental ill-health and substantially affects Aboriginal health generally. The Race Discrimination Commissioner stated:

> *Alcohol use and alcoholism in indigenous communities is grounded in the history of the mistreatment of Aboriginal and Torres Strait Islander peoples in this country since colonisation and in the contemporary experience of most indigenous people's lives".*[245]

The ramifications of alcohol abuse are wide-reaching. Physical health is eroded not only by direct adverse effects of excess alcohol, but also often indirectly by poor diet and a reduced interest in hygiene. The social impact of alcohol abuse is even more destructive. Domestic violence and physical and sexual abuse resulting from excess alcohol intake erodes not only the physical and mental health of those involved, but also the morale and esteem of the entire Aboriginal community, which in turn perpetuates the cycle.

The previous Labor government pledged $13.4 million to the development of innovative strategies that address indigenous mental health within the communities and improve access to mainstream services. Little detail of how this was to be achieved was included with the pledge.

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[245] Race Discrimination Commissioner, *Alcohol Report*, AGPS, Canberra, 1995, p1.

Recommendation 44

That the Commonwealth Government commit itself to guaranteeing the $13.4 million pledged by the last Commonwealth Labour Government for the development of innovative Aboriginal strategies that address mental health within Aboriginal communities and improve access to mainstream services.

Men's Health

In 1996 the Labor government announced a national program to improve men's health. An important aspect of the program was to address Aboriginal men's health issues. The status of the program remains unclear, although it is clear that Aboriginal men's health issues require attention.

Recommendation 45

That the Commonwealth Government commit itself to ensuring that any national programs which may be implemented address Aboriginal men's health issues.

Conclusion

Whilst this chapter only touches on the state of Aboriginal health and the health needs of Aboriginal people, the importance of improved health service delivery to Aboriginal people cannot be over-emphasised. It is particularly important for the National Inquiry and governments to attend to this issue if there is to be a genuine commitment to improve the life and well-being of Aboriginal people who were subjected to the assimilation policies and removal practices. In order to improve the health well-being of Aborigines and delivery of health services to Aboriginal people, the focus must be on allowing Aboriginal people to determine their needs and the most appropriate ways to address them.

Alice's Story

I was born in 1934 in Mullewa, a station on the Murchison. I am the fourth eldest of nine children. Only myself and my youngest sister are alive today. We were all taken away from our parents.

I was about ten years of age when I was taken away from my parents. Some of my brothers and sisters were taken to Mogumber or Moore River Settlement, others to Wandering Mission. I was taken to the Church of Christ Mission at Carnarvon.

I felt terrible when I was taken to the Carnarvon Mission. I cried for a week. I wanted to run away. Other kids were telling me that I couldn't run away as the devil would be out there.

I felt very lonely. I was treated awfully.

I couldn't make friends with white people because I was teased. This also happened when I was transferred to Mogumber Mission about two years later. When we went to stay at the nurses' quarters for a week I was teased by the other Aboriginal children. They used to say, "don't speak to her, she thinks she's white and better than us". I also felt a very great sense of loss when our parents were not around us, nor were our brothers and sisters. It was very difficult at the Church of Christ Mission and at Mogumber. It was a very strict regimental existence. What really hurt the most was that there was no loving environment. I missed the opportunity to be loved by my parents. I used to worry for my mother and cry a lot.

While I was at the Church of Christ Mission and Mogumber we never received any information about Aboriginal culture. I remember the authorities at the Church of Christ Mission and Mogumber used to say that when we left the missions to go out and work we would have to make it in a white person's world so we would have to forget our Aboriginal ways.

From Mogumber I went to Bennett House in Perth, when I was about 15 years of age. Then I was farmed out as a domestic servant to Meekatharra.

The person I worked for in Meekatharra was disappointed when she saw me because she thought I was going to be a big strapping person but I was rather small. I only received five shillings, of which half went into the Native Welfare Department. The Native Welfare Department controlled what I could do until I was 21 years of age. I was at Meekatharra for two years and then I went to a farm at Dinimup and I was there until I was 18 years old. I ran away from there. An officer from the Native Welfare Department caught up with me and took me back to Perth and I went back to Bennett House. I then went to Mogumber and stayed there for about a year. After that I went back to Bennett House.

My husband, who I had met in Dinimup came down to see me at Bennett House. We ran away to Gnowangerup before we got married. There I had Jenny.

In 1953 Mr Jones from the Native Welfare Department brought me a cheque which was a collection of money I had worked for. I was very lucky to receive that because many of the other people I know who were taken away never received the money they worked for and earned.

Mr Jones told me that my parents had given us permission to marry.

After Jenny was born, I saw my father in Mullewa. I telephoned my mum and she said that she would come to see us but she never did. I don't know why she didn't come. I never got to see my mother again.

We brought up Deborah in a hamlet near Gnowangerup. My husband was a shearer there.

We then adopted James when he was only three months old. His mother had so many little ones to look after she asked if we wished to adopt him even before he was born. We also adopted Carl when he was one and a half years old. His mother didn't want him and his relatives were not bringing him up in a loving environment. I took him and brought him up in a loving family.

I have seven grandchildren from my daughter and eleven grandchildren from my two adopted sons. I also have one great grandchild.

My mother was murdered in 1964 in Carnarvon. She was bashed to death.

Because of what happened to me when I was a child I am very wary of losing my grandchildren. I am very wary about my grandchildren being taken away from their parents. When Jenny used to go away, she used to travel quite a lot, she would leave her children with me. People from welfare used to come around and say that they would make the children wards of the State. I used to go into the welfare office saying that you are not going to take my grandchildren away from me and do what you did to me. I managed to keep all my grandchildren together.

I still feel very sad for what happened to me in the past. It is hard to know why it happened - to be removed from your parents is unbelievable.

The removal from my parents and the loss of my cultural identity hurts me very much even now. I think I have somehow managed to cope reasonably well with what happened but inside me I don't really cope that well. It is very painful.

CHAPTER 8

AGED CARE

Introduction

> *Recent improvements in the Aboriginal community in health, education, employment and land rights have failed to alter the circumstances of older Aborigines.*[246]

Of all Aboriginal people, the elderly have had the longest exposure to discriminatory and destructive government policies and racism in Australian society. They have borne the brunt of the assimilation policies and removal practices. Any inquiry which seeks to improve service delivery to those affected by the systematic removal of Aboriginal children from their families must allow the needs of the Aboriginal elderly to be voiced. The Aboriginal elderly have a special role as custodians of Aboriginal culture. If their needs are not met, the "transmission" of the culture to the Aboriginal youth will be made even more difficult.

Aged care is a neglected area of Aboriginal affairs. A minority within a minority, Aboriginal aged people have not enjoyed the same attention (academic, governmental, media) as other groups in Aboriginal society. This is in contrast to the emphasis and importance placed on "elders" in Aboriginal culture and community life. The scarcity of literature on the needs of, and service provision to, Aboriginal elderly is indicative of the absence of adequate attention given to Aboriginal aged care issues. Much of the literature on the aged in Australia does not contain any reference to the particular needs of Aboriginal elderly.[247]

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246 Sykes, R., *Issues Affecting Older Aboriginal People*, AGPS, Canberra, 1988, p41.

247 This is partially due to the fact that few Aborigines live beyond the age of 65. Research by the Health Department of Western Australia found that:

- Aborigines under 65 years of age die at a greater rate than non-Aborigines for all major causes of death
- Aboriginal health issues are complex. Their living conditions, personal and community

There has been a minimal attempt to understand the treatment and status of the aged Aboriginal, even though massive research has been initiated relating to Aboriginal culture.[248]

As with all aged people, Aboriginal aged have the same needs and rights as non-aged people as well as needs which are related to their advancing years. Aboriginal aged have particular needs as members of Australia's indigenous population. One of the few studies undertaken into Aboriginal aged care reported that:

There is no doubt that Aboriginal and Torres Strait Islander people remain the most socially and economically disadvantaged group in Australia. This fact, together with the effects of the past on the emotional well being of individuals and various cultural aspects are vital considerations in the development of an effective [aged care] service delivery model.[249]

Aboriginal Elderly: Their Needs

Most older people in Australia live independently.[250] However, almost 90 percent of Aboriginal elderly live with their families.[251] There is very little information about the quality of life of Aboriginal elderly. Independence, community participation and involvement are preferred to dependency on aged care services. This requires the development of services which support and allow Aboriginal elderly to remain in the community.

> hygiene, and access to medical care must be improved ... Aboriginal people must recognise the negative aspects of western culture such as tobacco, alcohol, processed foods and sedentary lifestyle and make healthy choices which suit their cultural and social environment.
>
> In Veroni, M., Rouse, I., and Gracey, M., *Mortality in Western Australia 1983-1989 with Particular Reference to the Aboriginal Population*, Health Department of Western Australia, Perth, 1992, p66.

248 Davies, J.A., *Older Australians*, Harcourt, Brace and Co., Sydney, 1994, p10.

249 Morrison, P., *Community Aged Care Packages for Aboriginal and Torres Strait Islander People Towards an Appropriate Delivery Model*, Curtin University, Perth, 1994.

250 Centre for Advanced Studies, Division of Health Sciences, *Aging into the Nineties: Policy Planning and Practice*, Symposium Proceedings, Curtin University, Perth, 1990, p20.

251 Davies, J.A., *op.cit.*, p11.

[In] the past elderly Aboriginal people in need of care have often been inappropriately placed in hostels or nursing homes, isolated from their families and out of 'their country'. This kind of situation creates a great deal of distress for the old people and their families.[252]

At the most basic level, Aboriginal elderly have the right to enjoy adequate accommodation, medical aid, personal security and, in remote areas, fresh water. These are rights common to all people. In addition, people of advanced age are especially likely to experience multiple vulnerabilities - frailty, widowhood, low income, dementia - which place them at considerable risk of dependancy and poor quality of life. They may need assistance with housework, meals, bathing, shopping and transport to medical appointments.

The issues affecting Aboriginal elderly are numerous. Some of them are not related to aged care specifically, but to the legacy of the Aboriginal historical experience. As the group with the longest exposure to racist and assimilation policies and attitudes, the Aboriginal elderly as a group are most disproportionately discriminated against in Australian society. The assimilation policies which led to the removal of children and the demise of Aboriginal culture have impacted on each individual who bears his/her own emotional and psychological scars. As a group, the Aboriginal elderly have had their role and status in the community undermined.

Some of the difficulties for the Aboriginal aged are culturally based. Avoidance relationships, geographic isolation, and distance from urban centres, the peripatetic nature of Aboriginal peoples and their associated obligations to maintain kinship relationships, can all act to complicate service delivery to the Aboriginal aged. Some problems specific to the Aboriginal elderly are outlined below. It must be stressed that owing to the absence of adequate literature or inquiry into Aboriginal aged care issues, not enough is known about the needs of Aboriginal elderly.

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252 Morrison, P., *op.cit.*, p5.

For some Aboriginal elderly, accommodation remains a problem which demands attention. Particularly in the fringe camps, "old people are living in the most appalling conditions".[253] Aboriginal elderly do not want to live so far away that they become isolated from their own people. They deserve a level of accommodation that caters to their needs for protection, security and health. Increased funding to relevant agencies for the provision of housing for Aboriginal elderly would be one way to counter this accommodation dilemma.

Recommendation 46

That the Commonwealth and State governments provide funding to public housing and aged care agencies to establish accommodation appropriate for Aboriginal elderly taking into account their culture and age.

Often problems arise for Aboriginal elderly in communicating with medical staff. Where the elderly patient does not understand the doctor and is reluctant to ask for an explanation, the health and care of the elderly person is jeopardised. Increased use of Aboriginal health workers/liaison officers should help ease this problem.

Recommendation 47

That the Commonwealth and State governments provide funding for more Aboriginal health workers/liaison officers in hospitals and medical settings to work with the Aboriginal elderly.

All providers in Aboriginal aged care need to be sensitive to the cultural needs of Aboriginal people, for example, preference for male doctors to examine male patients and female doctors to attend to female patients. Attention to such details should be included in the development of services.

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253 *Ibid*, p13.

Recommendation 48

That all medical professionals complete a properly accredited Aboriginal cultural awareness program to ensure sensitivity to the cultural needs of Aboriginal people.

A significant number of Aboriginal aged who may need some level of care look after grand children and great-grand children. The reasons for this are varied and include lack of permanent accommodation for Aboriginal families, and domestic violence and alcohol related family problems. Kinship and family obligations, despite the breakdown of culture, remain prominent in some settings, and account for the elderly caring for some young children. In these situations it is recommended that the role of the caregiver extend to providing some respite in regard to the care of the children and for the caregiver to work out the best way of providing assistance.[254]

Recommendation 49

That the Commonwealth and State governments provide funding to employ caregivers to assist Aboriginal elderly care for their extended family.

A disturbing and alarmingly consistent problem is that of "elder abuse".

> *This takes a number of forms, the most common being the stealing of money and food. Frequently it happens while the offenders are under the influence of alcohol and at times it happened with the use of physical violence. Old men and women spoke of the problems of 'those young fellas' coming here and giving us 'humbug' and of 'being afraid' on cheque day that those 'younguns' will start drinking, then come to here for money to buy more ... There are times when some of the old people feel put upon and abused by being left to look after the little ones ... it was always on cheque week that they got the little ones while the parents went drinking.*[255]

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254 *Ibid*, p15.

255 *Ibid*, p15.

The problem needs to be recognised and addressed. Perhaps the best initial step would be for Aboriginal community groups to meet with relevant departments and non-government agencies to discuss the problem of "elder abuse". More secure housing would be one way to ensure improved protection for elderly people. Certainly greater attention needs to be given to the issue of "elder abuse".

Recommendation 50

That the State government establish a Task Force of Aboriginal community leaders to inquire into the issue of "elder abuse" and make recommendations to relevant government departments and non-government agencies towards solving this issue.

Recommendation 51

That the Commonwealth and State governments give a commitment to ensure that adequate resources are provided to allow these recommendations to be implemented.

The breakdown in the social fabric of Aboriginal life impacts on the Aboriginal elderly. Traditionally Aboriginal elderly were the keepers of the secrets, transmitters of culture and thus instrumental in the cohesiveness and ongoing development of the family and community group. However, with Aboriginal exposure to western ways, the prominent position the elderly had in Aboriginal community life has gradually withered, so much so that their position is beginning to mirror that of the elderly in non-Aboriginal society.[256]

While the need for the elderly to be role models for children to impart wisdom and Aboriginal ways is generally acknowledged, it has been given little attention in the care of Aboriginal elderly. This role for Aboriginal elderly needs to be encouraged in a way that is appropriate for them.

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256 Davies, J.A., *op.cit*, p20.

Recommendation 52

That the Commonwealth and State governments provide funding and a suitable environment to programs which allow elderly Aborigines to fulfil their function as cultural role models for their children and grandchildren.

Past policies and practices relating to the removal of children have been instrumental in the destruction and demise of Aboriginal culture and community life, and the dysfunction of Aboriginal people in non-Aboriginal society. Such a statement is not intended to cast Aborigines exclusively as victims. However, the reality of these policies is that they have had serious negative consequences. Thus, many of the recommendations made in chapter 5 of this submission, in relation to reparation, are of particular importance to the Aboriginal elderly.

Aboriginal elderly must be recognised as a distinct "needs group". Information pertaining to their requirements and concerns must be collated in order for their needs to be understood and catered for.

Service provision

The challenge in the delivery of community based services and initiatives, such as Home and Community Care Program, lies in being able to assess the effectiveness of services. Assessments need to be made on present aged care support systems in order to develop effective care programs for individuals and groups of individuals.

A proposed system of care in which responsibility is diversified includes the following elements:

- what individuals can do for themselves, focusing on their own abilities;
- what relatives and friends can do;
- integration of self and family care;
- a comprehensive system of community services;
- access to care as an entitlement rather than part of a rationed system.[257]

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[257] Davies, J.A., *op.cit.*, p27.

The current emphasis on integrated care appropriate for each individual, needs the fullest expression in service provision to Aboriginal elderly. It is imperative that the Aboriginal aged are ensured full access to appropriate services, whether mainstream or those specifically tailored for indigenous peoples. It is encouraging to note that many local government bodies in Western Australia provide aged care and Home and Community Care services to their Aboriginal elderly constituents. Use and participation rates have not been collated. However, there is great diversity between local governments and although some are extremely proactive, others are hostile to providing Aboriginal specific services or even promoting Aboriginal participation and use of mainstream services.

A problem that arises in the provision of community care to the elderly is the amount of travelling undertaken by Aboriginal people. Family gatherings and tribal obligations result in Aboriginal people travelling great distances away from their usual support services, particularly in isolated and rural areas. This situation needs to be taken into consideration in the development of appropriate and effective services for Aboriginal elderly. The provision of adequate transportation for Aboriginal elderly, particularly those in isolated or remote communities, so that they may take advantage of services or attend tribal and community functions, must also be addressed. The Aboriginal elderly have an important role to play in tribal and community functions. Aboriginal elderly are respected elders, many may be senior law men and the elderly women's role is to teach the younger generations about traditional practices.

From the perspective of the client or user, issues of access to services, appropriateness of services and effectiveness of services are critical. There is a need for the development of integrated services which comprehensively address multiple, and often quickly changing, needs. In remote areas, a pool of trained caregivers would appear most appropriate.[258] Not only would such a pool ensure the greatest level of available care, but it would also allow for the observation of "avoidance relationships" by caregivers, and yet not result in a reduction in quality of care for the elderly.

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[258] Morrison, P., *op.cit.*, p17.

Recommendation 53

That the Commonwealth and State governments provide funding for a pool of trained caregivers to cater for the variety of needs within the Aboriginal community.

Aboriginal health care and aged care workers are a welcome development in service provision to Aboriginal aged people. Further understanding between Aboriginal health and cultural needs and western medicine is required. Importantly, Aborigines (the elderly and their representatives) need to begin to set their own health and welfare priorities. The need for empowerment and self-determination is important for the elderly Aborigines also.

> *There is a need for cross-cultural awareness training for all of those involved in the care of aged Aboriginal and Torres Strait Islanders as well as the need to employ or utilise the services of more Aboriginal people at all stages of the care process.*[259]

Aboriginal and culturally appropriate training has commenced at Marr Mooditj Aboriginal Health Worker College, Bentley. In relation to elderly care, students from the college have worked with leading staff from the dementia specific Sir James McCusker Training Project, operated by Anglican Homes Inc. Each group has profited from the other's experience. Students at Marr Mooditj and McCusker Project staff have been able to share the developed understanding of the needs of Aboriginal people suffering from dementia with health care workers in metropolitan, rural and remote locations.

Services for those who require residential based care should be culturally appropriate and facilitate family access and interaction. A nursing home which has successfully developed a program of residential care for Aboriginal elderly is the Aboriginal Centre nursing home in Kalgoorlie, managed by the Little Sisters of the Poor. Program and design features of the nursing home include outdoor open fire places, the occasional cooking of bush tucker, and regular day trips to familiar bush areas around Kalgoorlie.

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[259] *Ibid*, p4.

There appears to be little support for Aboriginal caregivers and families who are looking after an elderly person, particularly those who are suffering from a complication associated with ageing, such as Alzheimer's disease. This can lead to an attitude of ambivalence from the caregiver towards the elderly person. It is vital that information regarding available services and assistance (both governmental and non-governmental) be thoroughly disseminated. Information on the needs of elderly Aboriginal people should also be widely available to Aboriginal communities and those involved with Aboriginal people.

It has been recommended that flexibility should be built into all programs, schemes and benefits available to older Australians to ensure that they reach members of the Aboriginal community at a level commensurate with the more fortunate section of the public.[260]

Recommendation 54

That in the provision of health and welfare, attention be given by the Commonwealth and State governments to ensure elderly Aborigines set their own priorities, and that such services take into account culture specific needs.

Recommendation 55

That residential care services initiate programs to promote family access, interaction and cultural activities.

Recommendation 56

That information regarding Aboriginal services and assistance be thoroughly disseminated by the relevant government departments so that Aboriginal caregivers and families looking after an elderly Aboriginal person receive adequate support.

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[260] Sykes, R., *op.cit.*, p40.

Recommendation 57

That departments and agencies providing services and assistance to the aged population at large, initiate programs to ensure Aborigines are aware of such services and that flexibility be employed in the provision of services.

Conclusion

Aboriginal aged care issues appear to have been overlooked in the provision of services to the elderly. A senior officer from the Aboriginal Health Division of the State Health Department stated that aged care provision to Aborigines in remote and isolated locations remains fragmented with no clear guiding plan or policy.[261] This highlights a serious deficiency in the provision of health care to the Aboriginal aged.

The elderly have not been afforded the same attention as other Aboriginal groups. There is a perception they are a group without needs. The Aboriginal aged have the same needs as other elderly people in our society, and have certain needs specific to being of Aboriginal descent.

The Aboriginal aged have had the longest exposure to discriminatory and destructive government policies. They have witnessed and been participants in the ongoing struggles of Aboriginal society coming to terms with its past. This situation should be recognised and appropriate attention should be given to Aboriginal aged care issues. Elder abuse and appropriate accommodation are two issues that require immediate attention. However, Aboriginal aged care issues have been neglected and urgently require investigation and assessment. Relevant information needs to be collated on the needs of Aboriginal elderly in order to develop appropriate, effective programs and services. Such work should be given greater priority.

The development and provision of care for Aboriginal elderly should reflect the holistic needs of Aboriginal people including their spiritual, emotional, cultural, physical and mental well-being.

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[261] Telephone interview with Shane Huston, Aboriginal Health Division State Health Department, 10 January, 1996.

The experience of the few who are already in the field of Aboriginal aged care should be utilised. As with the further development and implementation of all Aboriginal specific or targeted programs or policies, consulting with Aboriginal people (in this case the elderly) should be mandatory in the planning and provision of services to the Aboriginal aged. But consultation is not enough. The Aboriginal elderly must determine what services they seek and how they should be provided.

Charlie's Story

I was born in Cranbrook in 1952. I was one of 16 children.

In my early childhood my family used to roam around the countryside from Cranbrook as far as Boyup Brook.

When I was roughly about five years of age I remember a kombi van come into Mount Barker and collected some of my family and another family. The man that picked us up was from the Native Welfare Office. We were taken to Merribank Mission. I was never told why we were taken to Merribank.

I didn't find life too bad at Merribank but I did receive a belting a few times and was made to go to church every Sunday and sometimes on a Wednesday night. I only saw my parents on one or two occasions while I was at Merribank.

Six of my other siblings were taken to Merribank.

I went to primary school for the first two years at Merribank then to Katanning and then to Katanning Senior High School.

When I was 14 years old I ran away from Merribank with my sister, back to our parents in Cranbrook. I wanted to get away because I wanted to see my parents and there was something inside me saying that I was a Noongar and needed to get away. I found that the mission had taken something away from me. Taken my culture away from me. I didn't really know what my culture was at that time.

The police came to my parents' home and picked us up. Someone from Merribank Mission came and took us back to Merribank. The next day my sister and I ran away again to Cranbrook. The police came and picked us up and took us back to Merribank. Then we ran away a third time. The police came to the tent where my parents were and said that they were not going to take us away. They would leave us for a week and see how things went. They came around the next Monday and picked us up and they locked us up in the police station nearly all day. Then a fellow from Merribank came and picked us up and took us back to the mission.

A little while later I was allowed to stay with my sister at Lake Grace. I stayed there for a few months and then went back to Cranbrook.

My parents were living in a big tent in Cranbrook. I wanted to be with my parents. My parents loved me but the opportunity to show their love was robbed when I was at the mission.

When I was at the mission there was no love or feeling shown towards me.

When I was in my late teens I started getting involved in crime and breaking into houses and I started drinking heavily. When I was about 16 or 17 I got fined for drunk driving. I couldn't pay the fine so I went to Hillston, up in the hills somewhere.

Later on I was convicted of stealing liquor from the bowling green in Cranbrook. I was placed on a two year probation period.

I went up to Geraldton and I was involved in a boxing exhibition. However, I was charged with carnal knowledge which was from forming a relationship with a 13 year old girl while I was in Albany. I served two and a half months of my four month sentence in Geraldton and then I went to Fremantle to serve the rest of the four months and then back to Albany to serve my probation period. I spent all of 1972 in Albany prison.

I then continued to be involved in crime and assaulting police. In all I spent about four to five years in prison.

It is only because of my responsibility as a father that I have finally taken control over my life and stopped drinking so I wouldn't get into trouble any more.

As I said before, Merribank wasn't that bad in the sense that I wasn't sexually abused or physically abused. It was terrible because there was no love and I missed the opportunity to receive the love from my parents. They were denied the opportunity to care for and love me and love my brothers and sisters and we were denied their love. That was the worse thing about being in Merribank.

My dad died two years after I had left Merribank and my mother died ten years after that.

The Merribank Mission took something out of me. It took my Aboriginality away from me. However, I always knew I was a Noongar. It was just that I was not able to experience the culture of kinship of being a Noongar, a warrior, while I was in Merribank Mission.

I believe that the loss of love and enjoyment of my culture while I was in Merribank contributed to my life of drinking and crime. I am very grateful now that I have been able to kick that terrible habit and cycle.

CHAPTER 9

EDUCATION[262]

Introduction

> *As we approach the year of Australia's bi-centennial celebration it remains overwhelmingly obvious that Aboriginal and Torres Strait Islander Australians have little cause for celebration. To say their employment situation has reached a crisis point would be an understatement.*[263]

> *In 1994 Aboriginal peoples and Torres Strait Islanders continue to be the most educationally disadvantaged groups in Australia.*[264]

The two statements above convey the dire state of Aboriginal education and training is in today. Not only are Aboriginal people under-educated, but are correspondingly disadvantaged in the labour market. Secondary school retention rates and tertiary education numbers for Aboriginal people, although improving, remain woefully low.

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262 This chapter focuses on the non-tertiary educational sector.

263 Committee of Review of Aboriginal Employment and Training Programs, *Report of the Committee of Review of Aboriginal Employment and Training Programs*, Vegas Press, 1985, p3.

264 Reference Group Overseeing the National Review of Education for Aboriginal and Torres Strait Islander People, *National Review of Education for Aboriginal and Torres Strait Islander Peoples*, AGPS, Canberra, 1994, p2.

Many people who gave their personal histories to the ALSWA complained of their lack of education or culturally appropriate education. One such example is provided by Ian:[265]

> *I was torn away from my mum and dad and sent to New Norcia. It was terrible there. They used to belt us for very small things. We were humiliated. The education was a joke. When I was with my mum and dad and brothers and sisters we lived a happy and pretty traditional life. So you can imagine what it felt like to be told that we had to learn Latin. I just switched off. They were not interested in my culture. In fact they prevented us from talking our own language. I learnt nothing at New Norcia. It was awful.*

Although there were exceptions, many children who were removed from their families suffered from poor education. These children did not just suffer from poor educational outcomes in the "mainstream" sense, but education of their culture was severely affected. Further, it was not only academic standards that were affected but many of those removed from their parents did not develop the necessary life skills to adequately cope in a world outside the missions and institutions.

The key to improved educational outcomes for Aboriginal people is the inclusion of Aboriginal voices, perspectives, families and communities in the education process. Unfortunately, the re-education of Aboriginal children in "white" ways was a central thrust of the assimilation policy. Without addressing current deficiencies in Aboriginal involvement and interaction within the education system, a more insidious form of discrimination will continue to disadvantage Aboriginal students.

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[265] Born 1948, "taken away" aged 7 years.

Aboriginal perspectives on education, curriculum content and teaching remain unheeded in many areas. This is despite the finding that:

> *no other institution [the educational system] has issued so many reports or made so many recommendations [pertaining to Aboriginal people]. People have been consulted, research projects initiated and Aboriginal people have said many times what they want, but despite the many proposals and suggestions over a number of years, it appears little has been heard and much is still to be done.*[266]

The gravity of the situation can be understood when considering that improved educational outcomes for Aboriginal people are central and necessary to the concept of self-determination.

Education must be applied equally to children and adolescents, as to the Aboriginal adults and communities, that is, all areas of Aboriginal education must be improved if Aboriginal people are to develop their own societal agendas and the means of achieving them. It is time for Aboriginal people to become active participants in the creation of their own agendas and the fulfilment of their own aspirations. Education is a necessary lynch-pin to achieving this.

As Dodson highlights, Aboriginal educational priorities can be different to those of the non-Aboriginal educational system:

> *Not only do Aboriginal and non-Aboriginal people sometimes educate their children and adults differently, but their ways of teaching and learning can also be culturally different. One perspective is that an Aboriginal world view is interactional while that of the Western world is transactional.*[267]

If Aboriginal perspectives and approaches to education are absent in the system, then Aboriginal participation and performance are bound to falter. Further, it is questionable whether educational outcomes desired by Aborigines are necessarily the same as those of non-Aboriginal Australia. Once again the diversity of Aboriginal groups, cultural settings and distinct needs and aspirations

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266 *Ibid*, p560.

267 Dodson, P., *op.cit.*, Vol. 1, pp560-561.

require a diverse range of options and responses. For traditional Aboriginal communities, education needs may be perceived as related to the promotion and advancement of the community, with a strong practical and cultural emphasis. For Aboriginal people, the education system is required to respect the perspective of each community while at the same time to impart the skills and knowledge necessary for effective participation in the broader community.

As identified in the ATSIC compilation report of consultations with Regional Councils, education should be intimately linked to:

- localised relevant education and training for employment;
- education and training of youth and adults for culturally appropriate community leadership and management;
- education about non-indigenous society and how it functions;
- cultural awareness education.[268]

A consistent theme in literature on Aboriginal affairs is that often Aboriginal people do not understand the way non-Aboriginal laws, procedures and processes function. It is essential that the Aboriginal understanding of non-Aboriginal society is enhanced, particularly if Aboriginal Australia is to be increasingly relied on to manage its own affairs. This should extend from an understanding of non-Aboriginal laws and police powers, to economics, systems of societal organisation and operation of political structures.

Recommendation 58

That relevant Commonwealth and State education bodies (authorities) employ Aboriginal people in decision-making and policy development positions. Aboriginal decision-makers should be given the authority and resources to develop Aboriginal educational plans and curricula in Aboriginal education.

There any many factors that contribute to educational disadvantage for Aboriginal people. An education system that is unresponsive to Aboriginal cultural needs, values and backgrounds is an

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[268] ATSIC, *Towards Social Justice? Compilation Report of Consultations*, AGPS, Canberra, 1995, p63.

immediate cause. Remoteness, geographical isolation and special learning needs can present barriers for Aboriginal access to educational services. Poverty, ill-health and low self-esteem obviously affect the capacity of individuals to participate and perform.

Educational outcomes for Aboriginal people have been negatively affected or negligently overlooked by past discriminatory policies.[269] On-going Aboriginal disadvantage in the education system is a legacy of those policies because Aboriginal society and culture have been directly and indirectly undermined by past discriminatory government interventions which affect Aboriginal peoples for generations to come. The continued imposition of policies and programs "from above" will prolong Aboriginal disadvantage as Aboriginal people will remain excluded from the processes which shape and influence their lives. Aboriginal participation must be encouraged and enhanced at all levels.

Recommendation 59

That the State Education Department ensure an increase in the number of Aboriginal people participating at all levels of the education hierarchy, from the Minister of Education, to school principals, to teacher aides and students, as well as Aboriginal education advisers.

Recommendation 60

That the State Education Department provide better educational facilities to remote Aboriginal communities.

Increasing pressure will be put on the education system in response to Aboriginal needs, not only by a more insistent and impatient Aboriginal population and the wider public expecting greater

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269 For example, "In 1942 the Director of Education ruled that children could not be excluded from Government schools on the basis of race. However, the 1960s remained a period of schooling only to 4th or 5th grade for Aboriginal students (official viewpoint). Mission and special schools remained the prime educational sites for Aboriginal students [sic]. The *Bateman Inquiry* reassessed the provision of service to Aboriginal people, with responsibility for education being taken over by the Education Department. Even though Aboriginal children had not benefited from compulsory education before this date, the new arrangement did not become effective until late in 1949". Letter from the Education Department of Western Australia to the ALSWA, date 5 January, 1996.

accountability for government action and inaction, but also by an ever-increasing Aboriginal juvenile population. This situation increases the urgency with which the education system must become more responsive and adapted to Aboriginal needs and aspirations.

The need to further develop and establish enclave support groups, group programs, bridging courses and orientation programs is ever present. Independent Aboriginal schools are an important development. Aboriginal students require an education which enhances their self-esteem as Aborigines, and gives them a greater understanding of their own culture.

Another important aspect of the education system is that it must provide non-Aboriginal people with an understanding of Aboriginal culture. This is important for students, but is a particularly onerous obligation on the system with regard to teacher and child care training. Aboriginal history and culture must be taught to all students, by well informed teachers. Aboriginal studies curricula should also educate *all* students about successive government policies and practices with regard to the removal of Aboriginal children from their families and the residual effects on the Aboriginal community.

Recommendation 61

That there be two distinctive compulsory streams or courses on Aboriginal culture and history conducted in all government and non-government schools for <u>all</u> students at both the primary and secondary levels. The first should be on Aboriginal culture, history and present day Aboriginal society, and the second on the assimilation policies that led to the separation of Aboriginal and Torres Strait Islander children from their families.

It is imperative that there is an increase in Aboriginal participation in curriculum development and delivery of educational programs. This should occur not only for schools with predominant Aboriginal student population. There is a role for Aboriginal participation in "mainstream" curriculum development and educational programs. Non-Aboriginal student populations will also benefit from the process.

As Dodson comments:

> *the failure of the education system to create an awareness and understanding of Aboriginal history, culture and the implications of colonisation within children is likely to pave the way for uncritical acceptance of media reports and images. The absence of any comprehensive long-term government initiated public education campaign about Aboriginal affairs aimed at lifting European Australia out of its ethnocentric indifference is of equal seriousness.*[270]

From the perspective of providing adequate education to Aboriginal peoples, it costs eight to ten times more to provide remediation for educational problems later in life, if the educational system fails students the first time. The costs in human terms are inestimable. Considering past and continued Aboriginal disadvantage, the costs on Aboriginal children and society are high indeed.

Aboriginal Independent Community Schools

Thirteen non-government, non-Catholic Aboriginal community schools operate in Western Australia.

> *The schools are a tangible Aboriginal response to the perceived needs of a widely divergent group who share a common concern with their identity as Aborigines and the education of themselves and their children.*[271]

Each school has Aboriginal control over policy and operation, which facilitates the development of a community-based curriculum and encourages strong relationships between the school and the community. Aboriginal schools currently aim to provide flexibility in relation to the activities of the community; culturally relevant educational programs; a sense of community ownership and hence involvement; and post-compulsory education and training.

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[270] Dodson, P., *op.cit.*, Vol. 2, p729.

[271] Education Department of Western Australia, *Overview of the Aboriginal Independent Community Schools of Western Australia*, Education Department of Western Australia, Perth, 1995, p1.

The continued diversion of funds for Aboriginal purposes to mainstream services is a source of concern. Direct Commonwealth funding that by-passes State governments should be considered as a realistic option of funding for Aboriginal communities and their schools. Naturally, accountability structures need to be built into the direct allocation of funds. It is important that adequate funding is made directly available to Aboriginal communities and their schools. This is necessary to enhance the objectives of self-management and self-determination. The curriculum, support structures, organisation and outcomes of Aboriginal schools should be assessed as part of the process of developing more appropriate and adapted educational models for Aboriginal people.

Recommendation 62

That a joint Commonwealth/State structure be established by the Commonwealth and State governments to develop guidelines for assessing the merit of proposals by Aboriginal communities for establishing Aboriginal Independent Community Schools:

- ***to distribute grants to establish Aboriginal Independent Community Schools and the ongoing distribution of grants; and***
- ***to continuously assess Aboriginal Independent Community Schools.***

Recommendation 63

That the Commonwealth and State governments provide increased funding for Aboriginal Independent Community Schools.

Social Development

D'Arcy, Holman and Jolley in their report on health service delivery to Aboriginal communities in Western Australia state:

> *community education and development are together the single greatest need that must be addressed more adequately in remote Aboriginal communities if significant progress is to be achieved in the longer term.*[272]

The co-operation and collaboration of departments and Aboriginal agencies and communities in addressing community health care and development is imperative. As D'Arcy and colleagues stated:

> *ATSIC, DAA, [AAD] major utilities, Education Ministry and Health Department staff, as well as Aboriginal Environmental Health Workers and Environmental Health Officers all interact with community leaders and members in various settings and circumstances and each one of these interactions must be regarded as an opportunity to transfer knowledge and skills and to facilitate the community accepting responsibility for its environmental health.*[273]

Decentralisation of power to Aboriginal people and local services is increasingly being recognised as the most appropriate response to many Aboriginal issues. Needs and requirements must be assessed and programs initiated according to the needs of each community. While divestment of power can be supported and co-ordinated by a centralised body, the responsibilities and agendas of Aboriginal communities will, hopefully, come to be increasingly relied upon in the implementation of Aboriginal self-determination. Education, training and planning are key elements to facilitating self-determination.

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272 D'Arcy, C., Holman, J., and Jolley, W., *Assessment of Local Health Authority Service Delivery Needs in Aboriginal Communities,* Health Department of Western Australia, Perth, 1994, p46.

273 *Ibid,* p46.

Recommendation 64

That the Aboriginal and Torres Strait Islander Commission, the Aboriginal Affairs Department, and the Commonwealth and State Education and Health Departments collaborate in designing a health education plan which gives Aboriginal communities the responsibility to create a health education program specific to each community.

Another area of social development that must be addressed is the need to assist Aboriginal students who find the school environment alien and who may develop associated problems such as truancy. There must be adequate assessment and response to the needs of the child.

It is important that Aboriginal people are involved in the design and implementation of preventative programs for Aboriginal students. The current inadequate situation is highlighted by Wilkie:

> *[M]ost "targeted prevention" programs have as their primary, stated target young Aboriginal offenders: particularly the Community -Based Education Program, the Local Offender Program and the Community Youth Offending Prevention Program. In addition, the three projects funded by the Ministry of Education's Alternative Education Program [Balga/Girrawheen, South Hedland, Medina] are all in areas where Aboriginal students are the main concern ... Some of the services funded have an almost 100% Aboriginal client population. Yet few are managed by Aborigines and none are directly controlled by the local Aboriginal community. On the other hand most which cater for Aboriginal young people do not employ Aboriginal staff.*[274]

Pre-school Programs

Pre-school programs have been heralded as something of a breakthrough in preventative care for at-risk children. Most research has been conducted in the United States where pilot programs have been operating since 1962. Studies conclude that successful pre-school programs can reduce delinquency and have other important lifetime outcomes:

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[274] Wilkie, M., *Aboriginal Justice Programs in Western Australia*, Crime Research Centre, University of Western Australia, Nedlands, 1991, p205.

One striking feature ... is that the social benefits of pre-school are much broader than reduced recidivism, including increased employment and earnings, reduced teenage pregnancy and higher rates of high school graduation and tertiary education.[275]

Identified characteristics of successful pre-school programs include:

- staff who have adequate early childhood training and who maintain a curriculum focus through in-service training;
- use of a validated curriculum model, derived from principles of child development that permits children to plan or choose their own activities;
- support mechanisms to support the curriculum model - daily team planning and evaluation and curriculum leadership by the administration;
- a ratio of teaching staff to children of about 1:8 and a classroom size of about 16; and
- collaboration between teaching staff and parents as partners, with teachers as child development experts and parents as experts on their own children.

Any such program introduced for Aboriginal pre-schoolers would need to be customised relevant to their cultural and social needs.

A pilot program aimed at increasing the well-being of Aboriginal children up to the age of five has been introduced in Western Australia. The Best Start Program co-ordinates the activities of three WA government departments (Family and Children's Services, Health and Education) with the intention of improving access for Aboriginal children to four and five year old education programs and to link existing programs of child development. Promotion of health care, early socialisation, family support and early child educational and developmental needs are to spearhead the program. The initiative is welcomed, although assessment of the program is yet to be undertaken.

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[275] Potas, I., Vining, A., and Wilson, P., *Young People and Crime*, Australian Institute of Criminology, Canberra, 1990, p56.

Recommendation 65

That the State government establish a Task Force which has a majority of Aboriginal representation to assess the Best Start program and if necessary, recommend culturally appropriate changes.

Conclusion

The continuing disadvantage of Aborigines in the education system is a legacy of the past injustices against Aboriginal people and society including the separation of children from their families. Through the policies for the removal of children, Aboriginal children were placed in alien environments, away from their families and culture. They were made to learn what was of little relevance to their culture. Many were ill-prepared for life outside the confines of missions or institutions. Others did not develop the necessary educational skills needed for the "outside" world.

Educational programs run and funded by the Commonwealth and State governments are numerous. Although it is important to evaluate the relevance of these programs, it was not the purpose of this chapter to identify and evaluate every program of service available. Performance indicators and evaluation should be built in to every program affecting Aboriginal people. The purpose of this chapter was to identify some general themes and issues which are currently neglected or require attention in relation to Aboriginal eduction.

The pre-school period is recognised increasingly as an important formative period in a child's development. Support and educative programs for children and parents at this stage are crucial for the child's development and must be encouraged. Programs for Aboriginal pre-schoolers which will enhance literacy and numeracy skills to facilitate rapid learning in the early years of compulsory education should be developed. Pre-school support through the Commonwealth Aboriginal Student Support and Parent Awareness Program is important. Such grass-roots initiatives which bring parents and community closer to the child's educative and development needs are extremely beneficial if operated properly.

It is encouraging that the Education Department of Western Australia has committed itself to improving the learning outcomes of Aboriginal students. The Education Department's program and policy is placed firmly within the context of the National Aboriginal and Torres Strait Islander Education Policy. The national policy is, it is claimed, strongly influenced by the RCIADIC.[276] While this approach is to be commended, it is not enough. The recommendations of the RCIADIC must be adequately and appropriately responded to and implemented. Aboriginal participation at all levels of the education system from the student to decision-makers, must occur if there is to be an improvement in meeting the needs and desires of the Aboriginal students and communities.

It is imperative that the recommendations in this chapter are taken up by Commonwealth and State authorities. If Aborigines are to move away from feelings of alienation from culture and a continued cycle of poverty and its associated effects, appropriate and relevant education is one of the keys. Further, education of non-Aboriginal students and the police force is needed to help reconcile the Aboriginal and non-Aboriginal populations and reduce racism. This education also must include discussion on the history and culture of Aboriginal society, and the assimilation policies and removal practices of the past which have caused so much damage to the Aboriginal population and continue to do.

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276 Education Department of Western Australia, *Annual Report*, Education Department of Western Australia, Perth, 1993-94, p71.

Rosemary's Story

I was born in 1951 at Wagin. I have seven younger brothers and sisters.

I think I was about four years of age when I was taken away from my mother. At the time I think we were living at the Katanning Native Reserve. I don't remember too much about that day. All I remember is being in a big black car and I had two of my brothers with me.

We were taken to Gnowangerup Mission. My mother used to come and see me at the mission when I was very young. But then the visits stopped. I am not sure how old I was when my mother stopped seeing me, but I don't think I would have been much more than six or seven. I never saw my mother again until I was 19. That was only when I went looking for her. I saw her again when I was in my 20s and had my own children. I remember asking her why she stopped visiting. She said that the missionaries had told her to stop visiting. She said that they were saying that her visits were upsetting me and my brothers because we didn't know who she was. If this is what the missionaries were telling her, it was a load of rubbish. So you can imagine how hurt I still feel about all that period of time when I didn't see my mother.

I also asked my mother whether she ever used to think about us. She replied in one sentence which will always stick in my mind, 'a mother never forgets her child'. This is very different to what we were being told at the mission. At the mission we were told that we were there because our parents didn't look after us and we should be thankful that the missionaries were looking after us. I think that is probably one of the biggest hang-ups I have about being at Gnowangerup Mission and later, Roelands Mission that the missions prevented my mother from seeing me and my brothers. That hang-up has never gone away.

Gnowangerup Mission closed in 1965. We were sent to Roelands Mission. I was about 14 years old. I stayed at Roelands Mission until I turned 17.

Mission life was very demanding and uncaring. There was no love around the place. There was just discipline and hard work. We were up very early to do our chores, then we had breakfast, then off to school and when we came home we did more chores. This may seem fair enough, but when you are very young it is very demanding. When we were only eight or nine years of age we were feeding, cleaning and washing babies who were down at the nursery.

At Gnowangerup Mission we went to the local school. We wore distinctive uniforms which meant that everyone knew we were from the mission. We always felt different at the school. I remember at lunch times I used to see my cousin walking across the oval to go back to the reserve. I would be very envious as he seemed to have freedom that I didn't have. I couldn't even go down to the shops. I would envy those children who were allowed to be free and roam around town

after school. Us mission kids were put straight on the mission bus and sent back to the mission to do our chores.

Us mission kids did have some good times among ourselves. However, there was a lot of cruelty by the missionaries. I used to hate seeing other children being belted by the missionaries. I hated any form of cruelty. I felt so frustrated because there was nothing I could do to stop it. We mission kids had to hold in our feelings, if we didn't we would suffer from physical abuse.

The physical abuse was quite severe. I remember one time that me and another girl stole two potatoes because we were so hungry. We cooked and ate the potatoes. Another mission kid told the superintendent of the mission that we had stolen potatoes. The superintendent gave us 13 cuts on our hands. The next day at school I couldn't hold my pen. When my teacher realised what had happened he took me and my friend to the headmaster. We told the headmaster the story. I don't know if he did anything about it.

When I was about six years of age I experienced sexual abuse at Gnowangerup Mission. One missionary tried to penetrate me but he was unsuccessful. However, he did play around with my genitals. This still affects me very much today. I am trying as much as possible to block it out.

At both Roelands Missions and Gnowangerup Mission we had a lot of religion thrown at us. It has turned me off religion for life.

Going to Roelands Mission was very strange. I couldn't get used to it. I had come from Gnowangerup which was a flat sheep and wheat farming area and now I was up in a hilly dairy farming area. I felt very alienated. To make things worse when I went to Roelands Mission I was separated from the friends I made at Gnowangerup Mission. When Gnowangerup Mission closed the kids were scattered around the state.

I suffered physical abuse at Roelands Mission. When I was 14 I remember that I and some others got into trouble. One of the missionaries or house parents came up and shook me vigorously. He said to take my pants off, go to the bed and he was going to smack me. It wasn't the pain of being smacked that really hurt, it was the embarrassment. Can you imagine a 14 year old girl having to remove her pants to a grown male?

When I was at Roelands Mission I went to Harvey High School. I liked it at the high school. When I finished third year, the headmaster and some of the teachers tried to encourage me to stay on. I knew that if I stayed on at school I would have to stay at Roelands Mission. There was no way I was going to do that. I think being at the mission suppressed my academic development. In primary school at Gnowangerup I was put into the top class. Because the other Nyoongar kids were in the bottom class I was very upset at being separated from them. I had to cry and plead with the headmaster to be put down to that class. I suppose

I didn't really get the most out of my schooling.

When I left Roelands Mission at 17 I went to work as a domestic on a dairy farm at Dardanup. They trained us to be domestics, but I believe I had the academic ability to do a lot more. After I left the job as a domestic, I came up to Perth. Within a few days I had a job as a clerk.

I think what happened to me at the mission and the separation from my mother has affected me in my relationship with men. I seem to be more accepting of Nyoongar men in the sense that I sympathise with them because I know that they went through a lot of the same things I went through. I married a New Zealander but he didn't really seem to understand what I went through.

I have always wanted to search out my relatives. You want to be accepted by them because you have been through a life of rejection and away from Aboriginal culture. I think a big problem with myself and other mission kids is that we were caught between the white society and the Aboriginal society, but don't really fit in either.

I sought counselling to try and help me overcome a lot of the feelings I carry with me from my childhood, but it doesn't seem to really help. The counselling I received has not been from people that know much about Aboriginal culture or what we went through at the mission.

I find that as I am getting older there are emotions that are arising up in me that I never thought I had. They just seem to spring up very quickly. It has created problems with my employment. The last two jobs I had, I have left, partly because I haven't been able to accept authority, which I believe is a reaction to the way we were treated in the missions.

Last year I was working for the Department of Employment, Education and Training. I couldn't cope with one of the supervisors there. I couldn't accept the way he spoke to me. It was in a very uncaring and patronising manner. No one at work seemed to understand why I was getting so upset. I think you would have to be one of the children at the mission to understand.

I think what prevents me from holding a job is basically the hang-ups I have from the mission days. I can't accept authority. I know you need authority but I react in a negative way to it. It really comes down to a certain tone that people in authority use. I think I link it back to the mission days where there was no compassion or feeling. If someone uses a very authoritarian voice with me, my mind races back to the mission days and all the sad memories there.

I think the biggest hang-up I have is the fact that I didn't get to see my mum for all those years and that the missionaries told me that my mother didn't want to see me. I had this great feeling of rejection which I still have.

CHAPTER 10

LOCAL GOVERNMENT

Introduction

All of the issues which have been treated separately in this submission, for example, health, housing, education, care for the aged and the children, are affected in some way by local government authorities.

The problems associated with service provision to Aboriginal people by local government are complicated. They stem from:

- the legacy of past legislative and administrative discrimination;
- the division of responsibilities for Aboriginal communities between three levels of government;
- resistance to change by each bureaucratic level; and
- an absence of any clear overarching plan for development of, or detailed exposition of the responsibilities of each of the players in the local government/Aboriginal community arena.

It is crucial that the delivery of services to Aboriginal people and communities by local government be properly addressed. The total lack of services in some areas, and the inferior standard of those provided in others, continue to be unacceptable. This affects the entire Aboriginal community, not only those Aboriginal people who are victims of the assimilation policy.

A review of the limited literature on local government service provision to Aboriginal people in Western Australia identified a number of recurring themes. These include:

- that there continues to be insufficient, or a total absence of local government activity in relation to service delivery to Aboriginal communities, resulting in Aboriginal people, particularly in remote and rural areas not receiving an equitable share of the services provided;
- that there is not enough communication, co-operation or co-ordination between service providers, consumers, government and relevant managing bodies;
- that legislation governing the area is prolific, convoluted, verbose and complicated;
- that the numerous bodies involved in the area (Aboriginal and non-Aboriginal) are often duplicating services, and this is damaging relations and attitudes, and squandering precious funds; and
- that a development policy and clear lines of responsibility are required in order for progress to be made.

Clearly there are some major problems to be solved in relation to Aboriginal people and their treatment by local government. These problems go to the root of the Aboriginal condition and the processes of empowerment and self-determination of Aboriginal peoples.

The diversity of municipalities in Western Australia is pronounced, with little consistency in regard to population size, infrastructure and attitudes to service provision or change. As a result, local government attitudes to Aboriginal people and their needs differ greatly. Some do not recognise Aboriginal people as a distinct group with particular needs. They do not engage Aboriginal people in identifying and remedying problems specific to Aboriginal communities, and so continue to discourage new developmental relationships with Aboriginal people.

In the light of recent reports and the national tenor of reconciliation and Aboriginal self-determination, certain local government attitudes must change. Urgent reforms and initiatives must be implemented in order to adequately respond to ongoing discrimination and disadvantage experienced by Aboriginal people.

Owing to the absence of any assessment of individual local government initiatives in Aboriginal service provision, the ALSWA surveyed municipal councils in Western Australia, by way of questionnaire, in January 1996. Although the survey could not be claimed as comprehensive, the responses did indicate some trends and glaring examples of municipalities being misinformed and under-informed. These are discussed below.

Overview

Although local government and Aboriginal communities have co-existed for many years, it has only been recently that co-operative and development relationships have been recognised as desirable. Traditionally, there has been little or no specific local government interaction with Aboriginal communities.

Most Aboriginal communities have backgrounds as missions, non-Aboriginal stations or ration depots. Prior to management by Aboriginal community councils in the 1970s, responsibility for Aboriginal communities rested with State and Commonwealth governments or the missions. Accordingly, it is only recently that Aboriginal communities have become players in the local government system. The definition and establishment of new roles for each group is one source of tension in local government/Aboriginal community relations.

Aboriginal people live within a range of cultural terrains. They include "traditionally oriented communities", "rural non-traditional communities", "urban communities" and "urban dispersed".[277] Devising and applying reforms and initiatives to such a diverse cultural group is yet

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[277] Refer to Aziz, E., *Enhancing Child Welfare in Aboriginal Communities*, Department for Community Services, Perth, 1989, which identified the four category framework:

Category 1 — *Traditionally Oriented Communities* - people who have the greatest geographical and social separation from the rest of Australian society with some degree of economic connection, e.g. homeland centres, outstations and traditionally orientated communities.

Category II — *Rural Non-Traditional Communities* - Aboriginal people who have considerable social and geographic separation from the rest of Australian society but are not as highly traditionally oriented as category 1.

Category III — *Urban Communities* - These people are highly geographically and economically embedded in non-traditional society but because of their community social organisation they have considerable social separation. Less traditionally oriented

another complication to overcome. Aboriginal cultural diversity often frustrates governmental policies which attempt to cater for Aboriginal people.

Aboriginal needs must be identified from the perspectives of Aboriginal people. Aboriginal voices must be heard in all their guises, as diverse and distinct if the requirements and aspirations of Aboriginal people are to be properly ascertained. Responses must be based on the real needs and not perceived needs of Aboriginal people. Aboriginal people must feel comfortable participating in and implementing the responses themselves. This requires as much Aboriginal participation as possible in both identifying and defining the issues and developing and formulating change for Aboriginal society.

Although Aboriginal needs are prevalent in municipalities which have an Aboriginal population, and must be addressed accordingly, those constituencies (usually rural or rural/urban) which have established Aboriginal communities within their boundaries, need to recognise and respond to particular issues that pertain to them. The social and physical isolation of many Aboriginal communities is but one such issue. The themes of the literature review identified in the introduction can uniformly be applied to Aboriginal communities' relations with local government in Western Australia.

The major area of ongoing concern in local government service provision is the inequity between standards of service provision and infrastructure in Aboriginal and non-Aboriginal communities. This is a problem acknowledged as much by local, state and Commonwealth governments, as by Aboriginal communities themselves.

A number of the recommendations of the RCIADIC deal specifically with, or target local government service provisions, development and reform in regards to Aboriginal communities. These recommendations, (77, 188, 192, 196, 198, 199, 200, 201, 202 and 204), respond to the findings of the RCIADIC that:

> *Aboriginal communities frequently do not receive services or if they do those services are at a far lower level than that provided to non-Aboriginal settlements by local governmet.*[278]

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[278] Dodson, P., *op.cit.*, Vol. 2, p446.

The general thrust of the RCIADIC recommendations is to encourage the development of adequate localised services to Aboriginal people, particularly in remote and isolated locations. The diffusion of services from central to local government would improve the relationship between service groups and "clients", increase the appropriateness and effectiveness of services provided, and improve communication and dialogue between service providers and service users. The development of local government service provision would also promote the involvement of local Aboriginal groups and communities in their own service provision. This is considered a key step in the process of Aboriginal self-determination and empowerment.

Despite the recommendations of the RCIADIC, little has improved in the provision of basic services to many Aboriginal communities. Deficiencies include the provision of fresh water, waste disposal and electricity. Other municipal services which demand attention include health services, construction and maintenance of access roads and buildings, and accessible transport facilities.

In response it has been recommended that, as a priority, a process of "normalisation" be undertaken in relation to essential service provision to remote Aboriginal communities.[279] This process aims to ensure that services to Aboriginal communities are delivered and maintained effectively and equitably, in the same way they are provided to non-Aboriginal communities. This is a matter of urgency.

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[279] Hames, K., *Report of the Chief Executive Working Party on Essential Services to Aboriginal Communities*, Western Australia Government Printer, Perth, 1995, attachment 3.

Recommendation 66

That Local governments make the "normalisation" of essential service provision for all Aboriginal communities a priority.

Government Responsibilities and Roles

Services to Aboriginal communities in Western Australia are provided, to varying degrees, by all three levels of government. The process of understanding who is responsible for any part of, or all Aboriginal community service provisions is thus complicated.

The Commonwealth government accepts that it has a particular responsibility to the Aboriginal people of Australia.[280] This obligation arose out of the 1967 referendum which, in the view of Aboriginal people, gave the right to the Commonwealth government to act in their interests. This responsibility has always been exercised with appreciation of State sensitivities and preferences. Consequently, the Commonwealth government has rarely been able to dominate this area. To quote Dodson:

> *Broadly speaking, Aboriginal affairs has been caught up with so many other major legal, economic and political considerations, that Aboriginal people as the indigenous race of this country, are either marginalised, mainstreamed, excluded or denied recognition.*[281]

Certainly this goes part way in explaining why Aboriginal people and communities continue to be disadvantaged by current political arrangements which are supposed to represent them. The different sources of service provision and funding blur the lines of responsibility and accountability resulting in a lack of co-ordination, and often, duplication of services. These are real and problematic issues.

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280 Council for Australian Governments (endorsed), *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*, AGPS, Canberra, 1993, p9.

281 Dodson P., *op.cit.*, Vol. 1, p454.

The WAMA acknowledges that local governments have a responsibility to all permanent residents within their boundaries. However, there appears to be no provision in the *Local Government Act 1960* (WA) specifying the duties of local government in terms of being under an obligation to provide services and facilities to citizens. Nor is there a provision guiding councils in deciding what facilities should or must be provided.[282] Somewhat ironically, the long title of the Act provides loosely the duty "to provide for the Good Rule and Government, Convenience, Comfort and Safety of persons in Municipal Districts".

Further, there is no express direction in the Act that local government have regard to the principles of the *Equal Opportunity Act 1984* (WA). This is despite Sections 4 and 46 of the *Equal Opportunity Act 1984* (WA) stating that it is unlawful for the local government or public authority who provides services, to discriminate against another person on the grounds of the other person's race, by refusing to provide the other person with services.

Hames reported that in one case, a local government took the view that Aboriginal ownership of land absolved them of responsibility.[283] The issue of ownership of land is central to the identification of responsibility for Aboriginal communities. Under the *Local Government Act 1960* (WA) municipalities are only under an obligation to provide services for those occupying rateable land. Land as part of the holdings vested in the Aboriginal Lands Trust has traditionally been considered private and so, it is argued, has absolved government agencies from supplying services. Other Aboriginal communities are founded on Crown land and as such are, it is argued, exempt from the *Local Government Act 1960* (WA) as well as, for example, the *Health Act 1911* (WA). In the Northern Territory, arrangements have been made to ensure that public authorities provide services to communities holding inalienable freehold title to their land. No such arrangements have been made in Western Australia.

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282 Hanbury, B., *Aboriginal Local Government Legal Issues Project*, Department of Local Government, Perth, 1993, p39.

283 Hames, K., *op.cit.*, p14.

In relation to large, permanently established remote Aboriginal communities and town reserve communities, the State government has primary responsibility. The Commonwealth government is currently responsible for outstation Aboriginal communities.

State utilities which play an important role in the provision of services to Aboriginal people include the Western Australian Water Authority, Homeswest, Western Power and the Main Roads Department. The relationships between the levels of government, their agencies and each player's respective duties and responsibilities to Aboriginal people are set out in a number of verbose, technical and complicated pieces of legislation, none of which facilitate understanding or access. Although it is unlikely that local governments could be sued for breach of statutory duty (considering the imprecise provision of duties and discretionary powers under the *Local Government Act 1960* (WA)), the State government may legally be liable for inadequate provision of services or facilities to Aboriginal communities, for example under the *Housing Act 1980* (WA) the *Housing Agreement (Commonwealth and State) Act 1990* (Cth) the *Equal Opportunity Act 1984* (WA) and the *Racial Discrimination Act* 1975 (Cth).[284]

Recommendation 67

That Local, State and Commonwealth governments recognise that self-government is a goal for Aboriginal communities, particularly those in remote and rural locations, and that all levels of government implement policies and practices which reflect this recognition.

The Example of Environmental Health Care Provision

A situation which graphically represents some of the difficulties which confront local governments and inadequacies experienced by Aboriginal communities is that of health care provision. The *Health Act 1911* (WA) is the primary legislative power available to the State in ensuring adequate environmental protection of public health. The provisions of the Act are to be carried out and enforced by local governments under Section 26 of the Act.[285]

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284 Refer to chapter 5 for discussion of the last two Acts mentioned.

285 *Health Act 1911* (WA) Section 26 - "Every local authority is hereby authorised and directed to carry out within its district the provisions of this Act and the regulations, by-laws, and orders made thereunder".

D'Arcy, Holman and Jolley identify four reasons used by local municipalities to absolve themselves from extending environmental health services to Aboriginal communities:

- the Aboriginal communities do not pay rates;
- that as Aboriginal communities are generally on Crown land, they are funded by government and are therefore exempt from the *Health Act 1911* (WA);
- that local government is not funded to provide the services that are required; and
- that in some instances, Aboriginal communities and the agencies of government concerned with their welfare have discouraged the involvement of local government. (In addition, historically many Aboriginal communities developed under pastoral or mission administration, and this has resulted in these communities moving along a path which is quite separate from municipal administration).

D'Arcy, Holman and Jolley go on to state, "A consensus is now emerging that the four arguments outlined above are no longer tenable".[286]

Some of the arguments against the attitudes outlined above have already been briefly touched on, such as the provision of funding under the Local Government Grants Commission which is to facilitate municipalities in achieving a level of service provision to its population which is not less than anywhere else in the State (that is, horizontal fiscal equalisation on the distribution of resources for *all* constituents in the municipality's boundaries). Others are more problematic. For example, some Aboriginal communities reside on Crown land, others do not. Arguably Crown land is not exempt from the *Health Act 1911* (WA) except where specifically provided. If such land is exempt, do those who reside on Crown land automatically forfeit their rights to service provision? Certainly those who do not reside on Crown land still have their rights to service. But what of rateability? Which Act is to prevail in the provision of health services to Aboriginal people? Answers to such questions are well canvassed by Barker in his report, "Responsibilities of Local Health Authorities and Legal Entitlements of Aboriginal Communities to Environmental Health Services".[287]

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286 D'Arcy, C., Holman, J., and Jolley, W., *op.cit.*, pp1-2.

287 Barker, M., *Responsibilities of Local Health Authorities and Legal Entitlements of Aboriginal Communities to Environmental Health Services*, Working Party on Local Health Authority Services to Aboriginal Communities, Perth, 1994, pp43-71.

The responsibilities of local government are substantial in relation to environmental health care and safety, and are underwritten by the actions of the Executive Director, Public Health. In 1992, under Section 15 of the *Health Act 1911* (WA), the Executive Director, Public Health, ordered the Shire of East Kimberley to comply with and enforce the Act in regards to the Kalumbaru Aboriginal community. The Executive Director, Public Health went on to advise WAMA that the reserve powers of the *Health Act 1911* (WA) would be used to enforce compliance with its provisions if required.

Environmental health responsibilities encompass design and construction standards, monitoring and surveillance, and means for remediation of environmental health problems. The D'Arcy, Holman and Jolley report[288] listed nine services to which such standards should be applied:

- building health and safety;
- drinking water protection;
- food protection;
- sewerage and effluent management;
- refuse management;
- recreational waters protection;
- animal and vector control;
- outbreak investigation; and
- general environmental health.

[288] D'Arcy, C., Holman, J., and Jolley, W., *op.cit.*

These essential services are based on both mandatory and discretionary legislative provisions contained in the *Health Act 1911* (WA), *Local Government Act 1960* (WA), and *Building Regulations Act 1989* (WA), and generally accepted and widely practised community standards.

The absence of adequate implementation of these Acts in Aboriginal communities has had some serious consequences. These include inadequate design and construction of buildings and sanitary facilities which represent a serious health threat, undetected and unreported environmental health problems because of a lack of surveillance services, and delayed or non-existent action to remedy the problems which do exist as Environmental Health Workers and communities have inadequate access to the technical and professional supports of local government.

> *Aboriginal people throughout the State of Western Australia and particularly in remote areas of the State suffer an inordinately high burden of illness directly attributable to poor conditions of environmental health and sanitation. While the mortality from these conditions has improved considerably, due to better and more accessible clinical services, the actual incidence of the conditions as measured by outpatient attendances and hospital admissions has not declined to any significant degree.*[289]

As is obvious from the brief overview, adequate provision of health services to Aboriginal communities demands a collaborative and intergovernmental approach between local government, AAD, WAMA, ATSIC and the Health Department of Western Australia, government and private utilities, Aboriginal organisations and the communities themselves. This is a mammoth task, but one that can be no longer be avoided. Without an adequate, unified response, serious Aboriginal health problems will persist. As Barker rightly states:

> *It goes without saying that unless Federal and State and Local government bodies actually consult each other and co-operate in the establishment of plans and programs for the improvement of environmental health conditions in Aboriginal communities within the State, improvements will not occur as speedily and appropriately as they should, nor in the most cost-efficient manner ... Co-operative community planning for the benefit of Aboriginal communities ... cannot be overstated ... [and] must be considered basic ... There is only isolated*

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[289] *Ibid*, p1.

evidence of such co-operative regional planning at this stage. Local and community development planning is still in its infancy.[290]

A key response to Aboriginal community health issues is that town and environmental planning be initiated on a one to three year basis, dealing with economic, social and cultural aspects of community life.[291] Further, D'Arcy, Holman and Jolley call for enforcement of Section 38 of the *Health Act 1911* (WA) by requiring each municipality to submit an annual report concerning the living environments of all Aboriginal communities within their respective jurisdictions. Such information should be collated and presented to Parliament as a report on Aboriginal environmental health in this State.[292] Further, local governments should assume immediate responsibility for the Aboriginal Environmental Health Worker Program and its enhancement of direct service provision to Aboriginal communities. Above all, however, Aboriginal people must be the dominant decision-maker in determining the delivery of services. This is necessary to the principle of self-determination.

Recommendation 68

That authorities charged with Local government responsibilities widely consult Aboriginal people on all matters affecting them.

Health care and safety is a major concern of Aboriginal people, particularly those living in isolated communities. The impact of inadequate health on other aspects of Aboriginal life is considerable. Welfare, education and employment are all affected negatively. However, health is only one of a multitude of issues requiring attention in regards to Aboriginal people and local government. Consider the complexity of the health issues as they pertain to Aboriginal communities, and then consider that level of complexity and required consideration transposed on to all the areas of societal management in which the government currently participates. So far, only health needs

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290 Barker, M., *op.cit.*, pp86-87.

291 *Ibid*, p(vi).

292 D'Arcy, C., Holman, J., and Jolley, W., *op.cit.*, p47.

as they pertain to "mainstream" citizens have been considered. Aboriginal historical, cultural and social considerations are still to be added to this "equation" of Aboriginal community needs.

Developments

A number of municipal services to Aboriginal communities are often provided for by CDEP, funded by ATSIC. The CDEP allows Aboriginal people to receive the equivalent of unemployment benefits while engaged in projects of value to their community. Whether the CDEP scheme provides benefits to Aboriginal people is highly debatable. It has been argued that the CDEP scheme which was commenced in 1977 provided a series of benefits to Aboriginal communities, including the stimulation of economic development, employment, self-management and improvements in municipal services, schooling, community health and housing and self-esteem.[293] It should be noted that recommendation 319b of the RCIADIC stated that the scheme should not be used as a:

> *substitute for the provision at an adequate level of municipal and other social services, unless funds equivalent to those which would have been provided in respect of municipal and social services are provided to supplement the co-operation of CDEP.*[294]

Assessment of CDEP operations in communities in Western Australia, to gauge their success and their ability to provide on-going and planned development, should be undertaken. If the possible negative effects can be properly addressed,[295] and if the CDEP is generally successful in the provision of services to Aboriginal communities, the CDEP scheme could be viewed as providing a model for autonomous service delivery to Aboriginal communities. This would further advance the cause of Aboriginal self-management, with the possibility of facilitating self-government (under the *Aboriginal Councils and Associations Act 1976* (Cth)). However, it should be noted that alternative structures of management are not generally favoured by local governments, their

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293 Hanbury, B., *op.cit.*, p17.

294 Johnston, E., *op.cit.*, Vol. 5, pp140-141.

295 For example, substitute for cheap labour, discriminatory effects, etc.

peak organisations or the Department of Local Government.[296]

The role of Aboriginal Resource Agencies (funded by ATSIC, and roughly analogous to local governments) should also be reviewed. They provide, amongst other things, a contact point between service delivery agencies and communities, co-ordination of funding applications and a limited amount of essential service delivery to remote communities.

A number of positive developments were reported by a study undertaken for the Department of Local Government in 1993 (the *Allbrook and Kickett Report*).[297] These include:

- the employment of officers with responsibilities to work with Aboriginal people;
- a network of Aboriginal Environmental Health Officers established by the State Health Department who can operate as a conduit, linking the needs of Aboriginal communities and the Shire;
- mobile polling facilities, funded by the Commonwealth Electoral Commission;
- ATSIC funded conferences to bring together local government and Aboriginal community members to identify mutual concerns; and
- the adoption in 1992 by WAMA of an Aboriginal Affairs Policy which commits local government to seek ways of developing better relationships with Aboriginal people.[298]

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296 Hanbury, B., *op.cit.*, p21.

297 Allbrook, M., and Kickett, D., *Local Government Service Delivery to Aboriginal Communities*, Department of Local Government, Perth, 1994.

298 *Ibid*, p21.

However, the Report concluded that:

> *While service delivery to Aboriginal town residents appears to be on the same basis as for others it is clear that ... few services are delivered by local government outside the gazetted townships, and those that are delivered are inferior to services to town based residents.*[299]

Allbrook and Kickett found "[a] clear ... lack of involvement and participation by Aboriginal people in the affairs of local government".[300]

It is interesting to note that there is no legislative connection between the Aboriginal Affairs Planning Authority (now the AAD), its Co-ordinating Committee and local government service providers. This is despite the Department being the peak body of Aboriginal representation and holding responsibility for the promotion of Aboriginal well-being. From the top down, the relations between Aborigines and local government, particularly in the Pilbara and Kimberley regions, often deteriorate. At a legislative level, under the *Local Government Act 1960* (WA), there is no requirement that local governments have regular on-going consultation with remote communities.

The *Allbrook and Kickett Report* is now two years old and the status of recent and current developments is largely unknown. A comprehensive assessment of the relations between differing governmental and funded agencies needs to be undertaken in order to effectively plan for the future, and to ensure that available funds are used in the best possible way, organisational structures facilitate the participation and inclusion of Aboriginal people, and that organisational functions are not being duplicated.

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299 *Ibid*, p68.

300 *Ibid*, p71.

Recommendation 69

That strong consultative relationships be developed between Local, State and Commonwealth governments and Aboriginal communities and organisations regarding service provision to Aboriginal people.

Funding

> *When ATSIC started we were told that Aboriginal people would be in control of funding. But ATSIC cannot do everything, and we still have all these government departments around doing their own thing and not talking to each other.*[301]

Funding is intimately linked to government action and perceived responsibility. Funding to local governments is provided by both State and Commonwealth governments. At the same time rates are collected by the municipalities themselves. A third complicating factor is that Aboriginal communities can be funded by State or Commonwealth governments.

Considering funding and resource constraints, responsibility for, and allocation of services to remote Aboriginal communities is considered a controversial issue.[302] Inadequate funding often hampers service provision to isolated and remote settlements. Nevertheless, remote non-Aboriginal townships are assured of essential service provision. As Dodson points out:

> *Despite a number of myths which suggest that government agencies are not receiving money for the provision of services to Aboriginal people, it needs to be noted that money paid into local government comes from the Grants Commission. This money is based on the actual number of people within a local government area ... in many areas that contains a high number of Aboriginal constituents. Hence local government does have a responsibility and a means to assist with the provision of services to non-Aboriginal constituents.*[303]

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301 Consultation, Kimberley, July, 1993, in Allbrook , M., and Kickett, D., *op.cit.*, p.23.

302 *Ibid*, p1.

303 Dodson, P., *op.cit.*, Vol. 1, 1991, p447.

Funding remains a key issue in the provision of services particularly to remote and isolated communities. In 1986 the *National Inquiry into Local Government Finance* reported:

> *Guidelines [covering the provision of Commonwealth assistance to local government in areas of significant Aboriginal population] should embody principles of equalisation that ensure local government is accountable for providing both services and employment opportunities to the Aboriginal population of the area.*[304]

Inadequate funding was cited as a major cause of inequity. This downplays the idea of discrimination in local government decisions. However, local governments remain orientated towards the needs of town dwellers and rate payers, categories which exclude many Aboriginal people.

Recommendation 70

That the Commonwealth and State governments jointly guarantee that adequate funding is directed to Local government and Aboriginal community needs.

Self-Government

An attempt at granting limited governance powers to Aboriginal communities was instigated under the *Aboriginal Communities Act 1979* (WA). The Act allowed Aboriginal communities discretionary legal control over certain aspects of community interaction.

The Act has operated with considerable difficulty. A lack of understanding by Aborigines of the Act inhibited initial effective implementation of its powers. This highlights the need for Aboriginal people to be involved at all stages of legal and policy development on issues directly affecting them. Enforcement has been a continuing problematic area. Wardens have been subsequently introduced to patrol community by-laws, although the warden system itself appears to have fallen

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[304] Self, P., *National Inquiry into Local Government Finance*, AGPS, Canberra, 1985, recommendation 107.

into dysfunction. As a result problems of punishment have arisen. Appropriate and enforceable punishments and sentences need to be developed if this attempt at Aboriginal self-management is to succeed. No provisions are contained in the Act that regulate, police or aid the community by-laws which each community creates.

Aboriginal people do want to control differing aspects of their lives, such as crime and disorder within their communities. However, Aboriginal autonomy needs to be placed in a developmental and supportive framework. Co-operative and supportive government and non-government bodies need to be available and accessible to Aboriginal people in any such process. If inactivity in the area of service provision to Aboriginal communities continues, the need may arise to accelerate the process of granting Aboriginal local government, where appropriate, the legislative framework which has been in place since 1976.[305] The *Aboriginal Councils and Associations Act 1976* (WA) provides for the setting up of Aboriginal corporations and councils. Over 2,000 Aboriginal groups have incorporated themselves under the Act, but as yet only Ngaanyatjarraku Shire has been incorporated as a local council.

Recommendation 71

That Local, State and Commonwealth governments recognise that the ultimate form of self-determination for Aboriginal people is self-government.

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305 *Aboriginal Councils and Associations Act 1976* (WA) - the Act endeavours to provide an alternative to local government for remote communities in that if the local authority is not providing the services that local government should be, then the community may be able to do so themselves. Co-operation between local government and the Associations, although not provided for in the Act, would be essential for the transfer of expertise, efficient use of resources and to ensure there was no duplication of services. Further, the *Aboriginal Communities Act 1979* (WA) allows Aboriginal "communities" (as designated by the Minister) to make by-laws that are in accordance with the constitution of the "community", to have application within the boundaries of the "community". The Act's affect is limited to matters of community order, but this does provide for limited self-government.

The *Aboriginal Councils and Associations Act 1976* (WA) is currently under review by the Australian Institute of Aboriginal and Torres Strait Islander Studies. Two principal areas of inquiry concern accountability and the establishment of local Aboriginal governance.[306]

In 1985 a Commonwealth report recommended:

> *The Commonwealth should enter into early discussion with relevant State/Territory governments aimed at encouraging the incorporation of Aboriginal townships as local governments.*[307]

Indeed the RCIADIC reported that:

> *The thrust of this report is that the elimination of disadvantage requires an end of domination and the empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.*[308]

Aboriginal aspirations to self-management within a framework of the wider community have been voiced throughout Australia. In the Northern Territory there is considerable support for autonomous Aboriginal local and regional self-government with direct links to the Commonwealth.[309]

Any moves in the direction of self-government must be instigated by Aboriginal people. Some communities may wish to remain within the mainstream of service provision. Where such a decision is made, the identity of the community should not be undermined by the way in which

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306 Institute of Aboriginal and Torres Strait Islander Studies, *Review of the Aboriginal Councils and Associations Act 1976 - Discussion Paper*, Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1995, p10.

307 Miller, M., *Commonwealth Committee of Review into Aboriginal Employment and Training Programs*, AGPS, Canberra, 1985, recommendation 73.

308 Johnston, E., *op.cit.*, Vol. 1, 1991, p15.

309 McKenzie, J., "Recognition of Aboriginal Customary Law", *Law School Journal*, June, 1993, p38.

services are provided to non-Aboriginal Australians. As self-management is only just being seriously considered by the various governments, the issue of Aboriginal community identity remains prominent.

Dodson highlighted the issue when reporting:

> *... local government matters in relation to discrete Aboriginal communities need to ensure that Aboriginal people are given a clear and fair presentation of what limited rights they may or may not exercise under a system of local government. There needs to be clear discussion about control and authority as it devolves from the upper levels of government. Aboriginal people also need to be properly informed about any consequences that may arise in relation to how particular options might impact on particular Aboriginal aspirations for self-governance.*[310]

The Canadian Model

A significant difference between the Australian Aborigines' struggle for equity and self-determination and that of the Canadian indigenous population is that, since 1982, Aboriginal rights have been recognised in the Canadian *Constitution Act* (Section 31(2)). Australian Aboriginal people have not yet been afforded such a recognition of their status as the original land-owners of Australia. Such Constitutional recognition underwrites Canadian government policies on Aboriginal affairs, the drive to provide a more equitable environment for Aboriginal people and acknowledges the dignity, history and rights of indigenous people.

It has been long recognised in Canada that no single model of self-government could meet the needs of all Aboriginal people. This should be similarly recognised by organisations working in Australia, particularly government departments.

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[310] Dodson, P., *op.cit*, Vol. 1, p450.

In 1988 the Sechelt Peoples of Canada were granted self-government under Federal legislation.[311] Prompted by the Sechelt proposal for self-government of their community, the Federal government realised the opportunity to demonstrate its commitment to Aboriginal self-determination, and its implementation. Considerable negotiations between Federal and provincial governments preceded the establishment of self-government for the indigenous tribe.

Under the Federal Act, the Sechelts have been granted almost total control of their affairs. This has included the creation of their own constitution. The arrangement attempts to replace externally imposed authority with "internally legitimised tribal authority".[312] As the Sechelt government is a Federal creation, it is not merely another municipality, but a truly independent indigenous community.

Despite the community's removal from the sphere of most provincial laws, the Sechelts have remained part of the larger local, regional and provincial community by, for example, paying taxes, negotiating with government bodies for funding and receiving benefits from local government programs.[313] The Sechelts continue to participate directly in local government institutions. Integration of the autonomous community was considered a key issue in the development of the process to self-government. The Federal government continues to monitor the Act establishing self-government. Non-indigenous peoples living within the boundaries of the Sechelt jurisdiction are afforded protection of their rights under a series of advisory boards (the inverse of the current Australian situation).

Although excluded from the enforcing of its own laws, the provincial government continues to indirectly influence the Sechelt community through *quid pro quo* financial relationships.

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311 Taylor, J., and Paget, G., "Federal/Provincial Responsibility and the Sechelt", in Hawkes, D.C., (ed), *Aboriginal Peoples and Government Responsibility*, Carleton University Press, Carleton, 1989, p297.

312 *Ibid*, p340.

313 *Ibid*, pp336-337.

From an organisational perspective, the Sechelt model appears to be well adapted and a success. Literature pertaining to the most important aspect of whether the new government meets the needs of its community has not yet been obtained. Models such as that of the Sechelt should be considered in the development of effective relationships between Aboriginal communities in Western Australia and different levels of government. There are important bodies of knowledge developing internationally that should be utilised and researched by the governments of Australia in the development of Aboriginal agendas, understanding and change. Developments in Canada, the United States and New Zealand should be keenly monitored considering the proximity of our colonial and post-colonial Aboriginal experiences.

Recommendation 72

That Local, State and Commonwealth governments facilitate the transition of identified Aboriginal communities to limited or complete self-government (or any other plan that is considered appropriate for the particular community), including any legislative reform, training, infrastructure development or provision of any other assistance that may be required.

Literature/Reports

1. Report of the Project on Remote Aboriginal Communities and Local Government[314]

The Report was instigated by the Department of Local Government of Western Australia to develop appropriate structures for local government service provision to Aboriginal communities. It cited numerous Commonwealth and State reports on local government which identified the same problems facing Aboriginal communities earlier in the 1980s.

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314 Report of the Project on Remote Aboriginal Communities and Local Government, *Remote Aboriginal Communities and Local Government*, Department of Local Government, Perth, 1989, p79.

The report which was completed in 1989, made the following recommendations:

- legislative provision that allows local government status to bodies charged with the responsibility of municipal service delivery is needed;
- equitable distribution of available Commonwealth financial assistance to local government which adequately reflects relative needs is required;
- accountability guidelines which ensure equity in service provision and participation at the local level are developed;
- representation of Aborigines on consultation and decision making committees is essential; and
- adequate budget for resourcing, training and management is needed.[315]

Seven years have passed since the Report was completed and, despite modest progress, many of the same issues continue to frustrate local government service provision to Aboriginal communities.

The Report proposed five management options that could direct the development of local government and Aboriginal community operations. The favoured option was that of traditional mainstream service provision within the existing legislative framework, but with more attention given to Aboriginal needs. This has obviously not succeeded. Another option was that Aboriginal communities may provide their own services under contract, thus ensuring enterprise, employment and autonomy. Other options were:

- the "Genera" option which required development of communities as local governments;
- the "Community Council" option whereby community councils would be delegated some of the legal and fiscal powers of a local authority; and
- the "Regional" option which envisaged the amalgamation of local authorities and Aboriginal communities to formal structures so as to benefit a region.

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315 *Ibid.*

Recommendation 1 of the Report provides that the government considers the options and adopts those most appropriate for Aboriginal communities. This recommendation appears to have received scant attention as there have been no clear directives or initiatives on the development of an appropriate relationship between Aboriginal communities and local governments in Western Australia.

2. National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders[316]

This Commitment was endorsed by the Council of Australian Governments on the 7th December 1992, following the endorsement of the Heads of Government in May 1992 to the development of a multilateral national commitment to improved outcomes. The Heads of Government also endorsed greater co-ordination of the delivery of programs and services by all levels of government to Aboriginal peoples and Torres Strait Islanders.

Sections 5.13-5.15 pertain to local government and provide generally that governments of Australia

> *agree that Local Governments will maintain their responsibilities to ensure the provision of a full range of local government services to Aboriginal peoples and Torres Strait Islanders in accordance with appropriate planning, co-ordination and funding mechanisms.*[317]

Section 6 of the Commitment outlines the formation of a planning framework, within which, it is suggested, all levels of government can best operate. The ALSWA is dismayed that there continues to be no current formal policy in relation to Aboriginal affairs. As proposed in Section 6 of the Commitment, the creation of an Aboriginal policy for each level of government would further define rights to and standards of service delivery to Aboriginal people, apportion responsibilities between levels of government, encourage the development of services and create

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316 Council for Australian Governments (endorsed), *op.cit.*

317 *Ibid*, p7.

a benchmark for assessment of implementation. The absence of a central and guiding government policy (at any level) on Aboriginal affairs is a major impediment to the development of service provision to, and the self-determination of, Aboriginal people.

3. Royal Commission into Aboriginal Deaths in Custody: Government of Western Australia Implementation Report 1995[318]

The State government reported that:

> *there has been a significant increase in consultation between Shire Councils and Aboriginal Communities during the past two years to determine project needs for the benefit of remote Aboriginal Communities.*[319]

The Department of Local Government formally encourages consultation between Aboriginal and local governments. However, it appears that such encouragement is confined to merely stating the principle.

Part of the Department's efforts in promoting Aboriginal/local government relations is to employ an Aboriginal Development Officer who provides advice to Aboriginal communities in regards to improvement of localised services, liaises and consults with other government departments, and oversees the incorporation of recommendations from Departmental, State government and local government conference reports.[320] The officer is to assist local government in the equitable planning of service delivery, particularly in non-metropolitan areas. The ALSWA welcomes this development, but believes that performance indicators for this position are required in order for the success of the role to be adequately assessed.

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318 AAD (co-ordinator), *Royal Commission into Aboriginal Deaths in Custody: Government of Western Australia Implementation Report 1995*, Western Australia Government Printer, Perth, 1995.

319 *Ibid*, p186.

320 *Ibid*, p183.

The Department of Local Government is currently planning a number of projects, for example, to improve communication processes between Aboriginal communities and local governments and address particular identified service delivery issues as they pertain to Aboriginal communities and local governments.

Despite the claim that the Department was working with WAMA to collate a local government response to the Task Force on Aboriginal Society Justice Report (the Daube Report), neither organisation could supply the ALSWA with any information on individual local government service provision or initiatives to Aboriginal communities.

The Department has not yet established Aboriginal Consultative Committees, which was one of the recommendations derived from the 1993 regional conferences.

4. Report of the Chief Executive Working Party on Essential Services to Aboriginal Communities, 1995[321]

The Report commented that the role and responsibilities of local government need to be further developed and defined. It recommends that the State government acknowledges responsibility for the normalisation of essential services to large permanently established remote Aboriginal communities and to town reserve communities. Essential services include the provision of fresh water, waste disposal and electricity. Other "municipal" services that should be provided include health services, construction and maintenance of access roads and accessible transport facilities.[322] The process of normalisation must include the development of community plans and community management supports as well as the implementation of town planning schemes.[323] The eventual goal is for service charges to be levied on individual consumers, as in non-Aboriginal communities.

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321 Hames, K., *op.cit.*

322 *Ibid*, p8.

323 Hames, K., *op.cit.*, recommendations 4, 7, 10, pp19-20.

The Report further identifies that an employment base and economic development needs to be facilitated through the training of community members to enable them to undertake routine management and maintenance of community infrastructure. Recommendation 13 states:

> *The development of Aboriginal Economic Development Strategy as recommended in the report of the Task Force on Aboriginal Social Justice. Training programs to complement capital upgrading of these communities must also be developed.*

Recommendation 73

That the State government ensure that the recommendations of the Report of the Chief Executive Working Party on Essential Services to Aboriginal communities be implemented.

The ALSWA Survey

The survey was undertaken as a result of the failure of inquiries to the AAD, the Department of Local Government, and WAMA to locate any information as to current local government service provision to Aboriginal people. The ALSWA dispatched questionnaires to all municipal bodies in Western Australia (144 questionnaires). Seventy-one responses were received as of seven days after the "due by" date (49 per cent return rate).

Statistics gleaned from the responses include:

- ninety-one per cent of responding municipalities had Aboriginal people living within their boundaries ranging from nine constituents to approximately 4,080. The percentage of municipal population that is Aboriginal ranged from zero per cent to 89 per cent. One Shire did not know if there were any Aboriginal constituents;
- of those communities who had Aboriginal constituents, 25 per cent had Aboriginal populations of over 500 people. Twelve per cent of those communities with populations greater than 500 had not applied for any Aboriginal specific funding;

- thirty-six (55 per cent of) municipalities which had an Aboriginal population stated that they did not currently assess the needs of Aboriginal people. Of those, eight (22 per cent) stated that they intended to assess Aboriginal needs in the next 12 months;
- only 51 per cent of municipalities with an Aboriginal population stated that they would promote and encourage involvement of Aboriginal peoples in existing programs in the next 12 months;
- twenty-seven per cent of municipalities responding were not aware of the availability of Aboriginal specific funding;
- sixty-eight per cent of municipalities employed Aboriginal staff, including outside workers. Eight percent of municipalities did not know if they employed Aboriginal staff;
- of those communities who employed Aboriginal staff, 73 per cent had Aboriginal employees engaged only in menial or clerical work; and
- only 24 per cent of municipalities had Aboriginal staff in administrative, counselling or managerial positions.

Responses indicated that:

- there was great diversity between municipalities, the services they provided to the community, the services they provided to Aboriginal people, their attitudes to service provision and their attitudes to service provision to Aboriginal people and communities;
- country shires tended to provide fewer services to their communities than urban shires (it appeared that some provided no services at all) This tends to suggest that country shires are more self-management orientated, relying on community organisations to provide services where needs arise. However, there were examples of extremely pro-active country municipalities;
- shires with large Aboriginal populations and urban shires tended to take into consideration Aboriginal needs and were, in principle, more sensitive to Aboriginal issues;

- there was a widespread misconception that Aboriginal people have equal access to mainstream services, and that to provide special services, and in some instances to promote Aboriginal use of existing services, was discriminatory and wrong. "This shire does not discriminate on race" was a common response amount those municipalities who did not assess Aboriginal needs, provide specific services, or promote the participation of Aboriginal people in pre-existing services provided. The concept of equality of opportunity/outcome appeared foreign to these municipalities. It would appear that such local government bodies believe that Aboriginal peoples should integrate or assimilate themselves within existing mainstream services. Such local governments apparently believe that Aboriginal people do not require catering of specific needs;
- Seventeen municipalities (24 per cent) were not aware of Aboriginal specific funding for projects and the provision of services. This is an indictment of the provision of information to local government and cooperation between departments and levels of government;
- the employment of Aboriginal people by local governments continues to be mainly in menial and outside work. Aboriginal people in decision-making and managerial positions remains low. This undoubtedly affects the way in which the needs of Aboriginal people are perceived by council members and staff. Aboriginal people can never expect equality when they remain under-represented in decision-making and management positions. Further, Aboriginal people will continue not to patronise government services if they are not culturally appropriate. Much needs to be done to develop these twin areas of Aboriginal employment - the employment of Aboriginal people and the creation of services appropriate for Aboriginal clientele/users;
- most Aboriginal specific services appeared to be in home and community care and elderly care; and
- few municipalities indicated that they were involved in any kind of capital works development for Aboriginal peoples or communities.

Aboriginal-specific funded programs identified ranged from arts projects, WAMA "reconciliation" funded projects, Commonwealth training, after-school care, rural access, employment funding, aged care, community health, Aboriginal liaison officer funding from AAD, and ATSIC Regional Councils.

One council reported that despite submitting several "well-presented" proposals for Aboriginal funding, none had yet been successful.

Some municipalities were obviously keenly aware of Aboriginal issues and pro-active in their attitude to Aboriginal people's inclusion in the community. The Shire of Ashburton, for example, undertook a study of, and formulated a health plan with the Bindi Bindi Aboriginal Community at Onslow.

The City of Gosnells recently completed drafting an Aboriginal Affairs Policy with the aim of improving Aboriginal access to the city's services and promoting greater participation. The four principles of the draft policy include that:

- *the City of Gosnells recognises that Aboriginal residents have special needs and it is committed to improving its collaboration with, and the coordination of, the agencies and Aboriginal organisations that are working to meet these needs; and*
- *the City of Gosnells accepts that Aboriginal residents must have "equity and access" (in terms of outcomes) to Council services and amenities.*[324]

Such an initiative is warmly welcomed and demonstrates the commitment and ability of one municipality to set in process a program for change. Such an attitude is a necessary precursor to any kind of constructive developmental relationship between local municipalities and Aboriginal people.

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[324] City of Gosnells, ALSWA survey response.

Comments received from the ALSWA survey included:

- need for more information on Aboriginal specific funding;
- need for more cross cultural training for Local Government;
- need for additional funding for developmental stages in programming to cover basic setting up costs;
- need more Aboriginal employees/workers;
- ATSIC advertised moneys were available for specific projects but there were so many barriers it was not worth pursuing; and
- Australian Local Government Association reconciliation money is so limited it is hardly worth applying for.

Concluding Comment

Local government and its potential impact on Aboriginal people has been sadly neglected. Local governments have a crucial role to play in the delivery of services to Aboriginal people and communities, including remote communities. It is crucial that local government, like the other stratas of government, have a genuine commitment to the delivery of services to Aboriginal people and communities. However, the crux of the matter is that Aboriginal people must be involved in the decisions as to the delivery of those services. In fact, they must control the process.

PART E

Warwick's Story

I was born in 1967 at Roebourne.

I was with my mother when they took me away. I was only about five years of age. I was crying when they took me away. I was sent to the Seventh Day Adventist Mission in Carnarvon. I kept on running away from there to go back home.

I was only at the mission for a little while. They sent me to my grandparents. I then went down to the Catherine McAuley Centre in Perth.

When I was at the McAuley Centre I was sent to foster parents in Port Hedland. I stayed there for two years. It was awful with them. We ended up in court because they were physically abusive towards me and the other foster children who were there.

After the foster parents in Port Hedland I went back to the Catherine McAuley Centre. Then I went to the Hillston Centre up in the hills. I was about 12 years of age then. I stayed at the Hillston Centre for about 18 months. It was pretty awful up there. It was like a military camp. We had to get up at 5.30 a.m. to do running, exercise, marching and so forth. While I was there, there were no Aboriginal programs or any lessons on our culture. There were quite a lot of Aboriginal children in the school.

Hillston was built on punishment and ridicule and just putting us down all of the time. There was incredible discipline. We had to go to church on Sundays. If you didn't you had to stay back and polish the floor.

There was this black room. It was all dark and there were no windows. If you did something they considered not to be right you were punished and had to stay in the room for up to two days at a time.

The food wasn't bad. It was rationed so the top table got everything; they got seconds. The middle table got food but no seconds. The no privileged table would miss out; for instance they may have got one slice of toast without any spread.

If you were confined to your cell you would have to stand up all day near to the window. If you sat down you would have to do extra exercises. We had to do so much exercise.

There was a school there, but because they were so strict on punishment you often spent more time out of school doing a punishment regime than you spent in school. As I was one of the younger people there (there were people there up to the age of 21) I was generally not physically abused as much as the other children were.

From Hillston I went to Longmore Detention Centre. I was sent to Longmore because I ran away from Hillston and committed a number of crimes, stealing and stuff like that. I committed those crimes so I would not have to go back to Hillston. By committing a crime and going on remand I was saved the experience of going back to Hillston.

I was about 12 years of age when I went to Longmore for the first time. After my stretch at Longmore I was sent back to Hillston.

I would run away again, commit a crime, back to Longmore, then back to Hillston. Then on one occasion, instead of returning to Hillston I was sent to Riverbank [Detention Centre]. I hadn't reached my 13th birthday.

I was in Riverbank a few times for short periods and then I was charged with a rape. I was about 14½ years of age when I was sent back to Riverbank for a longer period of time. When I got done for the rape charge I was imprisoned at the governor's pleasure. Because I had a long record of stealing and assault convictions I couldn't really be released on a good behaviour bond and the judge said I was too young to receive a long custodial sentence. But being in prison at the governor's pleasure has been very long.

At 16 years of age I went down to Fremantle Prison. This was my first time at Fremantle Prison and this was probably the first time I have been really scared. It was a very young age to be surrounded by all the adult prisoners. Because I was so young I basically had to do a lot of things I wouldn't have wanted to do, in order to be accepted and remain safe in the prison system.

So for most of my life I have been institutionalised. They should never have cut my family ties.

CHAPTER 11

OVER-REPRESENTATION OF ADULT ABORIGINES IN THE CRIMINAL JUSTICE SYSTEM

Introduction

The gross over-representation of Aborigines in the criminal justice system is shameful. This over involvement is the result of a number of fundamental social factors which are identified as being:

- land dispossession;
- undermining and devaluing of Aboriginal cultures;
- deliberate destruction of Aboriginal families and communities;
- racial discrimination;
- poverty; and
- social alienation.[325]

However, the intrinsic nature of the criminal justice system itself is also a major contributor to the over-representation of Aborigines in the criminal justice system. Thus it is important to address the criminal justice system itself. There is also the need to raise the general economic well-being of indigenous people to that of the non-indigenous population and improve the self-esteem, cultural identity, education opportunities, economic potential and job prospects of Aboriginal people.[326]

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325 Wilkie, M., *op.cit.*, 1991, p3.

326 Walker, J., "The Over-Representation of Aboriginal and Torres Strait Islander People in Prison", *Criminology of Australia*, August, 1994, p13.

Some of the factors identified by Wilkie are closely linked with the assimilation policies and removal practices of the past. The assimilation policies and removal practices destroyed Aboriginal families and communities, undermined Aboriginal culture, removed Aboriginal people from their land and alienated them from both Aboriginal and non-Aboriginal culture. This has made it extremely difficult for those people, the "stolen generation", to retain or improve their socio-economic standards. Many of the "stolen generation" have had further separation from family through involvement with the criminal justice system. In the context of the National Inquiry, it should be noted that of the 32 custodial deaths investigated by the RCIADIC in Western Australia, at least 19 involved detainees who had spent time in a mission.[327]

The story of Neil is illustrative of the connection between being removed from family and later involvement with the criminal justice system, leading to incarceration.

Neil's Story[328]

> *I was taken away from my parents when I was very young. I think I was around three or four years old. I was taken to a hostel near Meekatharra. I stayed there for about two to three years. The age range of the children at the hostel was from three to four to fifteen to sixteen. One of my older sisters was there with me and she tried to look after me. From the hostel I was placed in Tardun.*
>
> *The abuse started when I was very young, at the hostel, and the abuse was mainly sexual. It continued at Tardun. At Tardun the brothers would come around at night after we had gone to bed and touch us. I thought he was just being nice in the beginning. As a young child you think it's alright because he is so much older and there is no one to tell that it is wrong. You also think that if you let him do what he wants it will help you because at the time you are very desperate. He would watch us in the shower and then come in our bed during the night. He would touch you all over and then on your genitals. Some of the brothers would take you from the dorm and put you in their room and slap you across your bum with a strap and get off on it. One old priest had a big sheet up on the wall in the older boys' room and had an O and X marked on it with the boys' names.*

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327 O'Dea, J.D., *Regional Report of the Inquiry into Individual Deaths in Custody in Western Australia of the Royal Commission into Aboriginal Deaths in Custody Vol. 2*, AGPS, Canberra, 1991, Appendix 1.

328 Born 1948, "taken away", aged 3-4 years, 1951.

At the hostel I was also abused by the older boys both physically and sexually. The brothers at the hostel knew what was going on but never did anything about it. The boys were a lot older. There really was not a thing we could do to stop them. If we went for a walk they would just follow us and grab us later when we were out of sight from the rest of the children.

At Tardun I was raped several times. I felt powerless. They would just bash you until you gave in. There were always a lot of brothers around you, but it was just one or two that did it, but the others knew what was going on but did nothing to help us. One of my friends was taken to the toilet and told to strip and that the brother wanted to teach him about sex. The brother wanted my friend to touch his penis. My friend got away.

I have been raped and abused throughout my childhood. To make matters worse I have never had the love of my parents.

I have raped several women. I feel that it is because it gives me the power after all of these years. I really do not understand why I do it, but I think it is just because of all the abuse I had in my childhood and being away from any sense of love. Maybe raping just makes me feel good as it gives me some control over people rather than always having people have control over me which occurred in my childhood.

So the cycle continues. Because of the profound psychological effects of being removed and abused as a child, a person may commit offences as an adult and end up in prison. These prisoners have children too, but as a consequence of their imprisonment, the next generation of children are denied the love and care of a parent and the parent is denied the chance of bringing up his/her children.

Arguably, the greatest ramification of the high rate of imprisonment of adult Aborigines is that it increases the risk of custodial death.[329] In other words "custodial deaths seem to be a function of custodial conduct".[330] The RCIADIC, which was established as a result of the custodial death rates of Aborigines, found that:

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329 Broadhurst, R., and Maller, R., "Estimating the Numbers of Prison Terms in Criminal Careers from One-Step Probabilities of Recidivism", *General Quantitative Criminology*, 7, 1991, p275.

330 Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission Into Aboriginal Deaths in Custody*, Hawkins Press, Sydney, 1995, p3.

Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community. This occurs not because Aboriginal people in custody are more likely to die than others in custody but because the Aboriginal population is grossly-over represented in custody. Too many Aboriginal people are in custody too often.[331]

Statistics compiled by AAD for 1993, show that Aboriginal people are 11 times more likely to be arrested than non-Aboriginal people (presumably this includes adults and juveniles) and by international comparisons, Western Australian Aboriginal people " have an extraordinarily high rate of entry into the [criminal] justice system".[332]

Other statistics compiled by Harding et al on Aboriginal involvement in the criminal justice system confirm the gross-over representation. For example, Western Australia criminal justice data shows that Aborigines are 9.2 times more likely to be arrested, 6.2 more times more likely to be imprisoned by lower courts, 22.7 times more likely to be in prison as an adult than non-Aborigines. Further, 88 per cent of male Aborigines are estimated to be re-arrested compared to 52 per cent of non-Aborigines, whilst 76 per cent return to prison at least once compared to 43 per cent of non-Aboriginal males. Further, Western Australian Aborigines are more likely to be victims of crime. For example, Aborigines are 16 times more likely to be a victim of homicide and 6.5 times more likely to report crimes against a person to the police than non-Aborigines.[333] Aboriginal women are grossly over-represented as victims of domestic violence with Aboriginal people being 45 times more likely to be victims of domestic violence.[334]

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331 Johnston, E., *op.cit*, Vol. 1, p6.

332 See Innovation and Technology, and AAD, *Aboriginal Contact with the Criminal Justice System of WA: A Statistical Profile 1995, Royal Commission into Aboriginal Deaths in Custody Volume 2,* AAD, Perth, 1995, pp8-9.

333 Harding, B., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit.*, p14.

334 Ferrante, A., Morgan, F., Indermaur, D., and Harding, R., *Measuring the Extent of Domestic Violence*, Hawkins Press, 1996, p34.

Considering the disadvantages faced by Aboriginal people, it is probably to be expected they will be over-represented in the criminal justice system. Aborigines face on a day to day basis, overt racism and discrimination, homelessness, poverty, unemployment, violence and so on. Some of these underlying issues have already been dealt with in preceding chapters of this submission. This chapter focuses on the criminal justice system itself and what changes are needed to reduce the disgraceful over-representation of Aboriginal people in the system.

Policing

1. Introduction

HREOC has stated that: "there has always been a degree of police surveillance and intervention in Aboriginal life well beyond the experience of non-Aboriginal Australians.[335] For example, police were often involved in confining Aborigines to reserves and in removing Aboriginal children from their families either under Child Welfare Acts or Native Welfare Acts. The *National Inquiry into Racist Violence* reported that policing of Aborigines included:

- the discriminatory use of particular legislation, for example, the use of public order offences;
- regular foot or vehicle patrols which create an atmosphere of surveillance intention;
- spot lighting by police of housing in Aboriginal settlements; and
- discriminatory policies of particular activities such as the stationing of police in front of hotels used by Aboriginal people.[336]

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335 HREOC, *Racist Violence*, AGPS, Canberra, 1991, p82.

336 *Ibid*, p90-91.

Wilkie has stated that:

> *Aboriginal people have also complained that the police afford them inadequate protection against crime and inadequate recourse when they have been victimised. Some large Aboriginal communities are without permanent police presence. This isolation means they receive patrols infrequently and urgent attention is almost impossible. Policing of such communities, especially in the Kimberley, is virtually non-existent. There have been allegations that police ignore inter-Aboriginal offending, especially of a violent nature, and Aboriginal women have complained that police do not take seriously their complaints of rape and domestic violence...*[337]

Whilst the RCIADIC recommended that "all police services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders",[338] and the government states that the Police Department has implemented these recommendations, Aboriginal people are still arrested at a much higher rate that non-Aboriginals. It would appear that this recommendation is not "working effectively in law enforcement in Western Australia".[339] The Western Australian Crime Research Centre statistics for 1993 show that Aboriginal people represent approximately 20 per cent of the distinct persons arrested in 1993 even though they make up an estimated 2.7 per cent of the Western Australian population.[340] Although the rate of distinct Aborigines arrested on one or more occasions during the years declined since the peak of 1991, the decline has been greater for non-Aborigines, so in fact the relevant difference in the risk of arrest of Aboriginal and non-Aboriginal people has increased. For example, in 1990 Aborigines were 7.7 times more likely than non-Aborigines to be arrested but by 1993 Aborigines were 9.2 times more likely to be arrested than non-Aborigines. Harding et al state that:

> *from a policy point of view, it appears that the diversary schemes (such as cautioning) have had a more substantial impact on non-Aboriginal rates of arrest than Aboriginal rates of arrest.*[341]

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337 Wilkie, M., *op.cit*, 1991, p34.

338 Johnston, E., *op.cit.*, Vol. 5, p88.

339 Harding, R., Broadhurst, T.R., Ferrante, A., and Loh, N.R., *op.cit.*, p57.

340 *Ibid*, p37.

341 *Ibid*, pp38-39.

Recommendation 74

The Police Commissioner direct that police officers should attempt, where possible, to caution Aborigines rather than arrest them.

Just as alarming is that a greater proportion of Aborigines arrested were held in custody (20.3 per cent) than non-Aborigines (13 per cent). A significantly smaller number of Aborigines were summonsed (10.6 per cent) than non-Aborigines. Data from 1992 shows that of all Aboriginal persons brought before the courts, 88 per cent were arrested, with only 12 per cent being summonsed. However, of all non-Aborigines apprehended, 73 per cent were arrested and 27 per cent were summonsed. These figures indicate that the basis of police decisions as to whether to proceed by way of arrest or summons in dealing with Aboriginal people needs to be addressed.

Recommendation 75

That the Police Commissioner direct prison officers to undertake a short intensive course to ensure that the discretion as to whether to proceed by way of arrest or summons is properly exercised when dealing with Aboriginal people.

Recommendation 76

That the Police Commissioner direct that if possible and reasonable in the circumstances, Aboriginal people should be brought before the court by way of summons rather than arrests.

The risk of re-arrest for Aborigines also is of great concern. Probabilities of a male non-Aborigines being re-arrested is 0.52 and for a female non-Aborigines is 0.36 as compared to 0.88 for male Aborigines and 0.85 for female Aborigines.[342]

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[342] *Ibid*, pp53-54.

The ALSWA has produced a document which outlines some of the issues which regularly arise in the work of the ALSWA and its dealings with the police and Aboriginal people.[343] Some of those issues are raised here but matters dealing specifically with juveniles are discussed in chapter 13.

2. Aboriginal cultural awareness in Western Australian police officers

The ALSWA understands that police recruits receive only one day of Aboriginal cultural awareness training together with a second day of general cross-cultural training in the context of a 22 week course. This is totally inadequate considering the amount of time that police officers will be in contact with Aboriginal people within their daily work.

It is most unfortunate that the State government states that it is no longer able to run a one day training course on cultural awareness for serving officers, due to lack of funds.[344] It is submitted that it is absolutely essential that police officers receive cross-cultural training, especially those who will be working in areas of significant Aboriginal communities. It is also important that police training involves training to deal with violence towards and sexual abuse of Aboriginal women. Cross-cultural training should make police officers more sensitive to Aboriginal people and hopefully this will reduce the involvement of Aborigines with the criminal justice system and particularly the prison system.

It should be noted that the RCIADIC and the *Report of Chief Justice's Task Force on Gender Bias* recommend appropriate cross-cultural awareness training for recruits and serving police officers.[345]

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343 Ayres, R., *Issues relating to the Police Department which are of concern to the Aboriginal Legal Service of WA (Inc)*, ALSWA, Perth, 1995.

344 It is noted that courses in police studies at Edith Cowan University contained units in Aboriginal studies.

345 Refer to Johnston, E., *op.cit.*, Vol. 5, recommendations 177 (p109) and 228 (p120). Also see The Hon Mr Justice D.K. Malcolm, AC, Chief Justice of Western Australia, *Chief Justice Task Force on Gender Bias*, Perth, 1994, recommendations 114 (p93-94), 116 (p94) and 175 (p108).

Recommendation 77

That the Police Commissioner direct that recruits complete a properly accredited Aboriginal cultural awareness training program.

Recommendation 78

That the Police Commissioner direct that serving officers complete a properly accredited Aboriginal cultural awareness training program every two to three years.

3. Protocols with the ALSWA

The establishment of protocols between the police and the ALSWA was recommended by the RCIADIC. The RCIADIC specifically recommended the establishment of protocols to deal with arrest (223, 224), detention for intoxication (223), bail (90, 223), and local policing issues (88, 214, 215, 223).[346]

(a) Arrest

It is very unfortunate that in Western Australia a "prisoner's friend" is not required to be present during interviewing of an Aboriginal suspect, or that the ALSWA does not need to be advised.[347] The lack of this requirement is even more alarming when it is considered that the Anunga Rules do not apply in this State.

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346 There were also recommendations in regards to establishment of protocols to deal with apprehension of juveniles (242) and police questioning of juveniles (243). These will be discussed in the juvenile justice section.

347 Aboriginal Legal Services are contacted when an Aboriginal person is arrested in Victoria, South Australia, the Northern Territory and the ACT. *Ibid*, p14.

The Anunga Rules emanate from the Supreme Court of Northern Territory case of *R v Amunga*.[348] These rules regulate police interrogation proceedings of Aboriginals. Citing from the head notes in *R v Amunga* the Anunga Rules are as follows:

- an interpreter should be present to ensure complete and mutual understanding;
- where practicable "a prisoner's friend" should be present during interrogation. The "prisoner's friend" should be someone in whom the prisoner will have confidence, by whom he will feel supported;
- care should be taken in administering the caution, and after the interrogating police officer has explained the caution in simple terms, he should ask the prisoner to tell him, phrase by phrase, what is meant by the caution;
- care should be taken in formulating questions so that, so far as possible, the answer which is wanted or expected is not suggested in any way;
- even when an apparently frank and free confession has been obtained, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources;
- the prisoner, if being interrogated at meal time, should be offered a meal, and, where facilities so permit, should always be offered tea or coffee. If there are no facilities he should always be offered a drink of water. Further, the prisoner should always be asked if he wishes to use the lavatory;
- no interrogation should take place while the prisoner is disabled by illness, drunkenness or tiredness. Further, interrogation should not continue for an unreasonably long time;
- if sought, reasonable steps should be taken to obtain legal assistance for the prisoners; and
- if it is necessary to remove the prisoner's clothing for forensic examination, steps must be taken to supply substitute clothing.

The guidelines are not absolute rules, but the consequence of their non-observance may be the exclusion of statements of person questioned.

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348 (1976) 11 ALR 412.

Wayne, who was taken away from his parents in 1951, aged 2 years stated that he finds questioning by the police to be very confusing and frightening. He knows that if he is being questioned by police, he must be in trouble or they think he is in trouble and he does not know what he should say or how he should say it.

> *I get very scared when I see the police and even shaky when they question me. They always seem to be wanting to trick me into saying this or to saying that. Often I don't know what they want and when they say that I am suspected of doing something. I sometimes don't really understand what they are saying and it is just very frightening. Sometimes I am lucky to have a lawyer from the Aboriginal Legal Service but other times that hasn't been possible.*

The Police Service is extremely reluctant to contact the ALSWA prior to a person being questioned and charged. It is only after the decision has been made to charge a person that he or she may be given access to a telephone to contact a lawyer. This shows a total disregard for the right of Aboriginal people to be informed of their legal rights.

Recommendation 79

That the Police Commissioner establish a protocol whereby the ALSWA is contacted when an Aboriginal person is to be questioned over an offence (falling within an agreed category), prior to questioning commencing

Recommendation 80

That the State government introduce legislation enshrining the Anunga rules into the law of Western Australia.

(b) Bail

Again, the ALSWA does not have the resources to attend a police station every time an Aboriginal person is denied bail or is unable to meet its terms. However, a protocol could set out circumstances in which the ALSWA is to be contacted.

Recommendation 81

That the Police Commissioner establish a protocol for bail that sets out the circumstances in which the ALSWA should be contacted.

Other issues in regards to bail need to be addressed. Recommendation 91 of the RCIADIC recommended that governments, together with police services and the ALSWA, consider amending the bail legislation to ensure that inappropriate restricting practices or criteria were amended to improve access to bail (e.g. setting of high sureties for Aboriginal persons with no means of raising the amount required).

Recommendation 82

That the State government establish a working party with representation from the ALSWA and other interested parties to recommend appropriate amendments to the bail legislation to improve access to bail.

(c) Detention of Intoxicated Persons

Protocols dealing with the apprehension of intoxicated persons may have provisions applying to all cases but flexibility to deal with local conditions.

Recommendation 83

That the Police Commissioner develop protocols to deal with the apprehension and detention of intoxicated persons.

(d) Access to Telephones

The ALSWA is concerned that not all Aboriginal clients are afforded access to a telephone call when in police custody.

Recommendation 84

That the Police Commissioner establish a protocol which gives the right to a telephone call to all Aboriginal persons detained by the Police prior to being questioned and charged.

(e) Due Process Issues

The ALSWA has experienced significant problems in respect of due process issues. There are also specific international obligations upon Australia dealing with due process which should be considered.[349]

Major problems the ALSWA have encountered are:

- that clients are unclear of what they have been charged with (this problem is even greater among Aboriginal persons who speak English as a second language); and
- unhelpful approach of some police towards provision of the police facts to the defendant's legal representatives.

The ALSWA and the Police are currently piloting a scheme whereby the police fax to the local ALSWA office copies of the complaints and police facts for each Aboriginal person charged. If adhered to, this reduces delays in the courts and improved access to legal services by Aboriginal people.

When an Aboriginal person has been charged they should be given a written record of the charges, and copies of their complaint, the police facts and if relevant, a copy of the record of convictions should be provided to their legal representatives.

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[349] See *ICCPR*, articles 9(2), 14(3)(a).

Recommendation 85

That the Police Commissioner establish a protocol where the police are to give all Aboriginal people charged a written record of the charges, and give the legal representative a copy of the complaint, the police facts and if relevant, a copy of the record of convictions.

(f) Local Policing Issues

The RCIADIC made a number of recommendations on issues relevant to local and community policing in Aboriginal communities.[350] The *Chief Justices' Task Force on Gender Bias* also made a recommendation (173) to ensure that only police officers suited to work with Aboriginal people are posted to communities with significant Aboriginal populations.[351]

Protocols concerned with local policing should address the following issues:

- over-policing or inappropriate policing;
- policing needs of remote communities, particularly the needs of women;
- interaction between police and community wardens (where they exist) and community patrols;
- involvement of Aboriginal communities, organisations and groups to develop sensitive policing procedures;
- procedures for negotiation at a local level of policing methods which are perceived by the Aboriginal community to be harassment or discrimination;
- other concerns of local community e.g. public drinking areas; and
- processes to enable communities with significant Aboriginal populations to participate in decisions as to the placement and conduct of police in their communities.

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350 Refer to Johnston, E., *op.cit.*, Vol. 5, Recommendations 88 (p89), 214 (p117), 215 (p117) and 223 (p118).

351 See The Hon Mr. Justice D.K. Malcolm AC, *op.cit.*, p22.

Recommendation 86

That the Police Commissioner after intensive consultations with the ALSWA, local communities and other appropriate agencies establish a comprehensive protocol dealing with the local policing issues.

4. Complaints Against the Police

The ALSWA have acted on behalf of hundreds of clients over the last three years and has found the process of dealing with police complaints to be overwhelmingly unsatisfactory.

There are three major problems with the current system:

- that complaints against the police continue to be investigated by the police;
- continuation of extensive delays in the complainant's matter being dealt with at the stage of the police investigation and when the matter is referred to the Ombudsman; and
- in some instances, the ALSWA has found that if the police identify a complaint as being a "minor", a senior police officer will attend upon the Aboriginal complainant and pressure him or her to withdraw the complaint.

The RCIADIC made a detailed recommendation addressing the establishment of an independent body to investigate complaints against the police (recommendation 226).[352] The problems involved in investigating such complaints remain much the same as they were prior to the Royal Commission and have not been resolved despite this recommendation.

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352 Johnston, E., *op.cit.*, Vol. 5, pp119-120.

Recommendation 87

That the State government establish a properly resourced statutory independent body to investigate complaints against the police, and if the complaint is made by an Aboriginal person, one of the investigating officers should be Aboriginal.

5. Over Policing

The problem with over policing of predominantly Aboriginal communities was dramatically brought to attention by the ALSWA in its study of the predominantly Aboriginal township of Wiluna in 1994.[353] The conclusion of the report states:

> *The concept of 'over policing' provides a meaningful critique for the evolution of a regime of policing policies in Wiluna which are costly, excessive and oppressive for Mardu people. The rhetoric of its proponents, the Western Australian Police force, involves a perceived need to respond to a dysfunctional community by an increased level of intervention and incarceration. The reality, that such policies are in fact significantly destructive for individuals and community alike, is either beyond the perception of police and the Police Department, or is lower in priority than internal goals such as the maximisation of police numbers or revenues from meal allowances.*
>
> *Wiluna's status as an extremely over policed town is supported by data analysed between 1/1/1994 to 31/8/1994. Police numbers have almost doubled over the last five years and the only explanation consistent with police resource criteria ... is the specified targeting of the Aboriginal community. The strong correlation between police numbers, and police apprehensions/charge rates indicates that charge rates increase proportionately to police numbers, rather than in relation to offending behaviour. Based on available information, the resultant police/civilian ratio of 1:41 appears to be the highest concentration of police in Western Australia ... despite a case load which involves few serious offences.*
>
> *The excessive policing of Wiluna's Aboriginal population is reflected in the outcome that more individuals have been charged in the first eight months of 1994 than there are people living in the town. In most instances charging results in incarceration, if not at the first instance, then as a result of the fine default. The annual aggregate level of fines of around $300,000 imposes significant*

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353 Refer to ALSWA, *Counting the Cost Policing in Wiluna 1994*, ALSWA, Perth, 1994, and Leicester, S., "Policing in Wiluna" *Aboriginal Law Bulletin*, 3(72), 1995, p16.

impoverishment on an already impoverished population whilst increasing meal allowance revenues which accrue to the Officer in Charge as lock-up keeper.

Given the foregoing analysis, it is less appropriate to attribute current police policy as a needed response to offending behaviour, than it is to a perpetuation or intensification of the historical role of police, in controlling and containing the Aboriginal community:

> *"Police are charged with the maintenance of order and discipline in the Aboriginal towns. This order is of a quite specific kind and the Aboriginal community occupies a quite specific place within it. Enforcement of street offences legislation in these towns can be seen as a continuation and contemporary expression of the historical role played by the police in the construction and maintenance of this order. It is not simply a matter of enforcing community standards as if some consensus existed with respect to these standards. Aborigines are often regarded as a 'problem' insofar as they are actively unaccepting of 'their place' in this order".*

The Wiluna police clearly have little difficulty adopting this approach as their model for policing the township. The refusal to co-operate with recent initiatives of the community by refusing to attend meetings of the Aboriginal/Police Liaison Committee, reflects the police view that Aboriginal input into the policing of their community is irrelevant to the functions of policing. The reversal by police, of community negotiated restrictions on the supply of alcohol, similarly involves a denial of the community's right to self determination. The opportunity for police to signify a shift away from historical models of policing by implementation of relevant recommendations of the Royal Commission into Aboriginal Deaths in Custody has not eventuated to date. Rather, police appear to have adopted a sense of legitimacy in the differential treatment of Aboriginal persons that the Royal Commission recommendations inspire. By ignoring the content of the recommendations however, police have produced a regime of policing that is more intensive, more racist and more destructive to the community than before the advent of the Royal Commission into Aboriginal Deaths in Custody.

Urgent attention to the situation is required by the Police Department. Immediate consideration should be given to the recommendations set out above, and in particular the transfer of the officer in charge and the reduction in the total numbers of police officers in the town. The State government needs to act urgently to appoint additional Justices of the Peace, in particular including members of the Aboriginal community. It needs to move quickly to introduce an amendment to the Justices Act to remove the power of Justices of the Peace to imprison.[354]

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[354] ALSWA, *Counting the Cost Policing in Wiluna 1994*, *op.cit.*, pp31-32.

Over-policing is a major problem in many other Aboriginal communities. In regards to meal allowances, a major concern about the scheme was the ability of police officers to abuse it for the purpose of pecuniary gain. The RCIADIC recommended that police should not be paid allowances that could be used as an incentive to increase the number of arrests. The meal allowance scheme was such an incentive. The ALSWA welcomes action taken by the Police Service to dismantle the meal allowance scheme and replace it with an alternative meal system so that police officers are no longer involved in the supply of meals to detainees. The pilot alternative scheme resulted in significant decreases in the number of persons detained in police lockups.

Recommendation 88

That the Minister of Police commission an inquiry to investigate the ratio of police to residents in predominately Aboriginal towns and suburbs vis-a-vis predominately non-Aboriginal towns and suburbs, and make appropriate recommendations to reduce any over-policing in predominately Aboriginal towns and suburbs.

6. Summary

It is quite evident that many of the recommendations emanating from the RCIADIC in regards to policing and Aborigines have not been put in place, which only perpetuates the very high police/Aboriginal contact rate in Western Australia. This, no doubt, leads to a greater risk of Aboriginal people remaining in contact with the criminal justice system and eventually being incarcerated.

The Courts and Sentencing

1. Introduction

As Harding et al remarked, extensive information about the activities of the courts at both the State and National levels are not readily available.[355] The ALSWA has written to all courts in Western Australia asking questions on matters relevant to Aborigines who come before the court. Responses were received from only some courts. Here we are concerned with courts dealing with criminal matters for adult defendants.

The Magistrates courts at Kununurra, Roebourne, Geraldton, Kalgoorlie and Perth have appointed Fines Liaison Officers. These officers inform Aboriginal offenders, who have fines imposed against them, as to the methods of payment available to them and the ramifications of not complying.

After analysing information received from the Australian Bureau of Statistics and police apprehension records, Harding et al summarised:

> *Once convicted, Aborigines are about five times more likely to receive a sentence of imprisonment than non-Aborigines: that is four times more at risk in the Children's Court, ... six times more at risk in the high volume lower courts, ... and about one quarter more at risk in the low volume Higher Courts ... However, once a decision has been made to imprison, the Higher Courts are likely to impose shorter sentences on Aborigines than upon non-Aborigines, especially with regard to property offences ...*[356]

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355 Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit.*, p75.

356 *Ibid.*

The Pilbara Community Legal Service undertook a study of the Court of Petty Sessions (Magistrates Court) in Newman between the periods February to March 1994 and May to June 1994. The main findings of their research were as follows:

- *Aboriginal people represented over two thirds of the defendants in the Criminal Justice System at Newman ...*
- *Aboriginal people are 19.4 times more likely than non-Aboriginal people to appear in the Criminal Justice System at Newman ...*
- *The majority of the defendants were male and over three quarters of female defendants were Aboriginal ...*
- *Justices of the Peace dealt with and heard over two-thirds of all cases ...*
- *Almost one-third of cases dealt with in the Justice of the Peace Court were dealt with by a Justice of the Peace sitting alone ...*
- *The majority of defendants faced two or more charges ...*
- *The two most significant sorts of charges were for motor vehicle offences and assault/disorderly conduct offences. A significant proportion of both were alcohol related ...*
- *The types of charges made against Aboriginal people differed markedly from those made against non-Aboriginal people ...*
- *All charges resulting from police contact were alleged against Aboriginal people ...*
- *Over half of the defendants had a previous record and almost three quarters of Aboriginal defendants had a previous record ...*
- *A "guilty" plea was entered by the majority of those defendants who entered any plea ...*
- *In some cases defendants entered a guilty plea when they had indicated that they were not guilty ...*
- *In many cases defendants appeared not to understand what was meant by making a plea and generally appeared not to understand court procedures or documents ...*
- *Less than one third of defendants had any legal representation and no defendant in the Justice of the Peace Court had legal representation ...*

- *Fining was the predominant form of punishment used in the first instance. There was a related lack of alternatives to fining available ...*

- *Defendants were more likely to be fined in the Justice of the Peace Court than in the Stipendiary Magistrate's Court ...*

- *Justices of the Peace imposed, on average, higher fines than Stipendiary Magistrates ...*

- *Aboriginal people incurred, on average, higher fines than non-Aboriginal people and incurred higher than average fines in the Justice of the Peace Court and lower than average fines in the Stipendiary Magistrate's Court ...*

- *Justices of the Peace, in some cases, imposed higher fines than Stipendiary Magistrates for comparable offences ...*

- *The issue of capacity to pay was only considered in one third of cases ...*

- *Almost half the defendants fined in the Justice of the Peace Court defaulted on their fine ...*

- *The majority of those fined in the Justice of the Peace Court who defaulted were imprisoned ...*[357]

Other locations have similar statistical profiles. For example, figures from the Collie Court of Petty Sessions in 1993 showed that:

- *in nearly every offence far more Aboriginal people than non-Aboriginal people received a custodial (prison/lock-up) penalty; and*

- *non-Aboriginal people received custodial (prison/lockup) penalties only in two offence types, namely motor vehicle/traffic and good order.*[358]

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357 Robinson, M., *Costing (In) Justice: A Study Of The Court of Petty Sessions In Newman Western Australia*, Pilbara Community Legal Service, Newman, 1995, pp7-8.

358 Innovation and Technology and AAD, *op.cit.*, p33.

Recommendation 89

That the State government ensure that Aboriginal Fines Liaison Officers be employed in all Magistrates Courts in Western Australia.

Recommendation 90

That the State government ensure that interpreter services be provided at all court sittings in Western Australia.

Recommendation 91

That the State government ensure that an Aboriginal Customer Service designed by Aboriginal people be provided in all lower and higher courts in Western Australia to make the courts more "user-friendly" and reduce the alienation felt by many Aboriginal people when they enter the court system.

Recommendation 92

That the State government ensure that an Aboriginal cultural advisor be appointed to all courts in Western Australia.

Recommendation 93

That the State government amend the Justices Act 1902 (WA) to remove the power of Justices of the Peace to imprison.

Recommendation 94

That the State government appoint more magistrates so as to reduce the need to utilise Justices of the Peace.

Recommendation 95

That the State government appoint more Aboriginal Justices of the Peace.

Recommendation 96

That the State government appoint more Aboriginal Magistrates.

Recommendation 97

That the State government provide funding for appointment of more Aboriginal Court Officers by Aboriginal Legal Services, Community Legal Services and the Legal Aid Commission.

The Supreme Court has recently appointed an Aboriginal Community Liaison Officer to advise and assist in providing access to justice for Aboriginal people. However, precise details of the officers' duties were not supplied, therefore it is difficult to gauge how effective this appointment is to Aboriginal people.

2. The Attitude of Courts and Judges

In the main, the criminal courts and judges do not realise that some Aboriginal people do not understand the nature of criminal proceedings against them.[359] Wilkie quotes Justice Kriewaltd on his experiences in the Northern Territory during the 1950s:

> *... the correct decision in many instances would have been that the accused did not understand and could not have been made to understand, what was going on ... [and should therefore have been found unfit to plead].*[360]

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359 Wilkie, M., *op.cit.*, 1991, p13.

360 *Ibid.*

However, the High Court case of *Ngatayi v R* [361] refuted that it would be unfair or unjust for an accused to face a charge because they did not understand the law.

A number of the clients interviewed by the ALSWA in research for this submission has stated that it is very intimidating to be in court when they have no knowledge of what is really going on. They are unable to understand the rituals of the court, the law and in some cases the language. One client who told his story about being removed, and has completed three different periods of incarceration, commented that:

> *You know, I just don't understand it. I never really understand what the police said to me and when I get to court its all funny. The judge speaks in a funny and strange way and I just don't know what the lawyers are saying. In a way it reminds me of our mission days. I was taken away from my parents who were living on a reserve and sent to New Norcia Mission. It was very strange there. There were all these monks dressed up in a funny way and I couldn't really understand when they spoke English. What was even stranger was when we had to learn Latin. What happens in court is also very strange to me and even though I have been in court a few times things don't seem to get any easier.*[362]

Politicians, judges and administrators of courts should seriously consider the proposal of the ALRC that incomprehension on the part of an accused will bar him/her from pleading guilty.[363] Section 49(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) states that:

> *In any proceeding in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of six months or more, the court hearing the charge shall refuse to accept or admit a plea of guilty at trial or an admission of guilt or confession before trial in any case where the court is satisfied upon examination of the accused person and he is a person of Aboriginal decent who from want of comprehension of the nature of the circumstances, or of the proceedings, is or was not capable of understanding that plea of guilty or that admission of guilt or confession.*

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361 (1980) 54 ALJR 401 at 404 per Gibbs, Mason and Wilson J.J.

362 George, born 1940, "taken away" aged 3 years.

363 ALRC, *op.cit.*, p435.

This section of the *Aboriginal Affairs Planning Authority Act 1972* (WA) does to some degree comply with the proposal from the ALRC. However, the effect of Section 49 has been limited by the judiciary to Aboriginal defendants who are "traditional".[364] In many instances Section 49 is ignored by Magistrates and Justices of the Peace.

There are some positive signs that Higher Court judges may adjust the "tariff downward for Aborigines so that their sentences are reduced".[365] However, the Western Australia Court of Criminal Appeal in the case of *Clarence Woodley and Ors, April Boogna and Ors and Nicholas James Charles,*[366] which among other things involved offences of a violent nature against Aboriginal women, would not countenance the idea of the Aboriginality of the offenders being a reason to reduce the sentences. Thus as Harding et al comments "the questions of sentencing disparity by race is a complex one, with possible patterns overlaid by level of court and types of offence".[367]

Recommendation 98

That the State government amend Section 49 of the Aboriginal Affairs Planning Authority Act 1972 (WA) so it is applicable to all offences and that its effect not be limited to "traditional" Aborigines.

Recommendation 99

That the Chief Justice of the Supreme Court of Western Australia ensure that Judges, Magistrates and Justices of the Peace undergo a cultural awareness program which is to include courses on customary law and the continuing effects of the assimilation policy and removal practices.

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364 Wilkie, M., *op.cit.*, 1991, p15. Also refer to *Smith v Grieve* [1974] WAR 193 and *R v Grant* [1975] WAR 163.

365 Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit.*, p75.

366 (1994) 76 A Crim R 302.

367 Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit*, p77.

3. Sentencing Act 1995 (WA)[368]

This provides a variety of new sentencing options in an attempt to fill the gap between the current and less intrusive options, such as community service orders and the most intrusive option of imprisonment. The ALSWA is concerned that the Act contains no recognition of Aboriginal customary law and that Aboriginal people will continue to be subjected to the injustice of punishment under two different systems of law, traditional Aboriginal law and the non-Aboriginal legal system.

Given the continuing high numbers of Aboriginal people in custody, it is extremely disappointing that the government has not entrenched the principle that imprisonment is a sanction of last resort, as recommended by the RCIADIC. Such a provision was in fact deleted from the Criminal Code last year. The ALSWA is also concerned that Justices of the Peace still retain the power to sentence Aboriginal people to imprisonment, despite their lack of legal qualifications and training. While the proposed legislation abolishes sentences of imprisonment of less than three months (Section 86), there is concern that this may result in Aboriginal people receiving longer sentences than those previously imposed.

The sentencing principles contained in the Act are inadequate. They do not fully reflect the current common law and statutory principles of sentencing. In comparison to sentencing principles set out in legislation in other jurisdictions they are lacking. They do not take into consideration principles such as the youth, contrition or rehabilitation of the offender. In particular, they do not recognise the Aboriginality of the offender and considerations relevant to indigenous people.

It is also disappointing that the government has not taken the opportunity to remedy some of the apparent defects in the new fines legislation.[369]

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368 Assented to 16 January, 1996, but not proclaimed.

369 For a comprehensive critique of the *Sentencing Act 1995* (WA), refer to discussion paper, ALSWA, *Comments of the Aboriginal Legal Service on the Sentencing Bill 1995*, ALSWA, Perth, 1995.

Recommendation 100

That the State government amend the Sentencing Act 1995 (WA) to include recognition in the sentencing principles of punishment under customary law as a mitigating factor.

Recommendation 101

That the State government amend the Sentencing Act 1995 (WA) to include the sentencing principles that imprisonment should be a sanction of last resort.

Recommendation 102

That the State government amend the Sentencing Act 1995 (WA) to include in the sentencing principles that the judiciary consider the Aboriginal defendant's contrition, rehabilitation, and Aboriginality in mitigation.

Recommendation 103

That the State government amend the Sentencing Act 1995 (WA) to require that the judiciary must be informed whether the Aboriginal defendant was removed from his/her family in childhood, and of any continuing effects resulting from the removal, and if so, this to be a mitigating factor in sentencing.

Incarceration and Community Bases Corrections

1. Incarceration

Although there has been a slight decline between 1990 and 1993 in the rate of incarceration for Aborigines, the rate is still totally unacceptable. In 1990, Aborigines in Western Australia were 27.1 times more likely to be incarcerated than non-Aborigines and in 1993 they were 22.7 times

more likely to be incarcerated than non-Aborigines.[370] These rates are approximate prevalence rates of incarceration (excluding police custody) based on distinct persons received. With Aborigines, it is highly unlikely that there would be much difference if sentenced prisoners serving time in police lock-ups were included in the figures because there is a high parallel between those serving time in lock-ups and in prisons. Aboriginal people are 52 times more likely to be incarcerated in a police lock-up.[371]

Imprisonment of adult Aborigines in many cases perpetuates the splitting up of Aboriginal families. Although the ALSWA does not have statistical evidence, there is little doubt that many Aboriginal prisoners were separated from their families under native welfare or child welfare legislation. Jim and Len are two such clients.

Jim's Story [372]

> *I was taken away from my grandmother when I was very young. Also taken away with me were my oldest brother and sister. We were living on a reserve near Narrogin. My two younger brothers were taken later. They were fostered out.*
>
> *I was taken to a hostel near Meekatharra. After the hostel I was taken to Wandering Mission.*
>
> *The abuse started at the hostel and kept going at Wandering. I went to school in the morning and if you did anything wrong you were hit with a cane. Sometimes you were hit so hard that you bled. Often you were hit for the smallest thing.*
>
> *I saw lots of fights and lots of heartache at the mission and I found the only way I could cope was to turn my back on it and that is what I still do.*
>
> *I never saw my parents again. My mother died whilst I was in the mission. They would not let me go to the funeral. I was about 10 years old. They just came to the dorm and told me. I can't remember if there was anyone else there or not.*

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370 Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit.*, p88.

371 Innovation and Technology and AAD, *op.cit.*, p7.

372 Born 1949, "taken away", aged one year, 1950.

Looking back we were treated like animals at the mission. We had to stay in a bunch or you were flogged. They also made us stay locked in our rooms and made us sit in the corner. They would hit you anywhere they could with a strap or cane.

I never learned to read or write until I left Wandering and went to a hostel in Albany where I went to school. I only did second year of high school. I was too far behind all the other kids.

While at the Albany hostel I fell in with bad company and I was kicked out. The welfare just put me on a bus to Perth and told me there would be someone waiting for me at the other end. Some other welfare people picked me up at the other end and took me to Victoria Park where I met my grandmother again. I was then taken to my uncle's place. I had never seen him before. I stayed there for about 12 months. I did not know my uncle and his family at all, they were just strangers to me. My uncle was drinking most of the time I was there.

When I was at Wandering Mission, there were a few times I was fostered out to white families. Living with white families was very different than living with my uncle's family. I didn't feel comfortable with the white families and I didn't feel comfortable with my uncle's family. I left my uncle's family just before I was 20.

I did not like the way my family kept coming round to see me. Every time they did I started to drink and get into trouble. I was in a de facto relationship for ten years. We even moved to South Australia to get away from my family. It was a funny thing because I would go to one place and when I got there I would go somewhere else. I never felt like I belonged.

Now I am in jail it is very hard. I hate it in prison. Once again I am being told by white authorities what to do. It is just like the mission days.

When it comes time for parole I have no one to go to. No family to help me. It is very hard. I just cannot go home to mum and dad. The only way I ever found my brother who is in jail with me was when someone pointed him out to me in the pub. I cannot talk to any of my family because I have been raised as a white. But I am black, I do not fit with the whites either. I drink too much. It helps me to stop thinking about everything in my life and the pain.

Len's Story[373]

I was removed from my parent's custody when I was about four years of age. That was in the early 1950s. I was sent away to Roelands Mission. I do not know why I was sent to Roelands Mission because my home is around Kellerberrin.

It was awful at Roelands Mission. It was very cold. You used to get punished a lot. I stayed at Roelands Mission for a couple of years and then I was fostered out to a family in Harvey. The foster parents were not too bad but they never seemed to show any love towards me. I craved to meet my parents again. When I was about 16 I ran away from my foster parents and just drifted around the place. I went to Perth and lived on the streets or with anyone I could find to take me in for the night.

When I was about 22 years of age I started to get into trouble with the law. I did a lot of breaking and entering, stealing cars and being drunk. I have been in prison on and off for the last twenty odd years. Prison is really awful for me. It just seems to be the same as when I was younger. I was removed from my parents and my brothers and sisters. Now that I am in prison I am removed from my own family. I have five children from two different women. I very rarely get to see my children because they live in Kalgoorlie and Esperance and it is hard for them to visit me in prison up here in Perth.

I just feel that my heart is bleeding all of the time. I was taken away from my own parents and now I cannot even enjoy my own children. I hate being in prison. I seem not to be able to help myself. I always end up back in prison.

Prison is really awful. There are a lot of other Aborigines in prison but the fact that I cannot maintain my family links and also my culture really hurts me. Even though I was taken away from my parents when I was younger I have been determined to try and regain my culture. There are some programs in prison, or they tell us there are some programs in prison, that are supposed to look after us Aborigines but I do not find them particularly helpful. Also I am too far from my family. I hear some of the prison officers say that we ought to be able to be near our family. To be in a prison near our family, but in my case that is not so. When I was sentenced again to prison in Casuarina, my family at that time was living not too far away in Mandurah. Since then they have gone to Kalgoorlie and also to Albany and I have not been able to be transferred to one of those prisons.

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[373] Born 1949, "taken away", aged approximately four years.

Officially the Ministry of Justice has a policy to foster the culture of Aboriginal prisoners and to maintain their family links. The Ministry of Justice states that they have a number of programs which take into account the culture of Aboriginal prisoners. These include:

- Peer support groups operating for prisoners at Greenough, Albany and Bandyup prisons. At Greenough an Aboriginal Peer Support Officer is employed on a full time basis to provide support to prisoners in custody and on release. Currently the Ministry is examining the feasibility of expanding the scheme to other secure prisons in the metropolitan and country regions.

- The Ministry states that where applicable, Aboriginal prisoners are placed in a prison proximate to a community with which they identify. Where this is not possible Director General's Corrective Services Rule 2B allows for a prisoner to be temporarily placed in a prison so as to facilitate family visits.

- Director General's Corrective Services Rule 7A: Part 8 (which deals with prisoner attendance at a funeral) identifies the cultural significance of a relationship between a prisoner and the deceased as relevant to the criteria for granting leave to attend a funeral. During the 1994/95 financial year, over 80 per cent of all Corrective Services approvals to attend a funeral were for Aboriginal prisoners.

- A recent initiative undertaken by the Ministry has been the Elders Cultural Awareness Programme at Canning Vale Prison. This has involved Aboriginal elders from the metropolitan area talking to Aboriginal prisoners on a wide range of cultural issues. The Ministry states that the program has received widespread acceptance by both prisoners and prison administration.[374]

Whilst these initiatives must be applauded, there is argument as to their effectiveness. In any case, the initiatives are not sufficient.

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[374] Letter from Ministry of Justice to ALSWA, dated 16 February, 1996.

It is not enough to target certain prisons, because all prisons in Western Australia have high Aboriginal populations. In regards to the issue of leave to attend funerals, the ALSWA has acted for a number of clients who have found great difficulty in obtaining leave to attend funerals. In fact only 20 per cent of applications by Aboriginal prisoners to attend funerals were granted by the Ministry of Justice.[375] Another great concern is with the cultural appropriateness of the sex offenders treatment program. In order for sex offenders to obtain early release, they must complete the sex offenders treatment programme. Apart from the often unreasonable delay in being placed on the programme (in one case a prisoner waited for over a year to get on the programme), the ALSWA have received complaints from Aboriginal prisoners that the program is totally inappropriate for Aboriginal males.

Recommendation 104

That the State government make more resources available to allow Aboriginal prisoners to be relocated at the prison nearest to their home and/or family.

Recommendation 105

That the State government give Aboriginal organisations and communities the resources and responsibility to organise and manage culturally appropriate courses in prison.

Recommendation 106

That the Ministry of Justice made a concerted effort to increase the number of Aboriginal prison officers.

Recommendation 107

That the Ministry of Justice ensure all Aboriginal prisoners are given permission to attend family funerals.

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375 Telephone conversation with Ministry of Justice employee, February, 1996.

Recommendation 108

That the Ministry of Justice appoint Aboriginal experts to design and run culturally appropriate sex offenders treatment programs.

Recommendation 109

That the Ministry of Justice erect "half way houses" near Aboriginal communities to accommodate soon to be released Aboriginal prisoners near their families.

Recommendation 110

That the Ministry of Justice employ Aboriginal peer support officers at every prison to meet the overwhelming needs of Aboriginal prisoners.

2. Community Based Corrections

Community based orders are an alternative to imprisonment. They provide for sentenced people to engage in community work for a prescribed duration instead of being imprisoned. There are a variety of community based orders. They range from home detention, bail, work release, home detention prison, parole, community service, probation, work and development.

Figures for 1994 show that Aboriginal people receive one in four of all community based orders which was an increase from one in six in 1991.[376] Seven out of every ten community based orders are work and development orders.[377] Other statistics compiled by Harding et al found that work and development orders issued to Aboriginal people remained fairly stable between 1990 and 1993. This was around 20-23 per cent of all work and development orders issued. The home

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376 Innovation and Technology and AAD, *op.cit.*, p37.

377 *Ibid*, p38. Work and development orders are imposed for fine default rather than as a sentencing option.

detention program which commenced in April 1990, has only been of limited use. However, as Harding et al remarked:

> *the proportion of Aborigines receiving such orders has a marked increase; this may well be attributed to a 1993 decision by the Ministry of Justice to designate certain Aboriginal traditional areas as "homes" for the purpose of the administration of scheme, particularly in the Pilbara, Kimberley, Eastern Goldfields and Murchison regions.*[378]

In respect to parole orders, Harding et al recorded that during 1993 there was 234 (25.9 per cent) issued to Aboriginal people. This is less than other groups and "broadly reflects the fact that Aborigines are somewhat less likely to receive parole sentences than non-Aborigines".[379] Figures collected from 1994 by AAD show that "parole orders have the highest completion rate and probation orders the lowest completion rate of community based orders".[380]

AAD state Aboriginal people have the highest level of non-completion in every community based order category. This raises questions about the cultural appropriateness for Aboriginal people of community based orders. There is a need for Aboriginal people to be consulted in order to ascertain and improve the cultural appropriateness of community based orders and determine whether there are any practical alternatives to community based orders that do not include imprisonment. However, while community based orders remain the alternative to imprisonment, where possible, courts should pursue community based orders rather than imprisonment for Aboriginal people.

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[378] Harding, R., Broadhurst, R., Ferrante, A., and Loh, N.R., *op.cit.*, p105.

[379] *Ibid*, pp112-113.

[380] Innovation Technology and AAD, *op.cit.*, p38.

Recommendation 111

That the Ministry of Justice undertake consultation with Aboriginal organisations and communities to determine and improve the cultural appropriateness of community based orders, and to determine whether there are any practical alternatives that do not include imprisonment.

Recommendation 112

That while community based orders remain the alternative to imprisonment, where possible, the courts should issue community based orders rather than imprisonment.

Conclusion

As stated in the introduction to this chapter, adult Aboriginal involvement in the criminal justice system is unacceptable. A concerted effort must be made to reduce Aboriginal involvement. Besides addressing the underlying issues which lead to the unacceptable involvement of Aborigines, much greater efforts must be made to change the criminal justice system itself. The policing issue is of utmost importance because it is at this stage that an Aboriginal person first comes in contact with the criminal justice system.

Major changes of a legislative, procedural and judicial nature must be made so that Aborigines do not feel so alienated by the court system and that particular considerations relevant to Aboriginal people are taken into account when sentencing. In this respect it is important that the whole issue of recognition of Aboriginal customary law be seriously considered and that the continuing effects of the past assimilation policies and removal practices be considered when sentencing those of the "stolen generation".

There is no doubt that whatever changes are made at the pre-custodial stage, there will always be Aboriginal people in prison. Thus, it is imperative that much more is done to foster a culturally appropriate environment for Aboriginal prisoners, and to allow them to maintain their family links.

A concerted effort must be made so that Aboriginals who are involved in the criminal justice system have a chance to be given a community based order rather than being imprisoned. However, the real answer lies in reducing Aboriginal involvement in the criminal justice system in the first place. It is essential that the very early involvement of Aboriginal youth in the criminal justice system must be addressed as a matter of urgency.[381]

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[381] See chapter 13 which deals with juvenile justice issues.

PART F

Jean's Story

I was born on the 23 August 1958, in Perth. I then went back with my mother to Moore River. Shortly after I was taken off my mother and placed in Mogumber Mission at Moore River.

My younger sister and I were placed at Mogumber Mission. My eight older brothers and sisters went to New Norcia.

At two years of age I was sent from Mogumber Mission to foster parents in Busselton. They were non-Aboriginal. I was made a ward of the State. I stayed with my foster parents until I was 18 years of age.

My foster parents had twin sons of their own and they had me. They then took my younger sister as a foster child, and they also adopted an Aboriginal child. I have to say that my foster parents treated my generally quite well and I was never abused.

Even though I had my younger sister with me and my foster parents had adopted an Aboriginal child, we were never told or had our Aboriginal culture fostered. I was never given any education about my Aboriginal culture at school. In fact, I was basically brought up as a person in a non-Aboriginal society.

When I was nearly 16, I moved up to Perth with my foster parents. I came up to Perth with my foster parents to further my music training. Between the ages of around 15-16 to 18 I had a lot of problems which I really can't explain at the moment but I did end up in hospital. I do remember feeling very restricted by my foster parents and having to go to music lessons and becoming very confused. I ended up in hospital for overdosing on tablets. It is hard to explain but as I said before, I felt very constrained having to be home all the time and being under great stress to do my music training, etc.

At 18 I realised that I was no longer a ward of the State and the Native Welfare Department didn't have control over me any more. When I say the Native Welfare it was probably the Department of Community Welfare or which ever department had control of State wards. I was very conscious of the fact that they no longer had control over me. When I was around 18, I was doing nursing. I lived in nurses' quarters for a little while, then I went to live on my own away from my foster parents.

I felt a real urge to find my parents. I took my younger sister and we went up to Mogumber and other areas around there but we had no luck in finding my parents. I couldn't even find any relatives. No one could help us. I really can't explain how I felt about it, it is just a blur to me.

Around the same time I started going down hill. I was living on the streets. I was homeless. I became involved with drink and drugs. I also had a few casual relationships at the time. It is really hard for me to describe that period because a lot of it is just a blur and I was very confused at the time. Even today I am confused about it.

Around my early 20s I ended up marrying a friend of my sister's partner. He was an Iranian and we decided to get married. I am sure that I did love him but I don't know if he loved me or if he just really wanted to use me as a way of staying in Australia.

We lived together as a married couple for about two years. During that time we had a daughter. He went away for about a year and then he came back. I was in a pretty bad state. I was drinking a lot at the time and I didn't really realise why he came back or even that he was there. He didn't stay. He went away and that was the end of it. We finally got divorced.

I actually don't really remember being divorced. It was only a couple of years ago that I found out that I was divorced. The legal process just occurred without me really realising what was going on. I suppose I consented to the divorce but I can't remember it.

This period was very cloudy for me. I don't really understand what was going on. I don't really understand what I felt and what my identity was. Was I Aboriginal or non-Aboriginal? I was very confused about who and what I was. I had no parents around at the time who I could go and talk to and give me some guidance. I was pretty well lost.

I was admitted to Graylands Hospital not long after my husband came back and left me again. Then my daughter was taken away from me and placed in foster care. She was two years of age, the same age as I was when I was taken away from the mission to my foster parents.

I remember when I went and saw my daughter in Ngala, she would have been just over two years of age. For some reason I thought it was the last time I was ever going to see her again. I came to that assumption and cut any ties with her and walked away from her. I didn't know, no one told me that I was able to retrieve her or have her back in my possession. I didn't know the laws. I thought it was just like when I was taken away from my mother. I then went into a drug rehabilitation centre. I formed a relationship with a man there. I stayed with him for about three or four years. I had three children to him. He was a pretty well known crim and he ended up in a lot of trouble and life was pretty miserable. It was also very unsettled and we were moving around. I had my next child in Geelong and then I had two in New South Wales and then the final one back here in Perth. It was a very unsettling environment. Before my second child was two, he had travelled across the Nullarbor four times with me.

My eldest daughter went to live with my foster parents. I am not sure if it was a proper foster arrangement or whether her father just placed her with my foster parents. She is now 16 year of age. From the age of two to 16 I have only seen her about three times. I had to plead with my foster parents to be able to see my daughter. She was sent to a boarding school and I was unable to see her. She is now out on the streets, going through the same problems that I have gone through and I believe she will continue to go through them. She can come back and see me but it is just hard to have that bonding because of the separation that has occurred since she was two years of age. Also I am very confused, as she is. I am very worried for my daughter. She already has a criminal record. I can't force her to stay with me because she is out on the street, basically for the same reasons I was. That was because of my foster mother. She has treated her the same way as she has treated me, which was in a very restrictive manner. She was not abusive but very restrictive.

When I was in Graylands Hospital one time the child welfare people came to me and said that if I was admitted to Graylands one more time my other children would be taken away from me. It just went over my head. I didn't understand. I did get admitted again to Graylands and my children were taken away from me. They were made wards of the State and placed in emergency foster care.

I remember the child welfare people asking if there was anyone on my Aboriginal family side who could look after the children, or even on my foster parents side. I knew some of my brothers and sisters, but in a way they were alienated from me. Because they were raised up in New Norcia and around Aboriginal people, they seemed to be around Aboriginal people a lot more than I was. I wasn't around Aboriginal people at all. I didn't feel comfortable leaving my children with them because the Aboriginal way of life was alien to me.

The welfare then suggested that the children go and stay with their father. He had just come out of hospital after an accident. He was basically confined to a wheel chair. My greatest worry was that he was living in a house with his own father who had just come out of jail for sexual abuse on two young girls. I told the welfare about this but they didn't seem to take it in. The children went and stayed with their father and grandfather. The children then went to live with their father's mother, their grandmother. She bought a house in Perth. She had come over from New South Wales. The children and their father lived with her.

My children's father and their grandmother didn't get on very well. He left but the children remained with his mother, their grandmother. They are still with their grandmother and she is the legal foster mother. She now wants to take them back to New South Wales.

Of course, this is a traumatic time for me because I don't want them to be taken away from me to New South Wales because I will not be able to see them. It is bad enough having them live in foster care, but if they went to New South Wales it would be a severe blow and hard to handle.

It is really hard to know what the Family and Children's Services position is, but they appear to be more favourable to the foster mother than they are to me. Family and Children's Services appear to believe that the children are better off with their foster mother than they are with me. Of course, I don't agree with that. In any case they are missing out on their Aboriginal culture. Even if my children don't miss the Aboriginal culture or don't end up with a cultural identity problem that I have, it is detrimental to the Aboriginal society. They are four children who are Aboriginal. They will be lost to the Aboriginal society because they have had no fostering of their Aboriginal culture. Family and Children's Services doesn't seem to be helping the situation because they didn't place my children with Aboriginal families. Even now they want to take any possibility of contact with me away from them by allowing them to go to New South Wales. Family and Children's Services do not seem to care about allowing Aboriginal mothers to keep in contact with their children. Things really haven't changed from the 1950s and 1960s.

CHAPTER 12

THE CHILD WELFARE PARADIGM

Introduction

Although the national commitment to the process of reconciliation has been made very public, Aboriginal people in Australian society remain marginalised. This is no more evident than in the over-representation of Aboriginal children in the welfare and juvenile justice systems. Aboriginal children continue to be subject to an insidious form of child removal and institutionalisation. As Aboriginal children are the future of Aboriginal society, this has major repercussions for Aboriginal society. The impact that child removal from families has on Aboriginal communities cannot be over-estimated.

In 1986 the ALRC undertook a major project on the recognition of Aboriginal customary laws.[381] The investigation was a watershed development in non-indigenous understanding and recognition of Aboriginal issues that touched on, interacted with, or were themselves issues of a legal nature. The ALRC moved beyond strictly legal concerns to examine Aboriginal structure of family and community processes of conflict resolution. The ALRC made these observations about child welfare:

> *Aboriginal child-rearing practices are generally very different to those of the wider Australian community and contrasting assumptions underlie them ... The differences between Aboriginal and non-Aboriginal Australian society are apparent not only in the structure of responsibility for child care, but also in the way children are in fact brought up. Compared to the general Australian community, Aborigines place less value on material comfort, discipline and training for their children; rather the emphasis is on values such as the expression of warmth, affection and acceptance.*[382]

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381 ALRC, *op.cit.*

382 Australian Law Reform Commission, *op.cit.*, para 230. Also refer to Choo, C., *Aboriginal Child Poverty*, Brotherhood of St. Lawrence, Melbourne, 1990.

In relation to the role of the extended family the ALRC found:

> *In Aboriginal communities the extended family plays a very important role in child care arrangements. It is common for a member of a child's extended family, often a grandmother, to look after a child or children for periods of time where the parents are unable to do so for one reason or another. Sometimes these arrangements may extend for longer periods of time, to the point where the child might be identified as permanently in the custody of the person(s) looking after him or her ....*[383]

Family and Children's Services and its Predecessors

In 1974 the *Royal Commission upon all Matters Affecting the Well-being of Persons of Aboriginal Descent in Western Australia* was established.[384] It determined that the Child Welfare Department's policy should avoid the removal of Aboriginal children from home and make efforts to assist in domestic arrangements. It is further stated that the non-Aboriginal measure of suitable living conditions was not appropriate to Aboriginal communities. The Royal Commission also reported:

> *the Department (for Community Welfare) has had enough experience to be familiar with the results of parental deprivation of young children and is consequently extremely reluctant to remove any child from its mother.*[385]

However, the removal of Aboriginal children to the care of the State still continues. The 1980 *Children in Limbo* report stated that 56 per cent of the children in the care of the Department for Community Welfare were Aboriginal, two-thirds of whom were placed with non-Aboriginal caregivers.[386]

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383 *Ibid*, para 383.

384 Royal Commission Upon all Matters Affecting the Well-being of Persons of Aboriginal Descent in Western Australia, *Royal Commission Report into Aboriginal Affairs in Western Australia*, Western Australia Government Printer, Perth, 1979.

385 *Ibid*, p259.

386 McCotter, D., *Children in Limbo*, Department for Community Welfare, Perth, 1981, p861.

In 1988 the Aboriginal Child Placement Principles were ratified by the Executive of the Department for Community Services.[387] The Principles' aim was to maintain Aboriginal children within traditional family structures for their care. According to the Principles, placement away from parents should occur only when unavoidable and be for the shortest time necessary. The order of priority for substitute care is:

- in the child's home locality with members of the extended family or same community/tribe, group, or another Aboriginal family;
- in a different locality with members of the extended family or tribal group, or another Aboriginal family;
- in a residential group, home or hostel with Aboriginal caregivers, preferably in the child's home locality; and
- with non-Aboriginal people.[388]

The Principles are currently under review by Family and Children's Services in order to address the current needs and issues of Aboriginal people. It is not certain what role Aboriginal people are playing in the review. However, Family and Children's Services states that it has a strong commitment to "taking into account [Aboriginal] needs and aspirations and ensuring appropriate Aboriginal input to the development of policies and practices".[389]

The RCIADIC was scathing of the policies of child removal and assimilation, holding that they resulted in the subjection of Aboriginal society to total domination by a people who shared neither their culture nor their perspectives. The RCIADIC commented that contemporary Aboriginal

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387 Harris, M., and O'Brien, K., *Report to the Minister for Community Services into the Decision Making in Out of Home Placement of Two Children and the Current Procedures for such Placement of Children in Western Australia*, Department for Community Services, 1993, p13.

388 Department for Community Services, *Walking the Tightrope - Rights and Responsibilities in the Welfare System*, Department for Community Services, Perth, 1989, p49.

389 Correspondence from Director General, Family and Children's Services, dated 8 December 1995. Further correspondence from the Director-General, dated 19 March, 1996, states: "there will be extensive consultation with Aboriginal agencies during the course of the review ...:

problems of identity and self-esteem are the product of non-Aboriginal institutional and individual efforts to deny Aboriginal culture and heritage to Aboriginal children.[390]

The RCIADIC recommended that the welfare services approach must cease, to be replaced with a "culturally appropriate framework facilitating self-determination".[391]

Perhaps one of the most important recommendations of the RCIADIC is recommendation 62:

> *That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.*[392]

In 1990 the Department for Community Development published the findings of its Substitute Care Review.[393] The comprehensive document stated that approximately 46 per cent of the children in substitute care were Aboriginal. Further, 67 per cent of those Aboriginal children had been in care for more than two years. The 1986 Australian Bureau of Statistics census figures show that Aboriginal children made up only 4.28 per cent of children 0-17 years in Western Australia.[394]

The 1990 Review held that the high proportion of Aboriginal children placed with relatives or with Aboriginal care givers indicates that the Aboriginal Placement Policy is being implemented. However, the Review Committee criticised the Principles as presuming a homogeneity of

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390 Johnston, E., *op.cit.* Vol. 2, 1991, p72.

391 Dodson, P.L., *op.cit.*, Vol. 1, 1991, p37.

392 Johnston, E., *op.cit.*, Vol 5, 1991, p83.

393 Department for Community Services, *Substitute Care Review*, Department for Community Services, Perth, 1990, p65.

394 *Ibid*, p65.

Aboriginal culture. It went on to recommend that practice guidelines for the implementation of the Aboriginal Child Placement Policy be developed by both the Department for Community Services and relevant private sector agencies to ensure the acknowledgement of the diversity of Aboriginal culture.

Recommendation 113

That Family and Children's Services and relevant non-government agencies further develop practice guidelines for implementation of the Aboriginal Child Placement Principles to enhance the responsiveness of the program and ensure appropriate responses are made that cater for the diversity of Aboriginal culture.

The Review Committee supported the thrust of the majority of submissions. It supported the view that substitute care is predominantly a strategy to support the family in its child rearing role.[395] It is also agreed with the general view of the submissions that current (1990) substitute care programs for Aboriginal people were not appropriate in meeting their needs.[396]

The 1990 Review agreed with the statement that:

> *the capacity of the non-government sector to develop a singular focus, its perceived distance from the bureaucracy, the 'closeness' to the community and a lessening of the impact on the identity of a child being in the care of the State, enable it to best provide substitute care of children.*[397]

The 1990 Review strongly supported the provision of services by the private sector. The 1990 Review also proposed that the Department adopt the Out of Home and Alternative Care model of substitute care. The emphasis of the model is towards family reunification and, where that is not possible, the importance of the family of origin. Two key concepts of the model are

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395 *Ibid*, p94.

396 *Ibid*, p195.

397 *Ibid*, p151.

competence (inter-personal and child rearing skills) and "complementarity" (parental participation in tasks associated with child rearing after intervention). As Aborigines are over-represented as substitute care clients, the Out of Home and Alternative Care model impacts substantially on Aboriginal society.

The 1992 report to the Minister for Community Services into the decision-making process and practices of the Department for Community Services was damning of the Department's implementation of the substitute care policy, stating that, "there is no visible plan for the integrated development of Out of Home and Alternative Care in this State".[398] The report held that policies and procedures for Out of Home and Alternative Care were fragmented and poorly integrated across government agencies and between government and non-government agencies. At the time of the inquiry it appeared that there was minimal, if any, attempt to monitor the implementation of Departmental procedures and protocols by field officers. Further, many practitioners in the Department were operating without full knowledge of important policy developments. Private sector agencies stated that Departmental workers appeared under pressure and under-resourced, and often seemed to have little understanding of, or regard for, the principles of good placement practice.[399]

The report commented on the importance of co-ordination between the Department and private agencies in ensuring effective service delivery and case management. The report went on to recommend that private residential child care agencies have an independent voice in the form of a formal peak organisation. Such an organisation, along with Out of Home and Alternative Care representatives, should have a formal liaison with equivalent organisations responsible for policy development, co-ordination and integration of services in the allied area of child protection.[400]

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398 Harris, M., and O'Brien, K., *op.cit.*, 1992, p78.

399 *Ibid*, p79.

400 *Ibid*, p78.

Recommendation 114

That the State government establish a joint government/non-government Task Force which includes Aboriginal representatives, to assess and make necessary recommendations to improve its effectiveness.

Family and Children's Services currently operates one Aboriginal specific program in conjunction with the Education and Health Departments of Western Australia. The "Best Start Programme" aims to improve the well-being of Aboriginal children up to the age of five years.

The above provides the backdrop to present policy, practice and criticisms of Aboriginal child welfare. Despite numerous name changes in the last five years of what is currently Family and Children's Services, there does not seem to have been a corresponding positive change in policy or practice for Aboriginal people. Family and Children's Services states that it is committed to employing more Aboriginal staff, many of whom are relied on heavily in regional country areas to work with Aboriginal communities.[401] As at 30 June 1995, Family and Children's Services employed 114 Aboriginal staff which is 8.8 per cent of its total staff complement. Most Aboriginal staff are employed in the lower level positions.[402] Aboriginal input is essential in policy making, administration, and program positions.

Recommendation 115

That Family and Children's Services employ more Aboriginal staff at all levels within the organisation, including policy making, administration and program positions, and especially in country and remote areas.

In the recent past much emphasis has been placed on the importance of private sector and Aboriginal community participation in child welfare. Implementation continues to be hampered

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401 Correspondence from Minister for Family and Children's Services, Roger Nicholls to the ALSWA, dated 28 July, 1995.

402 Aboriginal Affairs Department (co-ordinator), *op.cit.*, 1995, p281.

by inadequate dialogue between the players, inadequate structural reform in the Department and by the government, and an absence of clear directives outlining responsibilities and "industry" objectives/goals.

Family and Children's Services functions under the provision of the *Community Services Act 1972* (WA). Its legislative mandate, under the auspices of the *Child Welfare Act 1947* (WA), is very broad - to protect from abuse and exploitation all children under 18 years. In order to identify abuse, the Department attempts to ensure that assessment occurs in all instances of suspected or alleged abuse.[403]

Family and Children's Services states that its policy is to protect the child but aims to balance the rights of the child and family. The then Department for Community Services' Child Protection Policy states that "the Department, in co-operation with other agencies, should provide comprehensive treatment services for children and their families ...".[404]

Clients who have had dealings with Family and Children's Services have expressed views to the ALSWA which raise some doubts over the guiding philosophy and operation of that organisation.

> *The problem still remains. They talk down to us. They have always known what is best for our kids. That's why I was taken away from my parents. Nothing has really changed. The authorities know best.*[405]

> *They are so quick to judge. My children are my life. I love them. Because I don't fit into the white man's standard doesn't say my kids are not looked after properly. They shouldn't have removed my kids. It was only for a short while, but that was too long. My kids are everything. I know of white kids who have been belted by their dads but they have not been removed. But us blacks - we are always judged so harshly.*[406]

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403 Department for Community Services, *Child Protection: A Guide to Practice*, Department for Community Services, Perth, 1992, p7.

404 *Ibid*, p87.

405 Angela, born 1950, "taken away", aged 2 years. Two of her four children were placed in foster care for 10 months by the Department for Community Services.

406 Four of Jenny's eight children have spent time in foster care on the order of the Department for Community Services.

In 1991 Departmental guidelines dictated that, except in the case of emergencies, consultation in regard to case planning and child care matters would take place with relevant Aboriginal groups.[407] Where a non-government agency is involved in a case, the roles of each agency should be clearly negotiated, establishing accountability and ultimate responsibility of the child.[408]

A research study contracted by the Department for Community Services in 1989 stated:

> *it is in (the) area of 'what is' and 'what is not' acceptable in Aboriginal society that child protection workers need to negotiate with family members and the community to determine the extent of 'abuse' or 'neglect'.*[409]

A dilemma (which has been present since colonisation) exists between Australian law and Aboriginal traditional laws and cultural practices. Family and Children's Services current child protection practice purportedly seeks to understand the cultural pattern or context of the behaviour in a way which is relevant to the setting in which it occurred.[410] Taking a cross-cultural perspective involves a balance between the need to protect children from harm, and the importance of understanding and respecting the integrity of behaviour in its cultural context. The ALSWA involvement on behalf of its clients with the Family and Children's Services and its predecessors indicate that appropriate recognition of Aboriginal culture does not take place.

In assessing purported child neglect by Aborigines, the Department recommends that a decision be made on sound practice in consultation with significant others such as the Aboriginal community, Aboriginal Agencies and Department for Community Services Aboriginal workers.[411] Once a decision has been made to remove a child, the Department's aim is to adhere to the principles of Aboriginal child placement. Again, the ALSWA would query the Family and Children's Services success in complying with the principles of Aboriginal child placement.

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407 *Administrative Instruction 457*, Department for Community Services, 18 October, 1991, p4.

408 Department for Community Services, *op.cit*, 1992, p89.

409 Aziz, E, *op.cit.*, p15.

410 Department for Community Services, *op.cit.*, 1992, p23.

411 *Ibid*, p21.

Instruction 457 (18/10/91) sets out extensive guidelines on the management of Aboriginal welfare. The principles which underwrite those guidelines are to:

- provide for the protection and care of children and to promote family welfare;
- maintain and develop family relationships that are in the best interest of the child;
- to acknowledge the importance of maintaining and promoting the relationship between the child, the parents, guardians or persons having the custody of the child (and where appropriate, the extended family of the child);
- maintain the continuity of the living arrangements of the child's usual ethnic and social environment;
- consult with the child's parents and other persons with responsibility for the welfare of the child in accordance with Aboriginal customary law, and such other Aboriginal organisations as are appropriate in the care of the particular child; and
- encourage Aboriginal control in matters relating to the welfare and care of Aboriginal children, practise sensitivity and have respect for Aboriginal cultural issues in providing child welfare services to Aborigines.[412]

Further the instruction states that cultural consistency and family linkage are considered more important than material standards. Where possible, Aboriginal children should be placed with the extended family or the same Aboriginal community/tribal group or another Aboriginal family.[413]

The Administrative Instructions 456, 457 and 458 of 1991 were the last instructions on Aboriginal child welfare issued by the then Department for Community Services. This is despite subsequent Departmental re-organisation and new policy developments in governmental responses.

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412 *Administrative Instruction 457, op.cit.*, p2.

413 *Ibid*, p3.

Administrative Instruction 457, states that the procedural strategy is to include on-going work with individual communities to establish:

- minimum standards of care;
- strategies regarding child protection issues and neglect in the community; and
- networks of recognised supports for children who are abused or deemed at risk.[414]

The previously mentioned 1989 study *Enhancing Child Welfare in Aboriginal Communities* believed that the emphasis in service delivery to Aborigines should be upon the emotional nurturing of children rather than their physical well-being.[415] It held that many Aboriginal families live in fourth world conditions (third world existing within an industrial first world country), but are judged by the same criteria as first world countries. The report went on to suggest that a number of preventative packages needed to be developed in an attempt to reduce the over-representation of Aborigines in the child abuse and neglect client group, including:

- anti-poverty measures;
- anti-racist programs that change attitudes towards Aborigines; and
- measures to bring about changes where lack of resources are experienced.[416]

Further the report recommended that all Departmental workers need specific training in order to intervene effectively and equitably with Aboriginal families and Aboriginal communities where child protection is involved.[417] Although more than 8.8 per cent of Family and Children's Services staff have completed their "Working With Aboriginal People" cross-cultural training,[418] further training is needed.

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414 Aziz, E., *op.cit.*, p22.

415 *Ibid*, 1989, p9.

416 *Ibid*, p37.

417 *Ibid*, p11.

418 AAD, *op.cit.*, 1995, p103.

Recommendation 116

That all staff at Family and Children's Services complete a properly assessed cultural awareness program designed and conducted by Aboriginal people.

A 1993 Family and Children's Services document, *Guidelines for Assessment of Aboriginal Care Givers* affirmed the paramountcy of the Aboriginal Child Placement Principles. It also recommended that the assessment of Aboriginal care givers must be undertaken by Aboriginal people or through formal consultation with Aboriginal Child Care/Welfare related agencies. Further recommendations were that Aboriginal agencies develop a training package to advance Aboriginal care giver assessments.[419]

The *State Aboriginal Plan*, 1992 (affirmed by the Department in 1994) is to be up-dated each year to reflect changing priorities. Cornerstone principles of the plan are:

- to establish a partnership between the Department and Aboriginal communities; and
- to consult and involve Aboriginal communities in the development and implementation of policies and programs.[420]

The operation of the Department is underwritten by a service philosophy which includes that regard should be shown for cultural differences, the rights of people to cultural freedom, and the maintenance of culturally important relationships.[421]

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419 Department for Community Development, *Guidelines for Assessment of Aboriginal Care Givers*, Department for Community Development, Perth, 1993, pp21-22.

420 Department for Community Development, *Annual Report*, Department for Community Development, Perth, 1994, p39.

421 *Ibid*, p3.

The 1994 Department for Community Development's Annual Report proposed the creation of an Aboriginal Services Steering Group which is to:

- monitor the Department's implementation of the Report of the Royal Commission into Aboriginal Deaths in Custody;
- monitor progress on the Department's Aboriginal Plan;
- report on the Department's response to the Aboriginal Plan; and
- fund Aboriginal managed organisations which received $2,453,488 from the Department in 1993/94.[422]

Further, the Department was to implement a pilot program for the Best Start Program in 1994/95. The aim of this cross-Department program is to improve life opportunities for children (up to five years of age) through actively improving health, education and well-being.[423]

As stated before, it is difficult to assess the effectiveness of Family and Children's Services programmes. There is little doubt that the philosophy, principles, guidelines and aims of the programmes espoused by the Department, are in many respects, on the right track. However, there are two outstanding issues that create great concern.

First, many of our clients have expressed concern with the operations and attitudes of Family and Children's Services' officers. They feel they are not considered on equal terms, and are made to feel inferior and inadequate as parents. This only exacerbates the distrust and fear that many Aborigines have towards government welfare agencies. These feelings are understandable considering the historical legacy of Aboriginal child welfare in this State.[424]

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422 Department for Community Development, *op.cit.*, 1991, p39.

423 *Ibid*, p40.

424 These attitudes are exemplified in Sharon's story where Family and Children's Services are encouraging the removal of Sharon's children to another State. This strongly suggests that Family and Children's Services still has a long way to progress before it overcomes past and, indeed current, injustices to its Aboriginal clients.

The second issue is that of appropriate consultation and self-determination. Family and Children's Services must engage the Aboriginal community at all stages, from consultation and planning to service delivery and appropriate treatment. But even that is not enough. Aboriginal communities must have responsibility for determining the most appropriate method of delivery of child welfare services. It is disconcerting that the Department "has no specific policies in regard to the involvement of any Aboriginal communities within the Department".[425]

Recommendation 117

That Family and Children's Services prepare and release a current statement of its Aboriginal child welfare policy, including departmental directives regarding Aboriginal case-management and methods of assessing procedures/casework/complaints.

Recommendation 118

That the State government instigate an independent review of the Aboriginal child welfare policy of the Family and Children's Services and make appropriate recommendations.

Recommendation 119

That Aboriginal non-government agencies be increasingly relied on to provide placement, case management, policy and directive formulation, assessment and education services to Family and Children's Services and other involved government agencies.

Recommendation 120

That Family and Children's Services introduce programs of community assessment which pro-actively engage service-users and encourage public comment generally.

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[425] Correspondence from Family and Children's Services to ALSWA, dated 1st December, 1995.

Non-Government Organisations

The three main Aboriginal child care agencies in Western Australia are Yorganop, Manguri and Djooraminda.[426]

1. Yorganop Child Care Aboriginal Corporation

Yorganop has a reciprocal agreement with the Family and Children's Services which allows Yorganop staff access to Family and Children's Services' files. This is a unique position which was established in 1993. The immediate past and current directors of Yorganop stated that the organisation has an excellent working relationship with the Department. They believe that current policy is being implemented by the Department. Yorganop estimated that it has the support of about half the Aboriginal population in Western Australia.[427]

The last Annual Report from Yorganop in 1993, identified its purpose as representing the Aboriginal community's interests in all matters involving the care and protection of Aboriginal children. Its primary function was to provide a placement and consultative service which gives effect to the Aboriginal Child Placement Principles. Other activities include:

- liaising with government and other agencies in the development of improved child placement practices and policies designed to provide child protection; and

- providing a tracing service for Aboriginal people separated from their natural families through government policy, who now seek to locate them.[428]

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426 The information contained in this section is derived form interviews and information supplied by the organisations. (No information was received from Djooraminda as to their role and relationship with the Family and Children's Services).

427 Conversation between Yorganop directors and employees of the ALSWA.

428 Yorganop, *Annual Report*, Yorganop, Perth, 1993, pp4-5.

Although management of children may be shared or placed solely with Yorganop, Family and Children's Services retains the statutory and guardianship responsibilities of decision making, under the *Child Welfare Act 1947 (WA)*.[429]

While Yorganop is utilised by many in the Aboriginal community, there is a perception conveyed to the ALSWA by some clients that Yorganop is too closely associated with Family and Children's Services. It has even been suggested by some clients that Yorganop, is in effect, managed by Family and Children's Services. It was not possible to gauge the extent and veracity of this perception. In any case, this perception is potentially very damaging to Yorganop. It is important that Yorganop be considered by the Aboriginal community to be independent and part of the self-determination process that Aboriginal people demand, especially in the child welfare area. It is potentially fatal to Yorganop's survival and effectiveness that it be perceived as dependent on government. This problem is reinforced by the fact that Yorganop relies solely on Family and Children's Services funding, which is inadequate. The legacy of the assimilation policies and practices, as administered by the Department of Native Welfare (and its subsequent name changes) makes it crucial for Yorganop to be seen to be independent from Family and Children's Services.

Recommendation 121

That the State government provide adequate resources to Yorganop to undertake wide ranging consultations with Aboriginal communities and organisations.

2. Manguri Aboriginal Corporation

Formerly known as Sister Kate's Children's Home and operated by the Uniting Church (before that by the Anglican Church), Manguri became incorporated in 1994. Manguri values Aboriginal people, families and kinship groups as its best performance assessors. Manguri's purpose statement comprehensively examines its goals and responsibilities to and for Aboriginal people.

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[429] *Ibid.*

The agency places emphasis on the importance of kinship groups in the success of Aboriginal child welfare.

Manguri lists its strategies as:

- Manguri based care - cottages (three on-site at Queens Park; one in Maddington);
- community care (provided by eight families catering for up to three children each from their own kinship or family group, two cottages provided for families in transition - socially or financially);
- awareness (also an extension of community care with the establishment of a family based centre providing the services of counselling, parenting courses, sewing, pottery, horticulture, education and employment training); and
- interest group child care.[430]

In 1991 Manguri instigated a pilot Kinship and Community Care Program. Through the program, children are placed with kinship care givers, other Aboriginal community care givers or in the Manguri based community/residential facilities. A 1992 review of the Program recommended the formalisation of the development of the Aboriginal child-care sector in a framework of co-operation and shared support.[431] Further, the report identified the need for a clarification of areas of communication between the Family and Children's Services and Manguri, including an understanding of the appropriate areas where knowledge and resources are shared.

In 1994 a report on the "Aboriginal Value Based Service Design Project" was published. The project was undertaken by Manguri and the Western Australian Council of Social Services in 1993/94. The project was initiated with the aim of developing a value and service model for service providers to Aboriginal communities. Successful Aboriginal service provision was recognised as an essential and yet under-documented component of the implementation of Aboriginal self-determination policies. The report provides a comprehensive guide to current

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430 Manguri, *Purpose Statement*, Manguri, Perth, pp2-18.

431 Manguri, *Pilot Project on Aboriginal Kinship and Community Childcare Programme*, Manguri, Perth, 1992, p31.

attitudes in the Aboriginal community to, and improvement in the quality of service delivery to Aboriginal people.

The report found that Aboriginal families prefer to use Aboriginal services where available. Use of these services was sometimes limited by family conflict occurring within the organisation and the restriction of services owing to a lack of funding and organisation.

Government services were criticised, particularly the then Department for Community Development, for not understanding the values of its Aboriginal client base.[432] Those consulted emphasised that services should be designed to be supportive of the kinship structure and its own familial ways of caring for the needy.

Recommendations of the report include:

- recognition of clans as the basic self-governing unit upon which service development for Aboriginal people must be based; and
- recognition as to the importance of kinship in the structure and dynamics of Aboriginal service agencies and community organisation; and
- there should be increased consistency in policy and programs between levels of government, government departments, and other funding bodies.[433]

Current services operated by Manguri include:

- Esra - educational facility catering for eight to ten adults learning apprentice-like skills. This project is funded by the Department of Employment, Education and Training;
- an Aboriginal counselling service staffed by a part-time psychologist and volunteer counsellors, with both personal and phone services;

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[432] Manguri and Western Australia Council of Social Services, *The Rite to Do*, Manguri and Western Australia Council of Social Services, Perth, 1994, p29.

[433] *Ibid*, pp44-45.

- Nyoongar language centre;
- two cottages catering for six to eight children. This is funded by Family and Children's Services and is currently under review by the Department;
- driver training project; and
- kindergarten.

Manguri currently has submitted applications requesting funding for the establishment of a day, vocational and after-school care service. Most funding for Manguri comes from the State government.

Manguri finds itself in frequent conflict with Family and Children's Services regarding the removal and placing of children. The Program's Manager at Manguri opined that there has been no development of Aboriginal cultural understanding by the Department. Departmental and bureaucratic attitudes and values consistently undermine the relationship between Manguri and the Department.

Manguri is not equipped to deal with Aboriginal children who have had a history of contact with the criminal justice system.

Manguri's vision for the future is to create a place for Aboriginal family interaction, the development of skills and education. This must proceed through the transfer of knowledge to Aboriginal people from Aboriginal people.

Recommendation 123

That direct State government funding to Manguri be increased to a level to maintain its long-term viability.

3. Djooraminda Aboriginal Corporation

Djooraminda is an Aboriginal managed corporation which places Aboriginal children in out-of-home-care. It is unusual for Djooraminda to place children over 13-14 years old. Most children

are referred from Family and Children's Services who also fund the organisation. The cottages operated by the corporation are predominantly in the metropolitan area, with one in Northam. Plans have been made for the prospective purchase of others in country locations in 1996.

Djooraminda provides day care for those children too young to go to school. They employ a part-time education officer who ensures that the educational needs of the children are incorporated. This involves ensuring the children are enrolled at a school and that they get to school. Tuition is provided where and when required. It was stated that many of the children coming to Djooraminda are, educationally, two to three years behind their age group.[434]

Djooraminda also provides limited support to the parent(s) of children under their care, for example, liaising with Homeswest to ensure the processing of application forms.

Djooraminda believes that a "really proper" assessment should be made before a child is brought into care. This requires experienced and knowledgeable staff with "hands on experience". Cultural training and better education on Aboriginal issues and affairs is needed - "the human side of culture is different from that in textbooks". Such training, it was stated, was required by all service providers who have any interaction with Aboriginal people, especially teachers, police and social workers. It was stated that the education system is not equipped to adequately provide for Aboriginal children. "Kalunga" was cited as an example of a move in the right direction.[435]

Djooraminda have not been consulted by any government agency on policy or guideline development. Djooraminda stated there has been no consultation with the "grass roots" and that further, there is not enough communication between government departments, and between the departments and non-government organisations. Djooraminda believes there is an urgent need for an Aboriginal counselling service. Despite being part of a committee which formulated a paper on the information of such a service (Report on a Proposal to Establish an Aboriginal Counselling and Support Service, May 1993), the Director of Djooraminda said she had heard nothing more of the project. It was the Director's opinion that there was a real need for such a

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434 Telephone conversation between Djooraminda staff and ALSWA.

435 Kalunga is an Aboriginal community school. Refer to chapter 9.

service. This service currently runs out of Manguri.[436] The absence of knowledge of established services demonstrates the lack of communication, even between Aboriginal child welfare corporations.

Djooraminda would like to provide follow-up support for children leaving their care, but are under-resourced. Currently, Djooraminda has only six months of funding owing to a review by the State government of the welfare sector.

Recommendation 123

That direct State government funding to Djooraminda Aboriginal Corporation be increased to a level to maintain its long-term viability.

Recommendation 124

That a peak organisation be formed to represent Aboriginal non-government child welfare agencies.

Recommendation 125

That the peak organisation have formal liaison status with Family and Children's Services.

Aboriginal Affairs Department

On 1st November 1994, the Aboriginal Affairs Planning Authority became the AAD. The mandate of the new Department is contained in legislation presently being drafted. The Department is currently operating under the auspices of the *Aboriginal Affairs Planning Authority Act 1972* (WA). The Department is in the process of creating a 1996-1999 Aboriginal plan. The 1993 Aboriginal Plan continues to shape Departmental policy and practice.

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[436] It is called Yorgum.

The Aboriginal Plan provides a statement of State government programs that have, and will be undertaken by eleven departments on Aboriginal Affairs. It therefore has an important influence on the issue of Aboriginal child welfare. Hopefully, the four main objects of the plan; economic self-reliance, social well-being, self-determination and reconciliation will mean that Aboriginal communities will at long last become the custodians of Aboriginal child welfare in Western Australia. It is not clear how AAD is going to ensure the accountability of other government departments in the implementation of their Aboriginal Affairs programs.

Report of the Task Force on Aboriginal Social Justice[437]

As previously stated, the Task Force recommended that Aboriginal people must be fully involved in the development of programs and decisions that affect Aboriginal people. Further, it was recommended that Aborigines be part of the consultative and advisory processes.

This direction was seen as particularly applicable in the area of Aboriginal child welfare. The Task Force identified the unique qualities of small non-government task orientated organisations and their holistic vision. Such organisations were seen as less likely to be concerned about agency territorial demarcations and long-term politics, more creative in breaking traditional barriers and more innovative and flexible in their approach.[438] Generally, it was held that non-government organisations had a greater potential for effectiveness, efficiency, equity and accountability in Aboriginal child welfare.

Such a recommendation is supported by the finding that current responses to intervention in Aboriginal families range from inertia based on fear to instant inappropriate intervention based on over-reaction.[439] The Task Force also heard of failures in the support and protection of children placed in out of home care. The Department for Community Development was identified as being further hampered by its own reputation and past, and that generally of "welfare". This

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437 Government of Western Australia Task Force on Aboriginal Social Justice, *op.cit.*

438 *Ibid*, Vol. 2, p505.

439 *Ibid*, p502.

finding has been echoed by many of our clients, who remember the hurt and anguish of their childhood under the control of the Department.

The Task Force believed that statutory responsibility for child protection cannot readily be transferred and that the Department should retain the oversight of protective functions.[440] Recommendations 232-243 of the Report, and their prospective implementation, are key indicators of the future of Aboriginal child welfare in this State.[441]

The Task Force's proposed action on Aboriginal community welfare included:

- an Aboriginal policy and program unit in the Department for Community Development:
- investigation into the feasibility of contracting out some programs and responsibilities to Aboriginal organisations;
- increase in the proportion of funding going to Aboriginal managed targeted non-government organisations; and
- increased number of Aboriginal people in senior positions in welfare with appropriate incentives and career paths.[442]

Recommendation 126

That all government and departmental policies and directives in relation to Aboriginal people be informed by the rapid developments in the area of Aboriginal affairs, rights and expectations. Attention should be given to:

- ***international law;***
- ***programs and developments in other countries;***
- ***academic studies;***
- ***Commonwealth and State commissioned government reports; and***
- ***non-governmental reports and studies***

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440 *Ibid*, p504.

441 *Ibid*, pp506-507.

442 *Ibid*, "Summary", p9.

Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1994[443]

Recommendation number one of the RCIADIC outlines the process of accountability in the consideration, implementation and progress of the implementation of its 339 recommendations.[444] In 1994 there was a House of Representatives Standing Committee inquiry into the status of the implementation of the Royal Commission recommendations. The findings of the inquiry deal predominantly with the national trend of Commonwealth and State government implementation, not with individual State's responses. Some references were made to specific State activities and/or attitudes.

The Report states:

> *The existence of active, healthy, properly resourced indigenous organisations enables constructive dialogue to take place with mainstream agencies on a more equal footing. It was the view of all Commissioners that the need for mainstream agencies to negotiate with indigenous communities or organisations, along with the provision of resources on a non-dependency basis, were fundamental issues without which policies could not succeed.*[445]

The 1994 Report found that implementation of the Royal Commission recommendations had been very inconsistent and that many important recommendations had not been fully implemented.[446]

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443 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1994.

444 Johnston, E., *op.cit.*, Vol. 5, pp69-70.

445 *Ibid*, p11.

446 *Ibid*, "Executive Summary".

Recommendation 188 of the RCIADIC called for governments to negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and delivery of programs.[447] The 1994 Report found that governmental responses were extremely deficient and most cases totally failed to address the recommendation. The limited information provided in State Implementation Reports indicated that most Aboriginal bodies only have an advisory role, and the extent to which advice was acted on was unclear.[448] It concluded that involvement of indigenous people and organisations appears, in most cases, to be token.

Recommendation 192 of the RCIADIC stated that programs and services, where possible, be delivered through Aboriginal and Torres Strait Islander organisations.[449] Where no such organisations are available, government agencies were to ensure that consultation with Aboriginal communities was undertaken. The 1994 Reports states that the Western Australian government claimed that agencies continue to use Aboriginal organisations where possible. The 1994 Report also mentioned that Western Australian government highlighted the important role of the Department for Community Services in service provision to Aboriginal communities, stating that the Department will become more of a facilitator for the development of services by Aboriginal peoples, as well as a direct service provider. One of the stated objectives of the Department for Community Development is to increase funding for Aboriginal initiatives and organisations. The report went on to comment that the Committee received evidence from some Aboriginal people contrary to that provided by the Western Australia government, not only in relation to Department for Community Development, but other government agencies as well.[450]

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447 Johnston, E., *op.cit.*, Vol. 5, p111.

448 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *op.cit.*, p53.

449 Johnston, E., *op.cit.*, Vol. 5, p111.

450 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *op.cit.*, pp60-61. The Report cites the example of the delivery of health services to Aboriginal people in prison in Kalgoorlie, where 80-90 percent of the inmates are Aboriginal.

Recommendation 127

That the State government implement immediately recommendations 188 and 192 of the Royal Commission into Aboriginal Deaths in Custody.

Recommendation 128

That relevant government and non-government organisations design performance indicators to be included in all Aboriginal targeted or specific programs.

Current Issues

The previously mentioned 1986 ALRC report, *The Recognition of Aboriginal Customary Laws* raised many important issues pertaining to Aboriginal law, procedures and perspectives. In addition to a series of recommendations, the Report asked numerous questions regarding all areas of the dominant legal system of this country and Aboriginal customary laws, and their relevance to, and impact on, Aboriginal people. One of the areas was child welfare and the importance of culturally relevant delivery of services. Questions asked included:

- whether there is an obligation on the mainstream child welfare agencies to provide services in a culturally appropriate manner;
- whether there is a statutory requirement for Aboriginal communities to be represented on the board of directors of mainstream child welfare authorities servicing those communities;
- whether there is a requirement for the mainstream child welfare authorities to consult with Aboriginal communities regarding the manner of providing family and child welfare services; and
- whether there is a statutory expectation that Aboriginal communities will themselves receive funding or be licensed to provide child and family services to their communities.[451]

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451 Sweeney, D., *Cultural Perspectives in Child Welfare, Custody and Juvenile Justice Laws in Canada*, Unpublished Master thesis, University of British Columbia, Vancouver, 1993, p23.

Affirmative pro-active answers to these questions are now firmly entrenched in the current Aboriginal discourse of empowerment and self-determination. So much so that discussion of Aboriginal child welfare has reached the point of querying whether it is time Aboriginal agencies took the predominant role in the provision of services to Aboriginal society.

Obviously for such a transfer to occur, appropriate mechanisms and structures will need to be established. Co-operation, assistance and a commitment from State and Federal governments would be essential. Further, non-governmental organisations currently operating in the field of Aboriginal child welfare would need to be greatly developed and their services co-ordinated (with clearly delineated areas of responsibility) if such a transfer was to take place.

Voices calling for Aboriginal self-management have risen as government reforms of juvenile justice and welfare systems consistently fail to ameliorate the range of recurring and increasing problems faced by Aboriginal children.

> *Policy in this country in the area of child welfare does not accede to Aboriginal people what they have long been seeking and neither does it conform to the 'paradigm shift' that is taking place at the international level and the national arena. Aboriginal sectors want a decolonisation of their relationship with the State, with access to the tools required for charting a new course based on freedom, and self-determination for political, economic and cultural matters.*[452]

One of the major criticisms of the current system of funding and organisation of Aboriginal child welfare services is that it is fragmented and unplanned.[453] Ample recommendations have been made, originating before but including those of the RCIADIC, as to how the child welfare and justice systems should be reformed to become fairer and more equitable institutions for Aboriginal people. Although reforms have been instigated in many areas, they have been piecemeal, inconsistent and often unco-ordinated. A full and adequate response is yet to be made to the

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452 D'Souza, N., "Indigenous Child Welfare or Institutionalised Colonialism?", *Social Alternatives*, 12(1), 1994, p34.

453 Butler, B., "Aboriginal and Torres Strait Islander Children: Present and Future Services and Policy", *Children Australia*, 18(1), 1993, pp4-8.

issues at hand in order to end the destructive cycle, which reproduces and amplifies problems for Aboriginal society.

> *There is no doubt that given that the Australian government has signed and ratified the UN Convention on the Rights of the Child and the World Summit for Children Declaration for the Survival, Protection and Development of Children, the time is right for the development of a national strategy plan/policy for our children. The culmination of the Royal Commission into Aboriginal Deaths in Custody with its strong recommendations to governments to support the principle of self-determination, should not leave anyone uncertain about the fact that we will be developing that plan or policy.*[454]

The above statement was written three years ago and published with eight recommendations for national reform made by the Secretariat for National Aboriginal and Islander Child Care. To date, none of the recommendations has been fully implemented and Aboriginal children continue to be disadvantaged by their race in the justice and welfare systems.

Legislation which deals with child welfare in Western Australia is far from satisfactory. The division of responsibility between State and Commonwealth governments for different spheres of Aboriginal child welfare remains unclear.

Only State legislation and responsibilities are dealt with here. A series of statues govern the area of child welfare in Western Australia. Child adoption, fostering, custody, child removal, and juvenile justice regulation are contained in the following principle statutes: *Child Welfare Act 1947 (WA), Community Services Act 1972 (WA), Aboriginal Affairs Planning Authority Act 1972 (WA), Family Court Act 1975, (WA), Children's Court of Western Australia Act 1988 (WA), Young Offenders Act 1994 (WA)* and the *Adoption Act 1994 (WA)*.[455]

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454 *Ibid*, p7.

455 Refer to next chapter on Juvenile Justice for discussion on *Young Offenders Act 1994* (WA). *The Adoption Act 1994* (WA) is discussed in this chapter under Adoption. The other Acts mentioned are cited and briefly discussed in Appendix C.

The legislative compartmentalisation of the different areas of child welfare may be administratively convenient, but as Sweeney recognises, such categorisation masks two important issues, that all the areas of child welfare are concerned with the protection, upbringing and care of children, and that there is a practical link between child abuse, child removal and the criminal justice system.[456]

Consequently the law has:

> *often failed to recognise those areas in common with the result that there is often no unifying criteria or rationale articulated to govern the determination of the child's future ... [with the possibility of] legislative change designed to achieve a particular goal ... undermined if only implemented in one area.*[457]

The fragmented approach to Aboriginal child welfare and justice issues hampers efforts of change and reform. Implementation of reforms and co-ordination between departments is often difficult to achieve as the RCIADIC recommendations have proven. Policy implementation, clearly demarcated areas of responsibility and integrated programs requiring cross-departmental co-operation are but a few of the problems faced by having a patchwork of different legislation and bureaucracies managing the area of Aboriginal child welfare and justice. The best that can be achieved within the current arrangements is piecemeal reform dependent on the willingness, initiative and resources of each department.

A more holistic approach would be easier to manage and more responsive and appropriate to clients. In New Zealand, legislation is currently in place which provides such a setting. The *CYPF Act* unites common threads of both juvenile justice and welfare terrains and creates a single piece of legislation dealing with, for example, the treatment of children in relation to delivery of child family services, appearances of children before all courts of law, involvement of family and community during initial court hearing and post-sentencing reviews, and funding to indigenous community based child welfare service agencies.

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456 Sweeney, D., *op.cit.*, 1993, p2.

457 *Ibid*, p2.

The success of the *CYPF Act* has been widely acknowledged. The New Zealand Department of Justice reported that decreased offending was "over and above the expected effects from the *CYPF Act*."[458] Juvenile justice is but one area dealt with by the Act.

> *A major achievement of the Act is in articulating a cohesive set of principles and procedures that apply to all children in State care and to all decisions that may remove children into State care.*[459]

No Western Australian legislation related to child welfare contains specific provisions for the particular treatment, rights and needs of Aboriginal children. This is despite consistent calls for the inclusion of such provisions in legislation. By not having explicit protection of rights and special needs contained in legislation, Aboriginal people have been, and continue to be discriminated against by government, non-government and judicial institutions.

Interpretation of statutes, to say nothing of the discretion involved in interpreting and applying departmental directives and many of their ambiguous phrases and terms, has traditionally worked to the disadvantage of Aboriginal people. The commentary of the Manitoba Aboriginal Justice Inquiry applies equally to problems of legislative and quasi-legislative interpretation in Australia:

> *Terms such as "adequate care", "proper supervision" and "unfit circumstances", not to speak of "in the best interests" and "in need of protection", are vague and value laden. For the past four decades, many problems have arisen because the interpretation of these phrases has been left to the discretion and understanding of social workers, police, lawyers and judges who possess little or no understanding of Aboriginal culture. Cultural differences between Aboriginal families and non-Aboriginal social workers have blinded many non-Aboriginal social workers to the fact that different Aboriginal social-rearing methods are not wrong or inadequate, but rather, are acceptable alternatives.*[460]

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458 Zegers, J., and Price, C., "Youth Justice and the Children, Young Persons and Their Families Act 1989", *Auckland University Law Review*, 1994, p803.

459 Sweeney, D.,"Aboriginal Child Welfare: Thanks for the Apology, But What About Real Change?", *Aboriginal Law Bulletin*, 3(76), October 1995, p8.

460 Justice Hamilton, A.C., and Judge Sinclair, C.M., *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. 1*, Queens Printer, 1991, p545.

In order to overcome cultural ignorance at a judicial level, under the *CYPF Act*, the New Zealand Family Court has the power to appoint a cultural adviser to assist the court in its appreciation of the cultural issues which the case may involve. The Full Court of the Family Court of Australia, has acknowledged the power of courts in New Zealand, "to appoint a cultural advisor to assist the court in its appreciation of the cultural issues which the case may involve".[461]

One of the noticeable features of the New Zealand *CYPF Act* is its inclusion of Maori perspectives, and of specific provisions concerning Maori involvement in child welfare. In comparison with the process of legislative formulation in Australia, in which Aboriginal people and their organisations are inadequately consulted and very rarely afforded attention, the *CYPF Act* is almost revolutionary.

Since the granting of Aboriginal citizenship in 1967, Aboriginal children have, in principle, enjoyed the same rights as non-Aboriginal children. However, in addition to the advancement of universal rights (which are also noticeably absent in many pieces of legislation), Aboriginal children often require special protection or consideration in relation to Aboriginal culture and social issues. For example, the Aboriginal Child Placement Principles are not enshrined in the *Child Welfare Act 1947* (WA), despite being advocated for inclusion by Aboriginal communities and their organisation, academic writings, involved agencies and the "adoption" of the "Principles" by Family and Children's Services.[462] Such instances of important directives not being included in legislation can cause confusion as to what the rights of Aboriginal people and children really are.

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461 *In the Marriage of B and* R, *op.cit.*, at 619.

462 Although as previously stated Family and Children's Services are reviewing the Aboriginal Child Placement Principles. Further cases dealt with by the ALSWA and views expressed to ALSWA by its clients does raise doubts about Family and Children's Services compliance with the Principles.

As the ALRC found at the time:

> *The non-recognition of traditional marriage and of the characteristics of Aboriginal family structures in State and Territory adoption and child welfare legislation has had and to a degree continues to have a severe effect on the integrity of Aboriginal communities. In the words of one authority 'current adoption law and practice is ... contributing to the disintegration of Aboriginal culture since it fails to take account of Aboriginal family law'.*[463]

If the best interests of the child are paramount in the making of a placement decision, then the law must recognise that for Aboriginal children on-going interaction with their culture and extended family and kinship group is of central importance. The stability and security of home and family environments is crucial for the self-esteem and development of the child. For Aboriginal children, in regards to the consistency of their childhood environment and the development of their identity, placement within their culture and community should be given priority.

The Family Court in the case of *In the Marriage of B and R* recognised the importance of an Aboriginal child maintaining contact with his/her Aboriginal community and culture. The court acknowledged that the writings in the area recognised that Aboriginal children have historically been subjected to racism and are better able to cope with it within the Aboriginal community.[464]

The rights of Aborigines have been violated to such an extent that now many are reluctant to utilise the services of particular government departments, particularly the repeatedly reconstituted Family and Children's Services. One of the major obstacles identified by the then Department for Community Development in improving service delivery to Aboriginal people is the reputation it has inherited from the past:

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463 ALRC, *op.cit.*, para 272.

464 *In the Marriage of B and R, op.cit.*, at 605.

It is difficult to establish and maintain trust and effective working relationships with the Aboriginal community which is suffering the contemporary consequences of past policies ... (which are) responsible for past damage to their families and culture. Some Aboriginal people claim to feel degraded and humiliated by being forced to seek assistance from such an agency.[465]

To ensure that such abuses do not occur in the future, either directly, indirectly or accidentally, and to ensure that such services are as open to Aboriginal as non-Aboriginal people, the particular rights of Aboriginal people should be provided for in legislation which directly affects them. Considering that in both child welfare and justice fields Aboriginal children are over-represented, it would be prudent that their rights be provided for in legislation, and that provisions be designed to divert Aboriginal people from the welfare and justice systems. As long ago as 1986, the ALRC recommended that the Aboriginal Child Placement Principles and consultation with relevant Aboriginal custodians and/or Aboriginal child care agencies be explicitly provided for in relevant legislation. It is interesting to note that the Aboriginal Child Placement Principles have been included in legislation in NSW and the Northern Territory.[466] Similarly, adoption laws have been amended to include specific provisions in relation to Aboriginal children in Victoria 1984, South Australia 1988, and the Northern Territory in 1994. No such reform has been undertaken in Western Australia.[467]

Recommendation 129

That the State Government enshrine in legislation the Aboriginal Child Placement Principles.

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[465] Government of Western Australia Task Force on Aboriginal Social Justice, *op.cit.*, Vol. 2, pp496-497.

[466] *Children (Care and Protection) Act 1987 (NSW), Community Welfare Act 1993 (NT).* Further, the RCIADIC also recommended enshrining the Aboriginal Child Placement Principle (recommendation 54). Refer to Johnston, E., *op.cit.*, Vol. 5, p81.

[467] Prior to the last change of government in Western Australia (February 1993), the Adoption Bill included Aboriginal Child Placement Principles.

The ALRC further recommended that:

> *Careful attention should be given to the possibility of devolving child care responsibilities to regional or local child care agencies by agreement, and with appropriate resources.*[468]

Calls for radical reform of the child welfare, child protection, adoption and juvenile justice systems have become more emphatic as interest in, and discussion of, Aboriginal issues have become more prominent. Some suggest that it is time Aborigines had ultimate control over the systems which directly affect their lives, particularly those systems which control their children.[469]

A similar conclusion was reached by the NSW government appointed Steering Committee of the Aboriginal Children's Research Project. It is recommended that the government "guarantee Aboriginal control over their children" and limit the role of the NSW Department of Community Services so that it would not directly control the care or detention of Aboriginal children (except in special circumstances).[470] This recommendation was made in 1982. Thirteen years later Aboriginal people are still struggling for inclusion in decision making processes, and fighting for greater preventative and support mechanisms for their children.

It was the stated intention of the previous Commonwealth Labor government to create an environment for indigenous people where empowerment and self-management could flourish.[471] This is to be applauded. Underwriting such a policy is the recognition of the right of indigenous people to be able to make their own choices in matters affecting their own lives. Clearly, Aboriginal people should have an ever-expanding role in decision-making and management, the goal of which should be Aboriginal control of systems which affect their children's lives. This

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468 ALRC, *op.cit.*, para 392.

469 Sweeney, D., *op.cit*, 1995, p6.

470 *Ibid*, p8.

471 ATSIC, *Social Justice for Indigenous Australians*, 1994-95, AGPS, Canberra, 1995, p24.

direction has been given support by numerous studies and reports, including the RCIADIC. Proponents of Aboriginal self-management identify the need to move:

> *[f]rom a centralised hierarchy of policy making and implementation to a decentralised ascending hierarchy wherein the Aboriginal communities control the process.*[472]

It is argued that:

> *[i]f Aboriginal communities had ultimate control of child welfare and education, it would be hard to imagine that the recent controversial closures of the Treager Park School in the Northern Territory, and the Northlands Secondary College in Victoria,*[473] *would have occurred, or that juvenile justice detention centres in northern parts of Queensland and Western Australia would be situated so far from Aboriginal communities.*[474]

Calls for greater Aboriginal management of "services" which directly, or disproportionately affect Aboriginal people, should be heeded and given detailed consideration. Such roles must, of course be supported by adequate mechanisms of administration, organisation, accountability and expertise. But self-management must be self-determination, not just self-management under a non-Aboriginal authority, or quantitative self-management in a system in which the Aboriginal communities determine the method of delivery of child care and welfare services.

Recommendation 130

That the State government transfer policy making and implementation on Aboriginal child welfare from centralised non-Aboriginal bureaucracy to decentralised Aboriginal Communities.

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472 Gungil Jindibhah Centre of Southern Cross University, *Learning From the Past*, NSW Department for Community Services, Sydney, 1995, p83.

473 Which was re-opened by court order.

474 Sweeney, D., *op.cit*, 1995, p6.

Recommendation 131

That the State government introduce legislation similar to the Children, Young Persons, and Their Families Act 1989 (NZ) and/or amend relevant statutes to incorporate, where appropriate, recognition of Aboriginal rights, special needs, law and resolution procedures. Acts that should be considered for reform are:

- ***Child Welfare Act 1947 (WA)***
- ***Community Services Act 1972 (WA)***
- ***Family Court Act 1975 (WA)***
- ***Children's Court of Western Australia Act 1988 (WA)***
- ***Adoption Act 1994 (WA)***

Recommendation 132

That the State government ensures all relevant legislation guarantees Aboriginal control over Aboriginal child welfare.

Family Law

Family law is an important factor in the issue of child welfare because, often, family law proceedings will determine where an Aboriginal child, like any child will be reared.

Recently developments within the Family Court of Australia with regard to justice issues facing Aboriginal people are to be applauded. Initiatives such as cross-cultural awareness training with the Australian Institute of Judicial Administration, the development of pilot projects for Aboriginal Family Consultants and efforts to make the Family Court more accessible to remote locations have been undertaken in 1995.[475] Further, the Attorney-General in the Keating Labor government

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[475] See Hon. Justice Nicholson, A., "Family Court Initiatives with Aboriginal and Torres Strait Islander Communities", *Aboriginal Law Bulletin*, 3(76), October 1995, pp15-17.

announced it was the government's intention to introduce an amendment that will require the court to take into account Aboriginal and Torres Strait Islander law and culture when making custody decisions involving children of Aboriginal and Islander descent. The late addition of the section is included in the *Family Law Reform Bill 1994* (Cth) currently before Parliament. The Aboriginal community awaits the approach of the new Coalition government in this area.

Chief Justice of the Family Court of Australia, the Honourable Justice Alastair Nicholson, has been a key protagonist in encouraging these developments. In 1993 the Chief Justice established the Aboriginal and Torres Strait Islander Awareness Committee which was to prepare a plan of action for the court, and to improve liaison between the court and Aboriginal and Islander people. Resulting interaction has:

> *enabled the court to provide information about its services and practices generally, and to receive information about the barriers Aboriginal people face in accessing these services ... [while] individual Court Registries throughout Australia have begun to establish links with various Aboriginal and Torres Strait Islander organisations and community groups.*[476]

Further, discussions and consultations have highlighted the particular difficulties facing Aboriginal and Islander peoples because of the law's failure to recognise traditional adoption practices.

In 1986 it was estimated that 90 per cent of marriages by traditional Aboriginal people were not conducted under the *Marriage Act 1961 (Cth)*.[477] Current figures are not available, but it is likely that a significant number of Aboriginal marriages continue to be traditional. Further, it may be the preferred option of the Aboriginal parties involved in the breakdown of non-traditional marriages that the Family Court not be involved. Appropriate alternative services may need to be provided that are more in keeping with Aboriginal conflict resolution and traditional law procedures.

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476 *Ibid*, p15.

477 ALRC, *op.cit.*, para 233.

The court has always been able to take into account issues of identity, heritage and culture and the court has an obligation to receive evidence relevant to the unique experience of indigenous Australian peoples.[478] However, the court's obligation to include such information in the ensuing decision remains discretionary.

The Family Court of Western Australia is independent of the Family Court of Australia, in that it has a separate legislative mandate and jurisdiction. The initiatives of the Family Court of Australia mentioned above do not apply in Western Australia. However, the Family Court of Western Australia has implemented a number of its own initiatives.

In 1994, the Family Court of Western Australia established a committee to consider the court's role in relation to Aboriginal people. The committee has consulted with numerous groups in the two years of its operation and as a result, two main initiatives have been implemented:

- increased liaison with Aboriginal groups during country circuits (the court has a policy of not only regularly visiting major regional centres, but will, where appropriate visit individual towns), conducting seminars; and
- increased liaison between the court's independent Counselling Service and Aboriginal communities and the provision of Aboriginal counsellors for the court's Aboriginal "clientele", thus facilitating Aboriginal access to the court. Involved Aboriginal agencies include Yorgum Aboriginal Family Counselling Service and Kamany Aboriginal Centres.

Pamphlets with details of Aboriginal-specific service groups are available at the court.

The court concedes that its involvement with Aboriginal people is not great. The current initiatives aim to encourage Aboriginal use of and access to the court and its services.[479]

The services provided, and initiatives instigated by the Family Court of Western Australia are welcomed. However, the progress made by the national court should be considered as a starting

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478 *In the Marriage of B and R, op.cit.*

479 Correspondence between judicial officers of the Family Court of Western Australia and ALSWA.

model by the Family Court of Western Australia and the Western Australian State government. Many of the problems faced by the national court apply equally, if not more so, to the situation in Western Australia. The tyranny of distance, for example, often inhibits Aboriginal access to the court and, hence justice. Procedures for overcoming such problems require investigation. Pilot programs introduced in the Northern Territory that employ Aboriginal people who have an educative role for all players in the court, provide assistance to Aboriginal litigants, interface with Aboriginal communities and assist counsellors when Aboriginal people access the court should, be adopted in Western Australia.

Recommendation 133

That the Family Court of Western Australia, after consultation with a wide section of Aboriginal communities, instigate programs and services which will improve the access of Aboriginal litigants and defendants in the Family Court.

Generally, Aboriginal access to the Family court must be improved. This should be achieved as much through the provision of information as through the development of services to remote areas. Representation is the necessary precursor to access to the court. The ALSWA is under-resourced to adequately cover the whole State and currently responds on a "needs only" basis. Family court initiatives obviously have to be linked to corresponding development in associated agencies if they are to be effectual. The current resourcing of the ALSWA is insufficient to increase its family law coverage of the State.

The "needs only" availability of ALSWA representation to Aboriginal people must be seen in the historical context of Aboriginal interaction with mainstream services. Traditionally, Aboriginal people have been reluctant to seek the court's services. Previous "welfare" policies and their associated alienating effect on Aboriginal people, and the use of traditional Aboriginal procedures for resolving family disputes, are probable reasons for this. In the breakdown of mixed marriages, an indigenous person may feel disadvantaged in dealing with a largely non-Aboriginal institution. As a result, it may be that the number of Aboriginal people who require the services of the court are greater than those who are currently seeking representation by the ALSWA.

Encouraging Aboriginal access to the court through education, and the possibility of reforming the law so as to include applicable elements of Aboriginal law, adoption and resolution procedures should be considered. Greater funding is required for the Family Law unit at the ALSWA, if the rights and needs of Aboriginal people are to be adequately catered for.

Recommendation 134

That the Aboriginal and Torres Strait Islander Commission provide special grants to Aboriginal Legal Services to improve their ability to meet the family law needs/rights of Aboriginal people.

The case of *In the Marriage of B and R* raises many of the issues facing Aboriginal people attending the Family Court. The Full Court's decision was based on the ever increasing recognition of Aboriginality in previous cases and identified that recognition of the particular needs of Aboriginal people in all family law cases involving Aboriginal children should be mandatory. The court stated that:

> *The history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are ... unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad "right to know one's culture" assertion. It addressed the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child.*
>
> ...
>
> *The first step in the admissibility of this type of evidence is, we think, now beyond controversy. This is the devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment.*[480]

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480 *In the Marriage of B and R, op.cit.*, at 602.

The Court further identified constant themes which are raised in the now considerable body of literature on Aboriginal history and welfare issues:

> *The constant themes from the writings referred to ... and from daily Aboriginal experience include the following:*
>
> *A.* *In Australia a child whose ancestry is wholly or partly indigenous is treated by the dominant white society as "black", a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships and, seeking employment and housing.*
>
> *B.* *The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.*
>
> *C.* *Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.*
>
> *D.* *Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.*[481]

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[481] *Ibid*, at 604-605.

In the case of *R and R*,[482] advice was sought from the Director of an Aboriginal Child Care Agency who stated, according to the trial judge, that living in a tribal situation equips a child of mixed parentage far better to cope with periodic visits to non-tribal societies than vice-versa.

There is a need to treat Aboriginal people with a different yardstick despite the presumption that all are treated equally before the law:

> *... the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our current system of government.*[483]

However, as Brennan J realised in *Gerhardy v Brown:*

> *Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities "in political, economic, social, cultural or any other field of public life."*[484]

As stated *In the Marriage of B and R*:

> *... one realises that equal justice is not always achieved through the identical treatment of individuals. In many cases superficially identical treatment has a disparate impact on individuals; the same law or conduct may have the effect of respecting the essential humanity of certain persons while ignoring or undermining that of others.*[485]

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482 (1985) FLC 91-615 per Haese J, at 79,977-79,978.

483 *Leeth v The Commonwealth* (1991-1992) 74 CLR 455 at 486 per Toohey and Dean JJ.

484 (1984-1985) 159 CLR 70 at 129.

485 *op.cit.*, at 621-622.

In conclusion the court stated that:

> *... we think that in future cases involving the custody of an Aboriginal child it would be expected that these [Aboriginal] issues would be explored and evidence provided, especially about their significance in the particular case ... specific issue[s] in the custody of Aboriginal children ... require the delicate and professional handling to ensure that all aspects of it are considered and that the interests of the child, particularly in the long term, are taken into account.*[486]

Despite these advances at common law there continues to be a deficit in the recognition of Aboriginal culture and legal issues at the legislative level. Sub-section 68F(2) of the *Family Law Reform Bill 1994* (Cth) sets out relevant matters that are to be considered in determining the child's best interests. There is no mention of the ability to satisfy the cultural needs of the child or the removal of the child from his/her cultural setting. Rather any consideration of these matters is couched in imprecise, broad provisions concerning the needs of the child and any other facts or circumstances the court thinks is relevant. It is unfortunate that no specific recognition is made of the importance of maintaining a child in an appropriate cultural environment, particularly where the child is Aboriginal.

An amendment has been recently made to the Bill that inserts into Section 68F(2)(e) the requirement for the court to consider in determining the child's best interest the " need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islander". The inclusion is welcomed, but remains token considering the amount of legislation which does not provide for the special needs of Aboriginal people. It is hoped legislative reform in Western Australia will adopt this provision, but it is seen as only a start. It is hoped the *Family Court Act 1975* (WA) will go further in recognising Aboriginal resolution processes, kinship obligations and other cultural needs.

Section 82 of the *Family Court Act 1975* (WA) allows for representation of the child in proceedings. The inclusion of a separate representative for the child in custody, guardianship, access and property matters before the Family Court is an important development. Until recently,

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[486] *Ibid*, at 624.

the role of the separate representative has been an area of some ambiguity. However, in the *Separate Representative's case* Nicholson CJ and Fogarty J state:

> *We consider that a person appointed to separately represent a child in proceedings under the Family Law Act is empowered to seek orders on behalf of the child and, if necessary, to appeal.*[487]

This gives equal status to the separate representative who is generally required to:

> *Form a view as to the child's welfare based upon proper material and ... to make submissions suggesting the adoption by the court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child.*[488]

Such a direction allows for considerable discretion on behalf of the separate representative in determining what are in fact the best interests of the child. Although the representative is directed to act impartially and independently, the ALSWA believes that in cases involving Aboriginal children, lawyers and other relatively qualified people familiar with Aboriginal culture, legal and social issues should be appointed as a separate representative.

Recommendation 135

That the State government amend the Family Court Act 1975 (WA) to make it mandatory in cases involving Aboriginal children that the person appointed as separate representative is familiar with Aboriginal culture, legal and social issues.

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487 (1993) 16 Fam LR 485 at 495.

488 *Bennett and Bennett* (1991) FLC 92-191, at 78,259.

Recommendation 136

That the State government amend the Family Court Act 1975 (WA) to give appropriate recognition and effect to traditional Aboriginal marriages, Aboriginal resolution processes, Aboriginal kinship obligations and other cultural needs.

Recommendation 137

That Commonwealth and State Attorney-Generals and the Family Court of Australia and Family Court of Western Australia establish and maintain dialogue with Aboriginal communities on their needs in the area of family law.

Adoption

> *Adoption is alien to our way of life. It is a legal status which has the effect of artificially and suddenly severing all that is part of a child with itself. To us this is something that cannot happen even though it has been done.*[489]

The status of Aboriginal people in legislative reform in Western Australia is of particular concern. Once again consultation with, and specific provision for Aboriginal children and their needs, was passed over in the formulation of the *Adoption Act 1994*. The Western Australian government is particularly prone to ignore Aboriginal legislative needs, as other States have at least included the Aboriginal Child Placement Principles in their statutes. The Principles must be enshrined and the cultural and social needs of Aboriginal children must be recognised and taken into account when decisions are made regarding the adoption of Aboriginal children.

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[489] Butler, B., "Adopting an Indigenous Approach", *Adoption and Fostering*, 13(2), 1989, p28.

Section 45 of the *Adoption Act 1994* (WA) states:

> *(a) The Director-General is to give the person [who signs a form of consent to a child's adoption] the opportunity of:*
>
> *(i) expressing ... the person's wishes in relation to the child's upbringing and the preferred attributes of the adoptive family; and*
>
> *(ii) studying information provided ... and selecting a prospective adoptive parent.*

Section 52 states:

> *(1) The Director-General is not to place a child with a view to the child's adoption unless:*
>
> *(a) the prospective adoptive parent:*
>
> *(ii) meets as far as practicable, the wishes expressed under Section 45(a)(i);*
>
> *(v) meets, if relevant, the child's wishes and shows a desire and ability to continue the child's established cultural, religious or educational arrangements ...*

Not enough direction is provided by the Act in regards to the status of Aboriginal child adoptions. No adequate remedy is available where subsections 52(1)(a)(ii) and 52(1)(a)(v) are in conflict with each other.

Section 52 of the *Adoption Act 1994* (WA) does not adequately establish the importance of Aboriginal child placement in an Aboriginal cultural setting with extended family or other Aboriginal people (taking into account tribal affiliations and appropriateness of rural or urban settings). Once again confusion can result from not having clear legislative provisions on the status of Aboriginal child placement or other important Aboriginal-related issues.

The incompatibility of adoption with Aboriginal culture should not be under-estimated. The ramifications for the child and their biological parents is even greater if the Aboriginal child is adopted by non-Aboriginal parents. Unfortunately, this was too common an occurrence in the past, fitting well within the assimilation policies of previous governments. An example of the "problems" that can result from adoption of an Aboriginal child by a non-Aboriginal family is demonstrated by the case of Steven. In Steven's case, the ramifications were greater. His adopted parents took him overseas to live.

Steven's Story

My mother was just over 13 years of age when she had me. She wanted her family to look after me but the authorities pressured her into giving me up. She really did not want to give me up and she wanted her family to look after me, but the pressure was just too great. When I was almost two I was adopted by an English family. Shortly after they took me back to their home in the United Kingdom.

I did not like it over there. When I was going to school I was taunted with names such as "nigger" and "coon". I did not know why I was being called these names as I was no different from the other children. I was a bit darker in skin colour, but not a hell of a lot darker.

When I was about ten years of age my parents told me that I was Aboriginal. I was very confused. I just did not know what it all meant and I thought somehow I was not supposed to be where I was; I was supposed to be back in that place called Australia, which I did not know much about.

Things in life became very difficult for me. I just did not know what to do or who I was. I was supposed to be Aboriginal but I had never met an Aboriginal before. I did not know what Aborigines really were. The only thing I knew was that we briefly discussed Aborigines at school. I just felt so lost. I started taking some of my adoptive parents alcoholic drinks. I found that the drinking helped me to forget about the pain I was going through. By the age of 13 I was drinking pretty regularly and I was in constant trouble at school. Nothing really that bad, but wagging and minor things.

When I was 18 I came back to Perth. It was like I just had to come back. I do not know why but it was like something was pulling me back to Perth.

I managed to get a job in the Public Service in Perth, which was pretty good but I was hurting very much inside. I just knew I had to go and visit my mum and her family. I travelled up north to see them. It was one of the worst moments of my

life. I saw my mum but I found it very hard to talk to her. Her lifestyle seemed so different to what I had been used to. I felt so depressed I really wanted to become close to mum and learn about her culture, but I just could not.

I came back to Perth and I was hurting really badly. I was drinking and doing drugs. I was crying out for help but no one seemed to want to listen.

I committed an armed robbery at a service station. I do not know why I did it. I wanted attention. I handed myself in straight away. I got a six month sentence.

I committed another armed robbery at a service station. I wanted to draw attention to the hurt and suffering I felt. I felt very lost and confused. I still do feel very lost and confused.

I am in prison now doing time. I think I have done time for most of my life. It is just so hard not to feel able to fit into mainstream society or Aboriginal society. It hurts me so much that I am unable to feel comfortable with my own people. I do not know what life holds for me. I wish at times I could end it. I tried to commit suicide a number of times. Life has not been good for me.

Recommendation 138

That the State government amend the Adoption Act 1994 (WA) to enshrine the Aboriginal Child Placement Principles.

Recommendation 139

That the State government provide assistance to establish a non-government Aboriginal body to advise governments and governmental departments on adoption issues involving Aboriginal children.

Women's Issues

At first glance it may seem strange to include "Women's Issues" in a section dealing with child welfare. However, it is relevant. Many female clients have told the ALSWA that their family structure has crumbled due to problems of domestic violence. Often this violence has resulted from alcohol problems caused by their partners not being able to resolve their tormented childhood and adolescent years.

There is widespread concern in the community that the legal needs of women are not being met. For example, it was only in 1995 that the Legal Aid Commission of Western Australia established the Domestic Violence Unit.

Domestic violence is a particularly relevant issue for Aboriginal women who are often victims of alcohol-induced male violence. A recent WA study found that Aborigines are more than 45 times more likely to be a victim of domestic violence than non-Aborigines.[490] Aboriginal women account for 91.4 per cent of the Aboriginal victims of domestic violence.[491]

Langton reported in 1990 that:

> *It is clear ... that the appalling levels of domestic violence against Aboriginal women is not being addressed by Aboriginal law. Many women are hesitant to speak about it, but the daily parade of women with bandaged heads and broken arms, especially in towns and larger communities where there is access to alcohol, is plain for all to see.*[492]

Domestic violence is considered commonplace in many Aboriginal communities. It occurs far too regularly in Aboriginal families. Domestic violence is, to a certain extent, symptomatic of Aboriginal societal breakdown which can be linked to past governmental policies. Adequate legal, support and counselling services are required for Aboriginal women who are subject to violence.[493] Legal support and enforcement, such as ensuring restraining orders are served immediately and are enforced by police, and that police respond to calls reporting Aboriginal domestic violence, require attention. Until recently, Aboriginal women had little or no access to legal services in domestic violence situations. In many instances, Aboriginal women remain isolated and, just as relevantly, feel isolated from services which should protect and support them.

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490 Ferrante, A., Morgan, F., Indermaur, D., and Harding, R., *Measuring the Extent of Domestic Violence,* Hawkins Press, Sydney, 1996, p34.

491 *Ibid.*

492 Langton, M., "Too Much Sorry Business", in Johnston E, *op.cit.*, Vol. 5, 1991, p373.

493 Of course, counselling services are also urgently needed for the male perpetrators of domestic violence.

Legal advice and support regarding domestic violence is but one aspect of the legal requirements of Aboriginal women. Equal representation for Aboriginal women in all areas of the law must be assured. There are certain cultural issues, such as "Women's Business", which require female lawyers. The prominent role of women in Aboriginal society needs to be reasserted, while preventative and supporting mechanisms need to be put in place so that social, cultural and legal gains are not eroded by societal disintegration and its manifestations (such as alcoholism, domestic violence, lack of respect).

The establishing of an Aboriginal Women's Unit has been agreed to by the ALSWA executive. Funding for the pilot program has yet to be secured. It has been suggested that a separate Aboriginal Women's Legal Service may be the best way of fully serving the legal needs of Aboriginal women. It is disappointing that the previous Federal Labour government, in its allocation of increased revenue for legal services for Aboriginal women, did not see fit to direct some of that money to establish special women's units within Aboriginal Legal Services and/or separate women's Aboriginal Legal Services. It is submitted that Aboriginal Legal Services are more culturally appropriate to deal with Aboriginal female clients than general women's legal services.

It is important that Aboriginal women's issues (legal and social) are given sufficient attention by government and non-government agencies. For the ALSWA and other organisations to adequately respond to the demands and needs of Aboriginal women, and women in general, adequate structures need to be devised and adequate funding needs to be made available.[494]

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[494] The State government did establish an Aboriginal Women's Task Force (through AAD) but this seems to have become inactive through lack of funding.

Recommendation 140

That the Commonwealth and State governments provide assistance to establish an Aboriginal women's organisation to liaise with Commonwealth and State Attorneys-Generals and Minister for Aboriginal Affairs on issues relevant to Aboriginal women.

Recommendation 141

That the Commonwealth and State governments fund the establishment of special women's units within Aboriginal Legal Services and/or separate women's Aboriginal Legal Services.

Conclusion

This chapter has not attempted to provide a thorough analysis of the workings or practices of Aboriginal or State child welfare organisations. However, the information available to the ALSWA suggests that there is still much work to be done in the area of Aboriginal welfare. The historic forces which provide a backdrop to the current situation are tragic. They continue to haunt generations of Aboriginal people and influence the upbringing of the new. Beyond having to work against these factors, it seems that policy drafters and practitioners are still struggling to formulate how best to cater for the needs of Aborigines.

More specifically there appears to be a lack of communication and an amount of tension within the Aboriginal child welfare sector in Western Australia. The Family and Children's Services and its predecessors have been critiqued in the general reports already examined. A thorough, detailed independent analysis of its Aboriginal child policy and practice would prove invaluable for the development of a more effective, co-ordinated and appropriate child welfare policy and programme for Aborigines.

The non-government child welfare sector is under-resourced. For an understanding of current practice in Aboriginal child welfare, it is essential that Aboriginal agencies' current operations and interactions are assessed. This is imperative as government policy success is dependent on

effectively operating Aboriginal organisations such as Manguri and Yorganup. The co-ordinated practices and operations of these agencies is crucial to the success of Aboriginal policy. In the future, such organisations will be increasingly relied on to provide services to the Aboriginal community. They will be held accountable for the welfare of Aboriginal people by Aboriginal and non-Aboriginal society.

Despite the growth of an encyclopaedic body of literature on Aboriginal affairs, and a correspondingly wide number of views on how to remedy what is an urgent and critical set of problems and disparities, responses appear to be inadequate and often ineffectual. The process of change is occurring at a glacial pace. In key areas, oft-repeat recommendations, although acknowledged, are not implemented. Co-ordination, communication and Aboriginal participation are areas that are consistently found to be inadequately implemented.

Carl's Story

I was born on the 6th October 1969, in Darwin. My mother was aged 17 at the time of my birth and my father was aged 20.

I know very little about my separation from my parents. My Child Welfare Department file records that on the 27th August, 1970, I was declared neglected and committed to the care of the Department until I attained the age of 18 years by an Order of the Children's Court at Carnarvon. The view of the Department was that although my mother had cared well for me immediately following my birth, she appeared to lose interest in me in the months preceding my committal. On the 15th August my mother departed for Port Hedland, leaving me with my maternal grandmother in Carnarvon. I do not know how true the Department's views are in regards to my mother and also the Department's views that there were no relatives or friends in Carnarvon who were willing to care for me.

Following my committal as a State ward, I was placed in Ngala. I believe that whilst I was in Ngala my natural mother visited me on a number of occasions.

On the 17th February, 1971, I was placed in foster care with a family in Victoria Park. However, that placement did not work out because the family did not appear to want me and from the Department records it is stated that the family showed no interest in me.

On the 21st June, 1971, I was removed from the family in Victoria Park and placed with the Smith family in Mount Lawley. They subsequently moved to Safety Bay.

My Department file indicates that my mother signed adoption consent papers in May 1972. It appears that the Department thought it would be difficult to find an adoption for me because of my age. I have spoken to my mother about it and she tells me that she was never notified as to whether I was adopted or not. She was always under the impression that I was adopted.

When I went to the Smiths' home there were nine other foster children there. I recall that three children were removed in 1973. All, except myself and an Aboriginal girl were subsequently removed from the Smiths. All the other children who were removed were non-Aboriginal children.

In a report from the Department's Social Worker dated the 5th April, 1979, it was mentioned that the Smiths had been notified that they no longer had group home status. The Social Worker stated that I behaved in a very subservient manner with Mrs Smith and that I was 'very controlled within the home and used to getting the third degree about trivial matters'. The Social Worker also said that she would favour and encourage attempts to place me with an Aboriginal family but that she was concerned about the effect of this on the Aboriginal girl who was fostered with the Smiths, and on the Smiths themselves. The Social

Worker further stated that she felt that she had lost 'the ability to see the situation impartially and should have transferred the cases some time ago ... I apologise for the inept way these two children have been supervised. You can put it down to cowardice on my part'.

It appears from my Department files that I often was in trouble at school. I had trouble concentrating and engaged in attention-seeking behaviour.

My Department files indicate that on the 4th September 1979, a case conference was held by the Department to discuss concerns about the Smiths and their suitability as foster parents. It appears that because of concerns raised by a number of Departmental officers about the suitability of the Smiths it was recommended that both myself and the Aboriginal girl be removed from the Smiths. In the case file note written by the Social Worker it is stated that Mrs. Smith saw her job exclusively as that of telling me off for my 'offences', and that she constantly referred to me as a naughty boy, a bad boy or a 'little stinker'. The Social Worker further states that I showed interest in knowing about my natural mother and that I should be given the chance to establish my identity as an Aboriginal.

I was removed from the Smiths on the 20th September 1979. My Department files indicate that as a result of the earlier case discussion and my anxiety, it was decided that I should be removed from the Smiths without delay. I was placed for a week at the Catherine McAuley Centre then I was sent to Wanslea. I stayed at Wanslea for just over two months and then on the 20th November 1979, I was sent to live with my grandmother in Carnarvon. In a file note commenting on my placement as Wanslea and my performance at North Cottesloe Primary School, it is stated that I had a short concentration span and then I craved for affection. It also states that I was very eager to be placed with my family and that I was very excited when I was told that I would be going to stay with my grandmother.

On 20th November 1979, I was sent to live with my grandmother in Carnarvon. I enjoyed my stay with my grandmother and it was good to be away from the Smiths.

In January 1981, I travelled to Broome to see my father. I stayed in the St. Joseph Hostel in Derby for most of the year because my father was working as a Police Aide in and around Broome and was unable to care for me full time. I never was able to really get to know my father. He died in 1987.

While at the St. Joseph Hostel I developed a good relationship with Father Kevin. He is the only father figure I have ever had.

In December 1981, I travelled to Darwin to meet my mother. It was great to be with my mother and we formed a very close relationship. I stayed with her until I was 15 years of age.

In December, 1984, just before I turned 15 years old, I was released from the care of the Department.

After leaving the Smiths' household I blocked out memories of my life there. On at least one occasion when I was about 15 years old and living with my mother in Darwin, she asked me about my life with the Smiths. I was unable to recall anything about this period of my life.

I left my mother's household when I turned 15 years of age. I basically was on the road hitchhiking. I went to many places in the north-west and Goldfields region of WA. I had many different jobs including a station hand and a roof tiler.

In March 1988, I was incarcerated in the Kalgoorlie prison for some minor offences which I never committed. This was the start of a continuous period of being involved with the criminal justice system. In January 1989, I was sentenced to another term of imprisonment in Broome.

In about 1990, when I was about 21 years old, I began having occasional memory flash backs of incidents from my life at the Smiths, in particular, some of the beatings I used to receive. Some of the memories of events in the past were like looking at myself being hit. These experiences were very frightening. I began to use drugs heavily in order to cope with what I began to remember.

By June 1991, I had a serious problem with drug use and I entered a drug rehabilitation program in Darwin. Subsequent to my participation in the program, I spent some time in a Darwin prison.

In about April 1992, I left Darwin and I travelled to Broome. I continued to have occasional memories of my past and sought refuge from those frightening memories by engaging in drug use.

By September 1992, I was again in trouble with the police. I was sentenced to a term of imprisonment at Roebourne Regional Prison.

During my stay at Roebourne Regional Prison I contimued to remember more and more of my life at the Smiths. It came to the notice of the prison nurse because of my distress and my attempts to obtain sedative drugs from the prison doctor. The prison nurse approached a Social Worker from the Department for Community Health to counsel me. In November 1992, I was admitted to Nickol Bay Hospital in Karratha, as I felt suicidal. In November 1992, I was transferred to the Fremantle Hospital Psychiatric Unit for assessment. Whilst there I smashed a window after an argument and was subsequently sent to Graylands Hospital for seven days. I felt very out of place at Graylands Hospital.

The recollections I was having of my time under the care of the Smiths were of regular physical, emotional and sexual abuse. Some of my recollections are painful.

I was frequently beaten for various trivial incidents. I was beaten with a cord from either the electric frying pan, the toaster or the dog leash. Before each beating I was permitted to choose which of these items I was to be beaten with. I was then taken to my room, stripped naked and beaten. I was often unable to walk following these beatings and these beatings were usually administered by Mrs Smith.

I was also punished by being made to stand in the corner and jump continuously for about two hours at a time, and I was flogged with an electric cord if I stopped. I sometimes had my head flushed in a toilet bowl as a form of punishment. On occasions I was also made to chew on soap or chilli.

On at least two occasions I recall being made to sleep in the dog kennel outside because I was a 'dirty boy'. I was constantly told by Mrs Smith that I was 'dirty', or a 'naughty boy'. I do not recall ever receiving any praise.

I was not permitted to eat except at meal times and I remember being often hungry and stealing food. On one occasion I can remember being beaten for eating a bunch of grapes from the garden. I also had to obtain permission from Mrs Smith if I wanted a drink of water. Sometimes I would get so thirsty that I would drink water from the dog bowl, the chook pen or from vases in the house, rather than ask Mrs Smith if I could have a drink.

When I was between the ages of four and six years old I remember being punished every time I was observed having an erection. On these occasions Mrs Smith would take me to my room, take my clothes off and get me to masturbate. She would then hit me several times on the penis with a wooden spoon telling me it was wrong to have dirty thoughts.

When I was about five years of age another much older foster child was brought into the house for a short period of time. This female child would take me into the bedroom, take off my clothes and make me play with her genitals. She would then sit me on the toilet and have sex with me.

I attempted to run away from the Smith's home because I was so unhappy. However, because I couldn't find my way I would return to their home. On one occasion I followed a boy to his home after school and told the boy's mother I wanted to live with them. She eventually rang the police. I was taken home where I received a very severe beating. As a result of the injuries I received from the beating I was unable to attend school for a week. I was unable to walk for two days after this beating. The school teachers noticed my injuries. This was one of the reasons why I was removed from the Smiths.

All the time I spent with the Smiths I felt like a prisoner. The only time I was allowed out of the home was to attend school. I was never allowed to go to the pictures. Even though we lived in Safety Bay, I never saw the beach or was aware that the beach was only a short distance away.

During my time with Smiths, I was treated like a slave and made to feel like a slave. I had to look after fifty fowls, clean the pen regularly and do the gardening.

After being discharged from Graylands Hospital I returned to Karratha. In mid December, 1992, I again was in Nickol Bay Hospital as I was mixing drugs and alcohol and feeling very suicidal and anxious. In 1993 I once again spent a term of imprisonment at Roebourne Regional Prison from January to March and then again from July to October.

I am now in Canning Vale Prison awaiting trial on a murder charge.

While I was in Nickol Bay Hospital I was assessed by a psychiatrist who stated that I had 'a conduct and an emotional disturbance with periods of clinical depression. There is clear evidence of some psychopathic personality disturbance with considerable dependency and some borderline personality features. His thought content and his abnormal visual experiences tend to confirm that much of his disturbance is probably due to a deprived childhood where he ... suffered considerable physical and emotional abuse'.

The memories I have of the regular physical, emotional and sexual abuse while staying with the Smiths has made life very difficult for me in the last few years. I often suffer from insomnia and I am often too scared to close my eyes because of frightening dreams. I dream of revenge. Often I have tried to drown my pain by using alcohol and drugs. I try to push the thoughts out of my mind and as a result I use quite a lot of marijuana and alcohol.

I have many hallucinations and I hear voices yelling at me. Sometimes when I watch television the picture will be distorted. I feel very depressed and despondent and very sad that I missed out on a real mum and dad. I am very sad that I have not met all my brothers and sisters. Often I feel very suicidal. I have been prescribed anti-depressant medication.

I am very sad that I had a childhood which has brought so many bad memories to me and a childhood where there was no love or warmth given to me. I find it very hard to cope with my childhood experiences. Those experiences dominate my feelings today. I only wished I didn't have those experiences and those memories. I only wish I had a real mum and dad when I was growing up.

I am very scared for the present and the future. The prison or justice system does not cater for me. I need appropriate psychiatric help but where can I turn to? The prison system does not or has not given me the correct medication to be 'normal'.

I am climbing the wall seeking help. The prison doctors don't really know how to treat me. Sometimes they are good for a little while but then they want to change the subject - not deal with my problem, how I am feeling.

I feel so isolated.

CHAPTER 13

JUVENILE JUSTICE

Introduction

> *Mr Attorney, justice for children in any circumstances means a recognition of their great vulnerability - it means a recognition of the need to protect them when they are being questioned - to protect them against unnecessary arrest - to protect them against unnecessary bail conditions - to protect them in the court environment, and as I have said, to divert them as much as possible, out of, or away from the court system. In all these areas there is much to do ... the truth is that we entrench the young in the system too young and far too long. The answer, Mr Attorney, lies not in more aggressive policing, more aggressive courts and longer sentences, but in a caring, practical community response to the needs of our children.*[495]

> *... there are issues underlying the alienation of Aboriginal people and their continuing conflict with the law which cannot be solved by police and Aboriginal people alone. The key is to be found in the hearts and minds of all Australians. It lies in the recognition of the Aboriginal people as a distinct people, the indigenous people of Australia who were cruelly dispossessed of their land and until recent times denied respect as human beings and the opportunity to re-establish themselves on an equal basis.*[496]

The incarceration rate of young Aboriginal people in Western Australia is startling. Statistics complied in 1992/93 show that Western Australia has the highest rate of indigenous incarceration in Australia.[497] In Western Australia, Aboriginal juveniles are 48.3 times more likely to be

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[495] Judge Jackson, Inaugural President of the Children's Court of Western Australia, *Inauguration Speech*, December, 1989.

[496] Johnson, E., *op.cit.*, Vol. 1, 1991, pxix.

[497] Atkinson, L., "An Overview of Juvenile Detention in Australia", in Atkinson, L., (ed), *National Conference on Juvenile Detention*, Australian Institute of Criminology, Canberra, 1994, p26.

incarcerated than their non-Aboriginal contemporaries.[498] Nationally, Aboriginal juveniles are even more over-represented in correction facilities than their adult counter-parts (24:1 juveniles; 10:1 adults).[499] These figures are more than unacceptable, they are shameful.

Commentary

It is very disappointing that the State government has not made significant progress in implementing the recommendations of the RCIADIC. The traditional foci of the law and order agenda continues to reign supreme, without adequate attention being given to Aboriginal youth issues or progressive juvenile justice reform.

In the December 1995 report by the Crime Research Centre at the University of Western Australia and AAD on Aboriginal Youth and the Juvenile Justice System in WA, the authors state:

> *The overall picture in relation to Aboriginal juvenile justice issues remains, for the most part bleak in many areas of the State ... The reforms that have been made to the system have yet to make sustained inroads into rates of arrest and incarceration for Aboriginal children and young people.*[500]
>
> ...
>
> *The general picture shows a significant reduction in the number of arrests and charges. The rate of decrease for Aboriginal children and young people, however, is significantly lower than non-Aboriginal children and young people.*
>
> *Aboriginal juveniles are arrested by police more often than non-Aboriginal juveniles.*[501]
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> ...

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498 Broadhurst, R.G., Ferrante, A., Loh, N., Reidpath, D., and Harding, R.W., *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, Crime Research Centre, The University of Western Australia, Nedlands, 1994, p12.

499 *Ibid*, p3.

500 Crime Research Centre, University of Western Australia and AAD, *Aboriginal Youth and the Juvenile Justice System of WA; Royal Commission into Aboriginal Deaths in Custody Vol. 3*, Crime Research Centre, University of Western Australia and AAD, Perth, 1995, p5.

501 *Ibid.*

Rates of contact with the system are very high and not just related to criminal justice issues. In the Kimberley just over 50 percent of juveniles detained in police lock-ups were there because of alcohol.[502]

...

The data on cautioning shows that Aboriginal youth are less likely to be cautioned by the police than non-Aboriginal youth.[503]

...

Detention rates in police lock-ups are still high for Aborigines. They represent just under half of all juvenile admissions, the over-representation rate is particularly high for Aboriginal girls, twice as many are detained as non-Aboriginal girls.

Of particular concern perhaps is the age at which these people have contact with the police. ***One in five Aborigines detained in 1994 was 14 or under. Of these 91.6 percent already had an arrest history (emphasis original).***[504]

...

More than half [of lock-ups] detentions were in the Metropolitan area.[505]

...

The numbers of charges dealt with by the Children's Court have fallen substantially as police have increasingly cautioned youths.

...

While Aboriginal juveniles are facing fewer charges in court, they are appearing slightly more often than they were in 1990.[506]

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502 *Ibid.*

503 *Ibid*, p6.

504 *Ibid.*

505 *Ibid.*

506 *Ibid*, p7.

Recommendation 62 of the RCIADIC states:

> *That government and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.*[507]

Figures on Aboriginal juvenile detention in Western Australia have not been adequately maintained since the publication of the RCIADIC. However, the over-representation of Aboriginal people in custody has actually increased since its publication.[508] This is unacceptable and questions the commitment of the Western Australian government and our society to implement and facilitate change for Aboriginal people.

One must look to the past to understand the current excessive Aboriginal juvenile interaction with the criminal justice system. It is a situation that has arisen out of the legacy of assimilation policies, the destruction of Aboriginal family, community and culture. Historical factors and forces have played a significant part in the creation and maintenance of Aboriginal youth and community problems.

Sean's Story

> *Sean is my son. He is 16 years of age. He is in jail at the moment. He has been in and out of jail since he was 12 years of age. He does not know how much it hurts me to see him locked up. He needs his family. I need him.*
>
> *When I go and visit him he tells me that he is very sorry for what he has done to me. He just cannot seem to help himself. He just cannot help getting into trouble with the cops.*

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[507] Johnston, E., *op.cit.*, Vol. 5, p83.

[508] Dodson, M., in Council for Aboriginal Reconciliation, *Responding to Custody Levels*, AGPS, Canberra, 1994, p4.

Sean has been in and out of jail for a number of offences. He does not really know what he wants in life. It is very hard for him and for me, not having him around. I have to look after five other children who are all younger than Sean. That has been very hard.

What is even harder is the fact that Sean is away from me. Things have not changed that much from when I was taken away from my parents and placed in a mission at Norseman. By the time I got out, my mum had died and I could not find my father. I think he had gone somewhere over east and from what I heard he hit the bottle pretty badly.

Sean's father had also been taken away from his parents. He had gone to Mogumber Mission. He left me when Sean was only two years of age. The other kids' father is another man who has also left me now. Sean's dad just could not cope with his childhood. He was subjected to sexual abuse and made to work really hard.

No wonder Sean is the way his is. I and Sean's dad have had our own problems and I suppose they have rubbed off on Sean.

It really hurt being taken away from our family and culture.

A series of Western Australian statutes control juveniles and their interaction with the criminal justice system. Many of these Acts have been criticised as being, in breach of Australia's international legal obligations. As Aborigines are over-represented in the criminal justice system, legislation pertaining to justice affects Aborigines more than any other group.

Aboriginal juvenile crime is a problem "managed" by a number of governmental departments and bodies. The foremost amongst these is the Western Australian Police Service who has the initial contact with Aboriginal youth and are the "gatekeepers" of their entry into the juvenile justice system. Criticism of the police and their interaction with youth is vocal and ongoing.

The present conjuncture is being defined by innovations which are extending police controls and powers, while the kinds of provisions which ensured at least a minimal degree of support for our most disadvantaged and vulnerable youth are being eroded.[509]

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[509] Blagg, H., and Wilkie, M., *Young People and the Police*, The Australian Youth Foundation, Sydney, 1995, p2.

This was no more prevalent than in the defunding of many community welfare services by the previous Minister for Family and Children's Services, the Hon. Mr Roger Nicholls.

Most importantly, excessive interaction with the juvenile justice system and high custody levels have far reaching implications for Aboriginal youth, their families and their communities. The cycle of juvenile crime, interaction with the criminal justice system, detention and incarceration is self-perpetuating and destroys lives. This in turn destroys Aboriginal families, communities and culture. The cycle must be broken.

The Context of Aboriginal Juvenile Crime and Justice Issues

There are deep underlying issues giving rise to the over-representation of Aborigines in the criminal justice system which apply equally to Aboriginal youth as to adults. Some of the deep underlying issues already mentioned in this submission and identified by the RCIADIC are health, housing, education, employment, the legacy of historical abuse, denigration and loss of identity, substance abuse and despair. Super-imposed on these issues are more immediate factors of laws, policies and criminal justice practices.

The underlying issues affecting Aborigines are fundamental and require time, commitment and dedication to bring about healing. This is an onerous task that must be brought about by tripartite alliance of Aborigines, State and society. Equally onerous, but more immediately addressable are issues of crime, policing and control. Currently, many of the justice processes disadvantage Aboriginal people. These processes facilitate and perpetuate Aboriginal participation in the criminal justice system.

Central to issues concerning Aboriginal interaction with the criminal justice system has been the systematic destruction of Aboriginal cultural, community and family life. Under the assimilation policies, the State arbitrary removed Aboriginal children from their families, communities and culture. There was an attempt to rear Aboriginal children in white ways. Not only did these assimilation policies and removal practices destroy Aboriginal families at the time, but have had a profound impact on current Aboriginal culture and society. The destruction of Aboriginal

families and a debilitated community and culture were planned and necessary outcomes of these policies and practices. The dysfunction of Aboriginal society is this history's legacy.

International law considers that the family unit is a major component of the community environment.[510] Since at least 1949, the family has been considered the fundamental unit of society.[511] The emphasis on the importance and relevance of family to the rights of the child needs to be understood in the context of the Aboriginal experience, and the devastating policies which were inflicted on Aboriginal people, in order to fully understand the current problems facing Aboriginal people.[512]

The destruction of Aboriginal society has had far reaching consequences. For many Aborigines, family and parenting skills have never had the opportunity to develop, the family environment being foreign to many of them.

The assimilation and integration policies denied Aborigines their culture, and taught them to be ashamed of and renounce their race and its traditions. Pervading racist attitudes in society do nothing to dampen tension between the cultures. Aboriginal youth "suffer disempowerment as youth, but also, like their elders, suffer cultural disempowerment.[513]

Many young Aborigines have never been exposed to, or have rejected the controls and authority of their own culture. Similarly, many have been rejected by and reject the impositions and restrictions of non-Aboriginal society. For some Aboriginal children laws of neither society control them and as a result they consider themselves to have absolute freedom and apparent independence. That is until they come into contact with the criminal justice system. Others will be brought into the system through overzealous policing and abuse of police power.

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510 See the section in this chapter on International Law.

511 UDHR, article 16(3); ICESCR, article 10(1), ICCPR, article 23(1).

512 See, for example, ALSWA, *Telling Our Story*, *op.cit.*

513 Atkinson, L., "Aboriginal Youth, Police and the Juvenile Justice System in Western Australia", in Atkinson, L., (ed) *National Conference on Aboriginal Justice: Conference Proceedings*, Australian Institute of Criminology, Cairns, 1992, p271.

This system is often characterised by aggressive police tactics, prejudice in the police force, discretionary decisions by the police and judiciary resulting in higher incarceration rates for Aboriginal youth and bad relations between the police and youth.

> *The dexterity with which the police manoeuvre between criminal justice and welfare discourses to gain control of young people in public is a noteworthy feature of contemporary policing.*[514]

There has been a worldwide shift in the juvenile justice area from a system based on a rehabilitative ideal and child saving philosophy (welfare model) to one directed towards justice (justice model). Whereas the welfare model emphasised rehabilitation and treatment, the justice model focuses on the offence and promotes due process.

> *What has frequently been lost in the shift has been the notion of the specificity of young people's needs and requirements; their status as a 'vulnerable group' ... A justice system may inaugurate reforms emphasising 'due process', but tends to reconstruct the debate in ways which make 'just deserts' the over-riding dynamic of justice.*[515]

In 1988 the *Children's Court of Western Australia Act 1988* (WA) was proclaimed, thus separating the functions of the Children's Court from those of the then Department of Community Services. Despite the separation, the Western Australian Police Service continues to be a zealous player in the child welfare arena.

Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson highlights the gravity of the situation facing Aboriginal people and their young in his 1995 report:

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

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514 Blagg, H., and Wilkie, M., *op.cit.*, p4.

515 *Ibid*, pp14-15.

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

- *in 6 years, by 2001 there will have been a 15 per cent increase in the number of indigenous kids in detention;*
- *in 16 years, by 2011 there will have been 44 per cent increase in the number of indigenous kids in detention.*[516]

The Aboriginal population is growing with the average age becoming younger. Aboriginal youth incarceration will continue to increase disproportionately to the non-Aboriginal population if the situation is not addressed soon.

Aboriginal youth are a precious resource for the Aboriginal society. Their over-representation in the criminal justice system will effect the development of Aboriginal society for years to come, just as the assimilation policy continues to adversely affect many Aboriginal people.

The detention of Aboriginal youth is a form of child removal. This cannot be denied or ignored. Incarceration and its ensuing deprivation of liberty is a destructive and dehumanising experience. The devastating consequences of child removal, incarceration and institutionalisation must be fully appreciated and understood, particularly in relation to Aboriginal culture and the Aboriginal historical experience. Disproportionate and excessive levels of Aboriginal juvenile incarceration has serious negative implications for the future of Aboriginal society.

Incarceration as a response to crime is fraught with its own problems, including the collectivisation of criminal attitudes resulting in the indirect development of criminal careers and social alienation.

Much change is required in the policies and programs of the State. The onus for addressing Aboriginal issues and affairs has been firmly placed on the government by the recommendations of the RCIADIC. The implementation of the program for change embodied in the recommendations has not been consistent, and in some very important instances, such as

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[516] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, AGPS, Canberra, 1995, p15.

consultation with Aboriginal and interested parties in the formulation of juvenile justice and sentencing legislation, non-existent. The ambivalence of the Western Australian government in recognising the recommendations of the RCIADIC, but not implementing them must not continue.

At the same time, all Aboriginal people must recognise the gravity of the situation, and do all they can to advance the cause of their children. Aboriginal people must be given the opportunity to accept responsibility for their children, respect their rights and present them with opportunities for change and progress. Aboriginal people and organisations must continue to pressure State and Commonwealth governments into reforming discriminatory legislation and creating appropriate, fair and relevant laws for Aboriginal people.

Both criminal and welfare justice systems must act in concert to redress the continuing high levels of Aboriginal interaction with the juvenile justice system. These levels are shameful and totally unacceptable, particularly in the light of the RCIADIC recommendations.

Western Australian Legislation

1. Child Welfare Act 1947 (WA)[517]

Particular concern has been voiced over Section 138B of the Act. The provision has been cited previously in this submission but is reproduced here. Section 138B provides:

> *1. Where any police officer, or an officer of the Department authorised by the Minister finds a child:*
>
> *(a) which he has reason to believe is away from the usual place of residence of that child and is not under the immediate supervision of a parent or responsible person; and*
>
> *(b) which is in his opinion in physical or moral danger, misbehaving or truanting from school,*
>
> *he may apprehend the child without warrant and forthwith take the child to its usual place of residence or school.*

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[517] This Act is also discussed in Appendix C.

2. *An officer apprehending a child pursuant to subsection (1) shall make inquiries as to whether or not it may be necessary to make application to the court to declare the child to be in need of care and protection.*

3. *Where, on inquiry, no responsible person can be found to take care of the child for the time being, the officer may cause the child to be detained at some convenient place until such time as the child can be returned to the care of a parent or responsible person.*

The Youth Legal Service of Western Australia reported that this section is often overzealously employed by the police, in particular, the Juvenile Aid Group in "cleansing" the streets of potential young offenders.[518] A representative of the Noongar Alcohol and Substance Abuse Service Inc, which operates an outreach service in metropolitan Perth, indicated that relations with the police and the Juvenile Aid Group team were improving, despite ongoing hiccups in juvenile policing.[519]

Section 138B gives rise to the potential for members of the WA police force to engage in a form of "moral policing", effectively adopting a welfare role. This is not the role of the police. Further, police officers are not trained to identify "at risk" children. Therefore, they rely on their own predispositions and stereotyping when identifying a child in "moral danger". This can easily lead to racial discrimination and infringements of the child's rights. As Aborigines make great use of public space, the provision indirectly discriminates against Aboriginal juveniles.[520]

It is important to note that at least one senior ranking police officer believes that the de facto transference of a social welfare role onto police is unsatisfactory. While not going so far as to state that Section 138B needed to be repealed, he did concede that current arrangements needed reform.[521]

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518 "JAG have developed a specialism in increasing the numbers going into the system through their rigorous patrolling of Perth", Blagg, H., and Wilkie, M., *op.cit*, 1995, p11.

519 Interview with Program Manager of the Nyoongar Alcohol and Substance Abuse Service Inc., Jim Morrison, 22 December, 1995.

520 Atkinson, L., "Aboriginal Youth, Police and the Juvenile Justice System in Western Australia", in Atkinson, L., (ed), *op.cit.*, 1992, p270.

521 Interview with Senior Police Officer, 13 December, 1995.

Recommendation 142

That the State government repeal Section 138B of the Child Welfare Act 1947 (WA) and replace it with a section that gives police the power only to refer a child to a "welfare agency" in regards to child welfare matters.

2. Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA)

Although replaced by Division 9, together with Section 227 of the *Young Offenders Act 1994* (WA), the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was, at the time, criticised by a number of commentators as being in serious breach of *CROC* (in particular articles 3, 37 and 40) and the *ICCPR* (in particular articles 9 and 14).[522]

The Act was further criticised as being in contradiction to the findings and recommendations of the RCIADIC which stressed the urgent need to reduce the over-representation of Aboriginal people in custodial situations.

> *... the WA government is intent on imposing an extreme regime which will necessarily have the effect of dramatically increasing the extent of that [Aboriginal] over-representation.*
>
> *It has been put to the government that this disproportionate adverse impact will contravene the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibits effective and indirect discrimination as well as intentional and direct discrimination. [The late] Rob Riley, [the then] Executive Director of the Aboriginal Legal Service (WA), made the point that this is in fact a repeat of the notorious Aborigines Act 1905 under which Aboriginal people could be forcibly removed from or into mission and settlements (original emphasis).*[523]

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522 Wilkie, M., "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective", *Western Australian Law Review*, 22, 1992, p187; also Harding, R.W., (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia*, Crime Research Centre, University of Western Australia, Nedlands, 1993.

523 Wilkie, M., "WA's Draconian New Juvenile Offender Sentencing Laws", *Aboriginal Law Bulletin* 2 (55), 1993, p15 at p16.

The Act is generally held to have been a knee-jerk response by the government to excessive community pressure generated by a spate of high-speed car chases involving juveniles, stolen cars and several fatalities. Certain media outlets played a prominent role in the organisation and co-ordination of the ensuing public outrage.

> *The government was legislating to placate an increasingly vocal sector (both the public and the media) on the issue of juvenile crime. The Act was conceived during a perceived crime wave and in an atmosphere of 'moral panic'.*[524]

The *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) exemplifies the "law and order" and "short, sharp shock" mentality which is prevalent in Western Australia and the way it can influence legislation. Academic opinions, comparative studies, international legal obligations and local "Aboriginal report" recommendations were cast aside in the effort to provide a seemingly heavy handed answer to a perceived crisis. This cannot be allowed to happen again. A sunset clause allowed the Act to lapse in 1994.

3. Young Offenders Act 1994 (WA)

Commentary and analysis of the *Young Offenders Act 1994* (WA) as it pertains to Aborigines is yet to be written. Prior to the Bill being passed, a number of opinions were submitted to the WA government from interested organisations, including the ALSWA. Many submissions were critical of the Bill and the process of its formulation.

Comments included that the "perspectives of people who work daily with young offenders and their families" were ignored and:

> *the lack of consultation and total absence of negotiation with the Aboriginal community on this Bill is contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody ... No other Aboriginal community organisations were consulted in this process and even key government departments such as the Aboriginal Affairs Planning Authority and the Legal Aid*

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[524] Broadhurst, R., and Loh, N., "Selective Incapacitation and the Phantom of Deterrence", in Harding, R.W., (ed), *op.cit*, p75.

Commission were given inadequate briefings without the fine details of the proposed legislation ... The overall impression of the Bill is that it has missed a golden opportunity to develop a fresh, balanced approach to juvenile justice.[525]

The Aboriginal and Torres Strait Islander Social Justice Commissioner, believes the *Young Offenders Act 1994* (WA) is a:

clear illustration of the blatant disregard that the WA government has for the Royal Commission's recommendations and for its international obligations.[526]

Wilkie commented that the then *Young Offenders Bill 1994* (WA) did represent a significant improvement over the 1992 Act but there were a number of major concerns.[527] Wilkie argued that Division 9 of the Bill, which deals with young persons who repeatedly commit serious offences, would breach *CROC*.[528]

The *Young Offenders Act 1994* (WA) "is deficient in many areas, contains philosophical contradictions and contravenes human rights standards.[529] The faults of the *Young Offenders Act 1994* (WA) are exacerbated by the administration of juvenile justice through the Ministry of Justice. The ALSWA believes that the separation of juvenile justice from the former Department for Community Services was a backward step.

In 1992 the Youth Justice Bureau was created in the then Department for Community Services which allowed for greater co-ordination of juvenile justice while still remaining within the framework of a wider Community Services Structure. When the Youth Justice Bureau was transferred into the Ministry of Justice, community groups were concerned that juvenile justice

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525 Boyle, S., *Justice in Black Hands*, ALSWA, Perth, 1994, p1-2.

526 Aboriginal and Torres Strait Islander Social Justice Commissioner, *op.cit.*, p40.

527 The Bill did not significantly differ from the Act.

528 Refer to Wilkie, M., *Initial Comments on Young Offenders Bill 1994*, unpublished paper, 1994.

529 Boyle, S., *op.cit.*, p1.

would be overrun by the Corrective Services "prison" culture. This fear has been justified by the following developments over the last year:

- a fixation on building high tech prisons;
- a demonstrated poor record on working closely with Aboriginal communities to devise culturally appropriate programs; and
- less focus on community based prevention programs.

In addition, the large Ministry of Justice results in minimal ministerial attention being paid to the complexities of the juvenile justice portfolio and leads to an attitude that there is little difference between adult and juvenile crime. The latter point is illustrated firstly in the initiative to build a work camp for adult and juvenile offenders, and secondly, the planning of the new juvenile detention centre next to the Canning Vale adult prison.

4. Specific Comments on the *Young Offenders Act* 1994 (WA)

The 1994 ALSWA document *Justice in Black Hands*, provides specific comments on the *Young Offenders Bill 1994* (WA). Parts of that document have been reproduced as they are relevant to the Act.[530]

> *Part 2 - Objectives and Principles*
>
> *This section is not comprehensive enough and the proposed objectives and principles could be written in a more positive way. For example the following principles would enhance the Act:*
>
> *"The principle that, unless the public interest requires otherwise, the criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter (NZ)".*
>
> *"The principle that the vulnerability of children and young people entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence (NZ)".*

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[530] *Ibid*, pp6-15.

Clause 7(c)

This clause illustrates the confused philosophical framework of the legislation. It should be agreed young people should never receive harsher sentences than adults, because the adult sentences should be the harshest available. This clause seems to argue that it is acceptable to sentence young people as adults but not harsher than adults. The clause should be deleted and replaced with a principle similar to the following:

"7(c) That in principle a young person should receive a lesser sanction than an adult in which the age, vulnerability and immaturity of a young person is taken into account".

The courts will know how to apply this principle along with other sentencing principles in their deliberations.

Part 4 - Young Persons in Custody

Section 18 - Apprehension on suspicion of intoxication

This section provides too much discretion to police officers. The ALS[WA] believes that the words "where practicable" and "attempt" should be deleted. This will place the section in line with the RCIADIC recommendations to keep intoxicated persons out of police lock-ups. The amended section would still allow the police to detain youth if no other carer can be found, but places a positive onus on police to find alternatives to lock-ups.

Section 19 - Detention of young offenders apprehended by police

This is an area of major concern. The Act is totally inadequate in its provisions for basic protection of the human rights of the young people who are taken into police custody. This was also an area of major concern to the RCIADIC.

The current section 19 allows the Police Commissioner to make rules, orders or regulations concerning the apprehension of juveniles in police custody. This is the current inadequate state of affairs in WA.

Section 19 should be reworded substantially to enshrine in legislation the following rights into the Act:

- *the right to make a telephone call to a family member or friend before being questioned by police;*
- *the right to make a telephone call to a legal adviser before being questioned by police;*
- *the right for youth under 18 years of age to have a parent and/or an independent adult person present at police questioning;*

- *the right to a prompt medical examination and hospital treatment, where necessary;*
- *the right to have bail on reasonable conditions considered without delay;*
- *the right (if detained in custody) to have safety and welfare needs monitored by police at regular intervals; and*
- *the right to be treated in a dignified and humane way.*

Section 21 - Detention of persons in custody awaiting trial

An additional clause should be added which places restrictions on the time young people can be detained in police lock-ups. The time limit should be 72 hours and this provision would be in line with the spirit of the RCIADIC. It is important that this matter is placed in legislation and not just in a police manual or commissioners rules.

Part 5 (Division 2) - Juvenile Justice Teams

The major concern is that the proposed Juvenile Justice Team model is a half-baked and inadequate version of the New Zealand model that will not live up to its potential. While it is acknowledged that the Juvenile Justice Teams must be an adaptation of the New Zealand model for Western Australian conditions, the essential principles and elements of the Family Group Conference Scheme should be replicated.

The Juvenile Justice Team is inadequate for the following reasons:

- *there is restricted membership of the JJ Team;*
- *there is a lack of specific time frames (Section 24c);*
- *teams are restricted to only deal with minor non-scheduled offences;*
- *there are no legal safeguards for the young persons before and during the JJ Team's process; and*
- *the police have total power to refer individuals to the Teams rather than a decision being made in conjunction with the Team co-ordinator.*

Membership of the JJ Teams should reflect the contents of Clause 251 of the CYPR Act. The Western Australian government has however, chosen a model of specified team members where only the police and Ministry of Justice are legislatively required to be on the team. If the police must be on the team by law, so must an Aboriginal community member (if that young person is a Aboriginal) and a member of the Family and Children's Services and the Ministry of Education. This will ensure a truly multi-disciplinary and community based approach to the problem. If this is not in legislation the original concept of the Teams could easily be lost.

A major component of the former State Government's Advisory Committee's report was that the JJ teams should be complemented by action and services to strengthen Aboriginal family networks. This will not be possible especially in country areas where there will be no paid staff running the JJ teams. Existing overworked government officials will run the JJ teams. This Standing Committee should ascertain if the development of the Teams has the necessary resource commitment from the government to be implemented properly.

There should be a special provision to exclude the admissibility of any evidence obtained in a juvenile justice team for any future court hearings, especially if the young person elects to change his or her plea to "not guilty" and the matter subsequently reverts back to Children's court.

The ALS[WA] has been hopeful that if properly implemented, the Teams will be a beneficial addition to the juvenile justice system especially for Aboriginal youth and families. As a positive solution to the concerns the ALS[WA] recommends that government establish a Review Committee to monitor and Review the effectiveness and adequacy of the Juvenile Justice Teams. This committee should have bi-partisan support and must be able to receive submissions from community groups.

Part 7 - Sentencing and Related Matters

Section 49 - Remand for Observation

This section has no place in the Act. If the government want to maintain an old general welfare power to detain youth in custody (be it in a welfare or criminal institution) then this power should be properly debated in the context of child welfare or mental health legislation. The clause should be deleted.

Section 58 - Responsible Adults may be liable

It is objectional to allow the courts to punish responsible adults for the actions of children in their care. While the court must pay consideration to the financial circumstances of the responsible adults it does not make sense to punish these adults unless they have in some way contributed to the criminal behaviour of the young person. The court in this section is not asked to make this judgement and there are guidelines to the court as to when this section should be best applied.

This section is open to abuse by magistrates and Justices of the Peace who may be racist or culturally ignorant of Aboriginal family and parenting roles and consequently may seek to impose fines on Aboriginal responsible adults. This provision may be workable in the Juvenile Justice Teams' process where trained workers may be able to make appropriate judgements on parental responsibility but this power has no place in court proceedings. It is very much an irrational clause to appease the political view that being tough on parents solves juvenile crime.

Furthermore, the provision is hypocritical because the State is exempt as "exempt responsible adults" from sanctions for young people in their care (e.g. wards of the State). If it is appropriate to punish "irresponsible" parents then it should be appropriate to punish State authorities who do not meet their responsibilities.

Divisions 6 and 7 - Youth Community Based Orders

The Act goes into great detail into these community supervision orders and thus highlights the lack of detail in areas mentioned previously. The two major concerns are:

- *the lack of involvement of Aboriginal people on these orders; and*
- *the ability of the Ministry of Justice to adequately supervise these orders.*

This is one area where Aboriginal people could work closely with the Ministry of Justice to develop culturally appropriate community work solutions to juvenile crime. It is a concern that unless Aboriginal people are involved in the development of community options, these sanctions will translate into "more of the same" inappropriate options used currently by the Children's Court.

Secondly, the Ministry of Justice is at present inadequately supervising community work and probation orders. There are serious doubts that the Ministry will be able to cope with the additional burden of the new work conditions. This will result in further breaches of court orders due to poor implementation of this initiative.

Division 8 - Custodial Sentences

... the government's work camps should be scrapped. If they are to be retained they should be amended to reflect the government's own specific conditions. These conditions detail the following eligibility criteria for young people to attend the work camp:

- *only youths 16-18 years are eligible;*
- *youth must have no previous prison or detention sentence;*
- *youth must not have convictions for serious or violent crimes or serious drug offences; and*
- *youth must be psychologically and physically suitable.*

Division 4 - Supervised Release Orders

...

The key concerns with the Special Order are:

- *Setting aside all normal sentencing principles (Section 125)*

Like the previous legislation, this clause is contrary to the United Nations Convention on the Rights of the Child as it sets the protection of the community ahead of all other sentencing principles for juveniles. In fact this sentencing principle is worse than the previous legislation which only asked the court to balance out the rehabilitation of the youth with the protection of the community.

. *Discriminating to Aboriginal Offenders*

Aboriginal youth and country youth are discriminated against by this section as one of the qualifying pre-conditions for the special order is an exhibited pattern of repeated detention for any offence and these groups of offenders are more likely to receive detention sentences for minor offences. This section is likely to create totally unforeseen circumstances. If this section is to be retained, only detention for scheduled serious offences should be considered.

. *Application to discharge a sentencing order*

Section 129(4) allows the Attorney-General to veto any discharge of special order before it is brought to the sentencing court. This is an abuse of executive power in the operations of the judiciary.

The special order provisions should be deleted.

Part 9 - Detention Centres

Section 166 - Detention Centre Visitors

Section 166 concerns the hearing of detention centre complaints by detention centre visitors. RCIADIC recommendation 176[531] *sets out clear guidelines for the establishment of a complaints officer in custody. This section should be*

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[531] Johnston, E., *op.cit.*, Vol. 5, pp108-109, Recommendation 176 - that consideration should be given to the establishment in respect of each prisoner within a State or Territory of a Complaints Officer whose function is:

(a) to attend at the prison at regular (perhaps weekly) intervals or on special request for the purpose of receiving from any prisoner any complaint concerning any matter internal to the institution, which complaint shall be lodged in person by the complainant;
(b) to take such action as the officer thinks appropriate in the circumstances;
(c) to require any person to make enquiries and report to the officer;
(d) to attempt to settle the complaint;
(e) to reach a finding (if possible) on the substance of the complainant and to recommend what action if any, should be taken arising out of the complaint; and
(f) to report to the complainant, the senior officer of the prison and the appointing Minister (see below) the terms of the complaint, the action taken and the findings made.

This person should be appointed by, to be responsible to and report to the Ombudsman, Attorney-General or Minister for Justice. Complaints receivable by this person should include, without in any way limiting the scope of complaints, a complaint from an earlier complainant that he or she has suffered some disadvantage as a consequence of such earlier complaint.

amended to fully reflect the details of this recommendation.

Section 169

This clause should be amended to include a new category 169(d) which provides for the right of a young person's legal representative to enter a detention centre. This is a basic human rights provision.

Section 173

Section 173 allows the Superintendent or visiting justices to vary the earliest release date of a prisoner in response to a detention centre offence. Comment has already been made that youth should have access to legal advice on this matter and in addition, RCIADIC recommendation 180 called for all such offences which affect time in prison to be heard by a magistrate.[532] *This section must be amended in line with this recommendation.*

Recommendation 143

That the State government amend the Young Offenders Act 1994 (WA) so that the rights of young people are protected at all stages of the criminal process in a manner which is consistent with the best interests of the child and which recognises the vulnerability of young people.

Recommendation 144

That the State government amend the Young Offenders Act 1994 (WA) so it is based on the premise that criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.

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532 *Ibid*, p109, Recommendation 180 - That where a prisoner is charged with an offence which will be dealt with by a Visiting Justice, that Justice should be a Magistrate. A charge involving the possibility of affecting the period of imprisonment should always be dealt with in this way. All charges of offenses against the general law should be heard in public courts.

Recommendation 145

That the State government amend the Young Offenders Act 1994 (WA) to recognise the principle than a young person should always receive a lesser sanction than an adult.

Recommendation 146

That the State government establish a Review Committee to monitor and review the effectiveness and adequacy of the Juvenile Justice Teams in order to promote teams that are multi-disciplinary and community based in their approach.

Recommendation 147

That the State government amend the Young Offenders Act 1994 (WA) so that community supervision orders offer community work options which are culturally appropriate.

Recommendation 148

That the State government amend the Young Offenders Act 1994 (WA) so young people are not placed in work camps, or alternatively strict conditions on eligibility are applied in the placement of young people in work camps.

Recommendation 149

That the State government repeal the Special Order provisions of the Young Offenders Act 1994 (WA).

Recommendation 150

That the Ministry of Justice give attention to ensuring workers supervising release orders are adequately resourced and trained.

Ice Cream Boy

The so-called "Ice Cream Boy" saga dramatically highlights the deficiency of juvenile justice and child welfare system in regards to young Aborigines. The Ice Cream Boy saga reached its high point of notoriety in late 1995 when the Ice Cream Boy was detained in Rangeview Remand Centre after being charged with stealing an ice cream worth $1.80. At the time he was 15-16 years of age.

The Ice Cream Boy has an extensive history of substance abuse with the inhalation of aerosol paint being mentioned as a most frequently used substance. He also has overwhelming welfare issues and it appears that he offended only to provide for his needs.

The Ice Cream Boy has had a very chaotic and unstable life. He has been in a number of foster care situations and family life has been made more difficult by the fact that his parents were of different tribes. His natural father died before he was born, his step-father leads a very transient life style and his mother has substance abuse problems. He has frequently cared for himself, and has rarely attended school. He has frequently lived on the streets of Kalgoorlie.

The Ice Cream Boy came into contact with the juvenile justice system sometime in early 1993 when Kalgoorlie police became aware that he was frequently on the streets of Kalgoorlie in the late evening and early hours of the morning. He appeared, on many occasions to be influenced by the inhalation of aerosol paint.

He was remanded in Rangeview Remand Centre under Section 49(b) of the *Young Offenders Act 1994* (WA) to obtain a report on his mental and physical health. On each occasion, the charges that brought the Ice Cream Boy to court were very minor and it was the charge on the 16 October 1995, of stealing an ice cream which brought the matter into the public arena.

On the 2nd November 1995, the Ice Cream Boy appeared in the Children's Court of Western Australia in Perth before Yeates DCJ.[533] Her decision is reproduced herewith:

> *On the 2 November 1995 in the Children's Court at Perth the child GM appeared before me on a charge of stealing an ice cream. On my own motion I agreed to review the decision of the learned magistrate in Kalgoorlie to remand GM in custody for psychological tests for 30 days pursuant to Section 49 of the Young Offenders Act.*
>
> *Section 49 is concerned with remand for observation and is in the following terms:*
>
> > *"49. If a young person charged with an offence appears before the court and the court has reason to believe that -*
> >
> > *(a) the young person may be suffering from any mental or nervous disorder or handicap; and*
> >
> > *(b) should be remanded for observation, assessment and recommendation as to his future treatment, then, despite any other Act, the court may, after giving a responsible adult, if present, an opportunity of being heard, remand the young person to be placed in some suitable place, for a period not exceeding 21 days, for observation, assessment and the making of a report on the person's condition and a recommendation as to person's future treatment."*
>
> *Section 49 empowers the court to remand a young person charged with an offence for observation, assessment and recommendation as to his future treatment. Such a remand is, however, limited to a period of 21 days. In this case the learned magistrate has written on the face of the complaint charge number 405527/95 that the 30 day remand of the offender was made pursuant to section 49. On its face the remand for 30 days is beyond the powers given under section 49.*
>
> *In the course of the hearing of this matter it was drawn to the court's attention that this is the third occasion since January 1995 that this young person has been remanded in custody pursuant to section 49 for a psychological report, and on each occasion the remand was for one month. In these circumstances it seems to me that section 49 is being overused and inappropriately used. My view is*

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[533] *GM (a child) v Police*, Unreported decision, Children's Court of Western Australia, Perth, 2 November, 1995.

supported by the more recent reports of the Juvenile Justice Division clinical psychologist who reports that the child's welfare issues will not be alleviated by placing him in Juvenile Justice institutions and that incarceration in any form is doing him more harm than good. On each admission to Rangeview Remand Centre the child has presented as more hostile, resentful and unwilling to co-operate believing that he has been victimised by the police and courts.

The triggering factor for section 49 is that the court believes the young person charged with an offence is suffering from a mental or nervous disorder or handicap. It became apparent in this case that this young person was an habitual substance sniffer lacking any family support. It would appear that the section 49 was used to remove the child from the community. This court has a great deal of sympathy for local magistrates. They are present in a local community, they know the local problems. In this case the magistrate has apparently seen a young person with no support from his parents or family who has been in the wrong company sniffing substances and who has been picked up in Kalgoorlie from time to time charged with minor stealing offences often related to those substances. Because welfare issues have not been properly addressed, this young offender is apparently a nuisance offender who steals ice creams and other items. I accept that he creates a serious nuisance problem in Kalgoorlie.

Nonetheless, in my view, it is inappropriate to use section 49, a power triggered by involvement in the Juvenile Justice system in a manner that has no relationship to the seriousness of the offending. To remand a young person in custody for one month on a charge of stealing an ice cream valued at $1.90 seems to me not to be a proper use of section 49. On the other hand, I do have some sympathy with the learned magistrate when there are no adequate facilities for looking after a young person in this position.

The magistrate was faced with a young person who was repeatedly offending in a nuisance type way in a small community where all placements that were provided for the young person seemed to be unsatisfactory. The Children's Court, in the exercise of its Juvenile Justice jurisdiction is not in a position to deal with the welfare issues that may arise with such a young offender. Under the Young Offenders Act the court clearly must be concerned about welfare issues and take them into account, but the Young Offenders Act 1994 was specifically enacted to separate in Western Australia the Juvenile Justice issues administered by the Ministry of Justice from the welfare issues that remain under the Child Welfare Act the responsibility of the Department of Family and Children's Services.

This case has been complicated by the fact that there has also been a long standing care and protection application so that both that application and the stealing charge were before the learned magistrate. If section 49 is to be used by the magistrate it should not be mingled with welfare powers. It is a power of a magistrate that should be used proportionate to the offence with which he is

dealing. Section 49 does not confer a jurisdiction of preventive detention for young offenders. If the social agencies in our society do not provide a home or supervision for a child it is not appropriate for Juvenile Justice powers to be used to fill those gaps.

This court has a great deal of sympathy with the position the police are placed in by this sort of case. Shop owners should not have to tolerate young people affected by sniffing substances, running into their stores and stealing small items. Nonetheless, the police are obliged under the Young Offenders Act not to unduly detain a young person in custody for such a minor offence. The Young Offenders Act envisages that young people who commit minor offences will be released back into the community and not kept in some sort of preventive detention.

What these remarks lead to is that when we get to welfare issues, Family and Children's Services should take the dominant role. For these reasons I quash the order of the learned magistrate purportedly made under section 49 of the Young Offenders Act. It was in excess of the magistrate's powers and an inappropriate use of section 49.

In dealing with this case I am reminded of what the former Chief Justice of Western Australia, Sir Francis Burt, said in dealing with young offenders. He spoke of the futility of the criminal justice system dealing with young people who have by the accident of their birth received no parental support, have no family support, have not been educated, have not had the home and the nurturing that society expects will be given to children (sic). The court in the exercise of its criminal jurisdiction cannot do anything about that.

<u>Sentencing</u>

I am then called upon to deal with the charge of stealing the ice cream. The facts in relation to this charge are

> *"At about 8.30 am on Monday the 16 October the defendant was inside Mac's Deli on Notana Street, Kalgoorlie. While inside the store the defendant in company with others (not charged) has gone over to a fridge containing assorted ice creams and removed one Peter's Drumstick ice cream from the fridge and put it down the front of his pants and decamped the store with the same without attempting to pay for the time (sic).*
>
> *When questioned outside the store by staff, the defendant has gone to run away and when a short distance away, he has turned towards the staff and threw a stone in their general direction. The defendant was apprehended a short time later by police and conveyed to Kalgoorlie lockup where the present charge was preferred. No explanation was given."*

In his submissions on behalf of the offender counsel submitted that the offender denied throwing any stones and I proceeded to deal with the matter as a simple stealing of an ice cream. Having spent now 18 days in custody it is appropriate to exercise the powers under section 67 of the Young Offenders Act to refrain from imposing any further punishment because I am satisfied that such punishment as the court may approve has already been inflicted on the offender.

The Care and Protection Application

Before the court is a care and protection application which has a very long and troubled history and reflects the difficulties faced with a child of full Aboriginal descent who is not being supported in any way by his parents or family. Those are matters that have to be looked at in Kalgoorlie and the Family and Children's Services there will have to address them. The court received a recent report from them and can detect in that report their frustration in trying to find a place where this 15 year old child will live and remain.

The child GM has spoken to me in court. He recognises that if he goes with certain people and sniffs substances he is going to re-offend and he is going to be back in trouble again. In all the circumstances it is appropriate to adjourn the care and protection application sine die. The Juvenile Justice Division has undertaken to arrange the transportation of this young man back to Kalgoorlie. There are two places where he could remain this evening before the Family and Children's Services find as an appropriate place for him to reside.

Since his appearance in court in November, the Ice Cream Boy has re-offended. It is interesting to note, though, that in the week prior to the 10 January 1996, the Ice Cream Boy was sent from Kalgoorlie down to the Aboriginal run Lake Jasper camp near Busselton. This was an inappropriate move as the Ice Cream Boy is a Wongi, a different Aboriginal group to that in the Lake Jasper area. He could not settle at Lake Jasper and left there and committed some offences in Bunbury.[534]

Rights of the Child: International Law

There are a number of international declarations and conventions which protect the rights of young people, the principal amongst those being the *CROC*. The *CROC* was based on the

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[534] The concept of Aboriginal run camps for "troubled" Aboriginal juveniles is a step in the right direction. However, one must ensure that the cultural or tribal identity of the juvenile is considered when placing him/her in a camp. The problem is the dramatic lack of culturally appropriate places to send "troubled" Aboriginal juveniles.

Declaration of the Rights of the Child, agreed to by unanimous vote of the General Assembly of the United Nations in November, 1959, four years before the removal of children legislation was repealed in Western Australia.

The HREOC is empowered to investigate complaints concerning rights contained within the *ICCPR* and the *Declaration of the Rights of the Child.* [535] Principle 6 of the *Declaration of the Rights of the Child* states:

> *A child, for the full and harmonious development of his/her personality, needs love and understanding. He/she shall, wherever possible, grow up in the care and responsibility of his/her parents, and in any case, in an atmosphere of moral and material security. ... Society shall have the duty to extend particular areas to children without a family and to those without adequate means of support.*

The *Declaration* recognises the preference, importance and duty of family to take responsibility for children and protect their rights. The *Declaration* places an obligation on governments to protect the family unit, the interest of children growing up in a family where possible, and the right of individuals to a family life.

Children, like adults have rights to freedom from arbitrary interference with family life, freedom from arbitrary detention, privacy, liberty of the person and freedom of choice of residence.[536] Children are entitled to have their needs met in the least restrictive manner. Principle 2 of the *Declaration of the Rights of the Child* provides:

> *A child shall enjoy special protection, and shall be given special opportunities and facilities, by law and by other means, to enable him/her to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.*

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535 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), Sch. 2. This schedule also contains the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

536 *UDHR*, article 16(3); *ICESCR*, article 10(1); and *ICCPR*, article 23.

In addition to the same human rights enjoyed by all individuals, it is recognised that children need special measures of protection and assistance, that they are particularly vulnerable and that they are in the process of maturing towards adulthood. Some principles proposed include that protection and assistance should be provided in a manner which interferes with family life as little as possible, subject to the protection of the child from cruelty and abuse; and the legal powers affecting children should be subject to checks against arbitrariness by regular processes of review and by provisions of effective advocacy.[537]

Provisions of international law specifically dealing with juvenile justice include:

Article 3.1 of *CROC* states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

CROC envisages that it is in the child's "best interests" to be brought up with his/her birth family and by both parents (articles 9 and 18). Further, it is emphasised that the child has a right to inherit and participate, both independently and through his/her family, in the culture(s) into which he/she was born (articles 8.1, 29(1)(c) and 30 in particular). These principles create a double issue in regards to Aboriginal youth, in that they are to be protected both as children and as members of as an indigenous culture. Article 30 of *CROC* states:

> *In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.*

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[537] HREOC, *Our Homeless Children*, AGPS, Canberra, 1989, p34.

Clearly then, issues of and legislation concerning juvenile justice are to be intimately linked to the reform of broader social policies. It is questionable whether effective and appropriate policies and practices are currently in place.

Article 37(b) of *CROC* states:

> *No child shall be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

Article 40(4) of *CROC* provides in part:

> *A variety of dispositions ... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*

Proportionality refers to the general principles of sentencing and community standards, and must also refer to the specified and internationally agreed aims of juvenile justice: the rehabilitation or reintegration of the young offender and the protection and promotion of his/her best interests.[538] These principles are contained in the *Beijing Rules*, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (adopted by United Nations General Assembly 1985). The principal sections of the *Beijing Rules* provide that:

- a comprehensive social policy shall be in place to ensure the well-being of juveniles;
- reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence;
- those police officers dealing extensively with juveniles shall be specifically instructed and trained;
- detention pending trial shall be used only as a measure of last resort and for the shortest amount of time;

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[538] Wilkie, M., *op.cit.*, 1992, p193.

- placement of a juvenile in an institution shall be always a disposition of last resort and for the minimum amount of time; and
- necessary assistance shall be provided to facilitate the rehabilitative process.

It is to Australia's shame that the *UDHR* and the *Declaration of the Rights of the* Child were agreed to by the international community (including Australia) well before the assimilation policy and guardianship powers over Aboriginal youth were legislated out of existence in State[539] and the rest of Australia. It is pertinent to note that Aboriginal children continued to be removed from their families and put into custody under the provisions of the *Child Welfare Act 1947* (WA), and that recent and current legislation pertaining to juvenile justice has been criticised for being in breach of Australia's international obligations.[540]

Recommendation 151

That the State government ensures that all legislation dealing with juvenile justice conform to Australia's obligations under international law.

Policing

Traditionally, police have been deeply involved with Aboriginal "management". At various times the police have performed a multitude of functions in relation to the "protection" of Aboriginal people including police, gaolers, justices, providers of rations, health and welfare inspectors and protectors. These conflicting roles have not facilitated the development of harmonious relations between the police and Aborigines.

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539 By the *Native Welfare Act 1963* (WA).

540 *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA); and *Young Offenders Act 1994* (WA). See generally, Blagg, H., and Wilkie, M., *op.cit*, 1995.

The police continue to act in the area of moral policing particularly in regards to patrolling public space.

> *The police task in relation to the policing of youth and social space is a notoriously grey area; a shadowy domain defined precisely by its fluidity and absence of clear over-arching rules.*[541]

It has been recognised that such policing gives rise to Aborigines being disproportionately the subjects of police surveillance and public order offences.[542] Police do not have the requisite social or cultural training to perform moral policing and such policing should not be within their jurisdiction.

Recommendation 152

That the State government amend relevant legislation so that the police are no longer required to undertake moral policing activities.

The onus on police to fulfil their obligations to young people is a heavy one. International legal instruments set out minimal conditions by which children should be dealt with by the criminal justice system. However, it is unlikely that many police walking the beat are familiar with the *Beijing Rules* or *CROC*. As a senior police officer stated, "our cadets go through a 16 week training course which simply doesn't allow time for them to pick up on Australia's international obligations and learn cultural sensitivity.[543]

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[541] Blagg, H., Wilkie, M., *op.cit*, p19.

[542] Aboriginal and Torres Strait Islander Social Justice Commissioner, *op.cit.*, p23.

[543] Interview with Senior Police Officer, 13 December, 1995.

Recommendation 153

That the Minister of Police ensures that the police at all levels be made fully aware of their obligations under International, Commonwealth and State law, particularly the Convention of the Rights of Children, Beijing Rules, the Equal Opportunity Act 1984 (WA) and the Racial Discrimination Act 1975 (Cth).

It is widely accepted that the discretion in the hands of the police to prosecute or deal with matters informally remains the most significant decision-making function in the criminal justice system.[544] As gatekeepers to the juvenile justice system, it is the police who decide whether to open the gates of the system. The importance of this role cannot be over-emphasised. Police accountability and responsibility are paramount, particularly in regards to youth.

Racism is endemic in WA and is experienced in every area of society. However, the working conditions of police and the awesome power they wield can result in racism being reproduced in a "particularly heightened and intensified form".[545]

Aboriginal juveniles are often singled out for police attention. They are regularly subjected to police practices such as name checks and other interventions although they are not involved in offending behaviour. As a result of this sort of attention, Aboriginal youth perceive that they are being singled out and such police interventions can result in youths being charged with disorderly conduct (for offensive language in many instances), resisting arrest and assaulting police officers.

Racism in the police force needs to be ameliorated through education and increased dialogue and improved relations between the agencies which operate in the juvenile justice field. Such progress is not encouraged by comments such as those made by a senior member of the Police Union in Western Australia who claimed that the police were, "under siege from sundry cockroaches, minority groups, community watchdogs and politicians, civil libertarians, Aboriginal lobby groups

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544 Blagg, H., and Wilkie, M., *op.cit.*, p127.

545 *Ibid*, p125.

... all on the gravy train".[546] Entrenched firmly within police culture are a series of attitudes and opinions which consistently work against efforts at reform, increased police accountability and improved Aboriginal-police relations. Intimidating law and order perspectives and agendas must give way to more conciliatory and co-operative development working relationships within the community.

Recommendation 154

That the State government encourage dialogue between the police force and relevant juvenile justice agencies.

As stated above and consistently in literature on police reform, greater time must be spent educating police in Aboriginal ways, communication and in the legal obligations and responsibilities of police officers. Police power is significant. Constraints on its use must be introduced. As previously stated, cross-cultural training through in-service courses is one way police cadets and officers can be conditioned into wielding their power responsibly and appropriately. This is imperative particularly for those police stationed in precincts with large Aboriginal populations.

Undoubtedly there are major problems with policing in Western Australia. On-going reports of inappropriate police behaviour suggest that abuse of power is still prevalent in the police force. It is for this reason that the ALSWA believes that the rights of citizens in relation to police and the rights of those in custody need to be enshrined in legislation. Some rights are contained in orders issued by the Police Commissioner, but they are not binding in court. The creation of rights at a legislative level is imperative.

Necessarily, a complimentary independent investigative and review body is required to ensure the protection of those rights. Such a body is in keeping with recommendation 226 of the RCIADIC.[547] The current system of internal police investigation is not satisfactory.

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546 Report in *The West Australian* newspaper, 17 September, 1994.

547 Johnson, E., *op.cit.*, Vol. 5, pp119-120.

A senior member of the Western Australian Police Service has stated that the two basic reasons why Aboriginal children offend is that they are disadvantaged or damaged. He added:

> *Before the age of 9, children are practically immune from the law. 50 per cent of Aboriginal young offenders, by the age of 9 had already become firmly entrenched in the offending pattern. This means that at the age of 9, 50 per cent of Aboriginal young offenders moved through at least the first gateway. Before the children can be dealt with under the law, they have already entered the culture of crime. Once entrenched in the system, the cycle of crime, detention, release, crime is self-perpetuating.*[548]

In regards to Police Service responsibility for bad relations between Aborigines and police, the senior police officer stated that for the police to become more culturally aware and understanding, they needed adequate funding to establish an educational program. This has not been provided.

It was the opinion of the senior police officer cited that a greater sense of tribe, family and community needs to be fostered in order to reduce Aboriginal juvenile involvement with the criminal justice system. Aboriginal schools teaching Aboriginal ways is considered a necessary development. The "Kalunga" Aboriginal run school has been (mentioned in chapter 9) extolled as being an Aboriginal success story.

The senior police officer conceded that there were a number of problems with the current system:

- that the defacto transference of the social welfare role to police was wrong and needed reform;
- that there remained considerable friction and confrontation between agencies involved in juvenile justice provision; and
- that the adversarial legal system does not promote co-operation and dialogue.

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[548] Interview with Senior Police Officer, 14 December, 1995.

There are also problems with the extent of police power under Section 50 of the *Police Act 1892* (WA) and police questioning of juveniles. Whilst the police power under Section 50 of the *Police Act 1892* (WA) (to ask a person for his/her name and address) is theoretically limited to situations where there is a reasonable suspicion that an offence has been committed, the widespread use of the power and its repercussions for Aboriginal youth demands the need for further direction to be given to police officers in exercising this power. Section 50 of the *Police Act 1892* (WA) should be repealed. In the meantime guidelines regarding the use of the section could be included in a protocol. This would be in accordance with the recommendations of the RCIADIC. In particular recommendation 86 is noted which recommended that "[t]he use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge".[549]

Recommendation 155

That the State government repeal Section 50 of the Police Act 1892 (WA) and in the meantime a protocol be established which provides guidelines for the use of the section.

Recommendation 156

That the Police Commissioner order that decisions to proceed by way of arrest in the case of juveniles should be automatically reviewed by a senior officer.

The vulnerability of young persons in police custody is of particular concern to the ALSWA. There are no legally binding obligations on police officers to ensure that young people are fairly treated when questioned by the police. It is questionable whether the Orders applicable to the questioning of juveniles are adhered to. Western Australia should conform to the standards implemented in other States where such requirements are set out in legislation. In the meantime there is a need to ensure that the presence of a parent, responsible adult or a representative of ALSWA prior to questioning as recommended by the RCIADIC and that such requirements be incorporated into a police protocol.

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[549] Johnston, E., *op.cit.*, Vol. 5, p88.

The relevant recommendations of the RCIADIC are:

Recommendation 243

That where an Aboriginal juvenile is taken to a police station for interrogation or as a result of arrest, the officer in charge of the police station at which the juvenile is detained should be required to immediately advise the relevant Aboriginal Legal Service and the parent or person responsible for the care and supervision of the juvenile of the fact of the child being detained at the police station (without prejudice to any obligation to advise any other person).

Recommendation 244

That no Aboriginal juvenile should be interrogated by a police officer except in the presence of a parent, other person responsible for the care and supervision of the child or, in the absence of a parent or such other person, an officer of an agency or organisation charged with responsibility for the care and welfare of Aboriginal juveniles.

Recommendation 245

That legislation, regulations and/or police standing orders, as may be appropriate, be amended so as to require compliance with the above recommendations.[550]

Recommendation 157

That the State government incorporate into legislation recommendations 243-245 of the Royal Commission into Aboriginal Deaths in Custody, and in the interim the Police Commissioner incorporate the recommendations into a police protocol.

The *Young Offenders Act 1994 (WA)* introduces a number of gateways to the juvenile justice system. These gateways are supposed to filter the varying types of offenders, so that only the most persistent are dealt with by the court and formally enter the criminal justice system. The gateways provided are:

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[550] Johnston, E., *op.cit.*, Vol. 5, pp124-125.

- cautioning;
- juvenile justice teams; and
- Children's Court.

Cautioning was introduced in 1991 and was based on the rationale that:

- early and unnecessary contact with the criminal justice system can be counter-productive and may actually increase the likelihood of offending;
- offending by young people is often opportunistic, trivial and transient;
- cautioning is a more effective and efficient means of dealing with minor offending; and
- cautioning would provide police with the opportunity to contact parents, encouraging parental involvement and responsibility.[551]

Cautioning is used by the police for the most minor offences and can be either verbal or written, the latter of which is recorded and a copy given to a responsible adult.

> *The limited trends in juvenile offending reported here strongly suggested that a significant diversionary effect has been achieved by cautioning ... The high rates of Aboriginal detention and persistence of the 'criminal careers' tend to point to specific failures of policy and practice for this group.*[552]

Recent data indicates that Aboriginal juvenile offenders are less likely to receive a caution than their non-Aboriginal counterparts.[553] Hence for Aboriginal juveniles, the cautioning system, as it is employed at present, further disadvantages them and further increases the disproportionately negative treatment they receive under the juvenile justice system. *The Young Offenders Act 1994* (WA) does not obligate the police to communicate in an age appropriate and/or culturally appropriate manner with a child when administering cautions or require parental involvement or if necessary interpreters.

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551 Bartholomew, P., "Preventative and Diversionary Programs in Western Australia", Atkinson, L., (ed), *op.cit.*,p453.

552 Harding, R.W., (ed), *op.cit.*, p94.

553 Crime Research Centre University of Western Australia and AAD, *op.cit.*, p6.

There is no provision within legislation or policy for individual police officers to impose conditions on cautions apart from where the Act allows a properly constituted Juvenile Justice Team to delay a caution until certain conditions are met. Any caution given by a police officer cannot at a later date be rescinded where a child has failed to complete an undertaking given at the time of the caution. There have been concerns expressed within the community about this issue, with claims that some officers are giving "cautions on condition".

The Crime Research Centre of the University of Western Australia and AAD in their recent joint report stated:

> *Western Australia is moving toward what has been called a* ***bifurcated*** *model of juvenile justice. In simple terms, this means that the system is increasingly operating on the principle that there are two classes of offenders: those perceived as minor offenders and others deemed to be serious and/or repeat offenders. While diversion for minor offenders may be highly desirable, there are some real dangers where the bifurcation process seems to occur along racial lines. The signs are that the process of bifurcation is currently favouring non-Aboriginal youth. As the statistical evidence shows ... non-Aboriginal youth are being diverted at a much higher rate than Aboriginal youth. Given this fact, the emerging danger is that the cautioning process may further entrench Aboriginal youth in the justice system and confirm Aboriginality as synonymous with crime and prison. The effects are compounding in the sense that the courts may perceive Aboriginal youth to have "failed to respond" to diversionary options such as cautioning and family group conferences (...) and consequently "up-tariff" them, that is, give them a more severe disposition than justified by the current offence alone.*
>
> *State-wide consultations with Aboriginal people conducted for this project found that Aboriginal adults often felt excluded from the cautioning process and were uncertain of its implications. Some said that they only found out that their child had been cautioned by the police when they faced charges in court at some later date. One Aboriginal parent in Albany said: "Parents get no information. Your kid is a criminal before you get to hear about it". Another carer recalled that she only discovered by chance that her child had been questioned by police officers at school on a number of occasions, with neither the school or the police informing her of this fact.*[554]

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554 *Ibid*, p13.

Juvenile justice teams are the second gateway which deals with more serious offences where the child admits guilt. Although youth or juvenile justice teams were originally envisaged to mirror the New Zealand program, the team's formulation is not mandatory and does not have to include the victim. It may only include a representative from the police, Ministry of Justice, a responsible adult and the young person. The Team can decide on a course of action that the young person is invited to comply with. This cannot include making orders of restitution or compensation but may include an agreement to make such a payment. Referrals to the teams can be made by the police or the Children's Court. If the young person (or the responsible adult or the victim) do not agree to the outcome then the case is referred back to the police or the court.

Where the offence is too serious for cautioning or the Juvenile Justice Teams, it must go before the court. On such occasions the police are to make use of the "Notice to Attend Court" summons in preference to arrest.

Recommendation 158

That the State government ensure the policing process be rigorously constrained within a legislative rights framework, which inter alia, obliges police to communicate in an age appropriate and culturally appropriate manner.

Recommendation 159

That consultation takes place between the Ministry of Justice, the Police Service, Youth and Aboriginal Legal Services in regards to the operation and performance of juvenile justice teams.

A concern regarding the sentencing provisions of the *Young Offenders Act 1994* (WA) is that although Section 46(2) provides that the sentence imposed should be "in proportion to the seriousness of the offence and consistent with the treatment of other young persons who commit offences", this principle of proportionality is afforded little regard in the light of Section 125. That section states that if the offender is part of the "target group" (multiple offenders who have served time under two separate custodial sentences, and have further committed a serious crime -

Section 124) the judge, in formulating a sentence, is to have "primary consideration to the protection of the community ahead of all ... other principles". Over-represented young Aboriginal offenders are more likely to be subject to these different sentencing principles than other offenders.

Further, in regards to "special orders", the Act clearly proposes that an offender is to be judged accountable to public protection twice. Under Section 125, public protection must be considered as the primary concern of sentence. However, the court may then impose a special order which also reflects a concern for public order.

> *It is misleading to regard public protection as somehow contrary to other concerns. The best form of public protection might lie in programmes designed to take account of the equational, cultural and vocational needs of the offender.*[555]

The inclusion of such harsh and discriminatory sentencing rules are perplexing considering the well documented failure of such provisions under the *Serious and Repeat Offenders Act 1992* (WA). These provisions also appear contrary to the development of the common law in Australia. In *Chester v The Queen*[556] the High Court (per Mason CJ, Brennan, Deane, Toohey, and Gaudron JJ) held that:

> *[it] is now firmly established that our common law does not sanction preventative detention. The fundamental principle of proportionality does not permit the increase of sentence imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.*[557]

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555 Morgan, N., *The Young Offenders Act 1994: Repeat Serious Offenders*, Unpublished Discussion Paper, University of Western Australia Law School, Nedlands, 1995, p5.

556 (1988) 165 CLR 611.

557 *Ibid*, at 618.

Indeed crime reduction likely to be achieved by incarceration is at best very small, whilst the costs are very high in terms of additional custodial space. From the Aboriginal incarceration rates provided at the beginning of this chapter, it would appear that sentences of incarceration are overzealously employed.

Harding queries the commitment of the criminal courts of Western Australia to employ the section when he writes, "what imprisonment rates seem to indicate is either that this section is being widely disregarded by the judiciary or that Western Australians are a particularly unpleasant lot".[558]

Recommendation 160

That the State government amend the relevant sentencing provisions of the Young Offenders Act 1994 (WA) to emphasise that custodial sentences for juveniles be a measure of last resort, and to give due considerations to the rehabilitation of juvenile offenders.

One issue that contributes to on-going Aboriginal juvenile over-representation in detention centres is the power of Justices of the Peace to determine charges and impose penalties. While these powers remain in place, Aboriginal juveniles in the rural and remote areas will continue to be subjected to an unregulated second class system of justice.

The observations of Ross on Canadian sentencing are universal and have particular import when considering the needs of indigenous peoples:

> *Sentencing is not, after all, an end but a means to the other ends. It is a tool employed in an effort to accomplish rehabilitation of the individual, deterrence to him and to others in the community and protection of the community. It requires that we learn as much as we can about the individual and about the context in which he lives. The greater our misinterpretation, the less likely it is that our sentence will produce the results we intend.*[559]

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[558] Harding, R.W., "The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions", *Western Australian Law Review*, 22, 1992, p75.

[559] Ross, R., "Leaving Our White Eyes Behind", *Canadian Native Law Reporter*, 3, 1989, p2.

Programs to divert Aboriginal offenders from detention should be developed. There is a great need to find alternative placements and programs for Aboriginal juveniles. A study from the Australian Institute of Criminology on wilderness and adventure programs concluded that:

> *... great results have been claimed to emerge from wilderness and survival programs for delinquents. To a lesser extent, program evaluation has revealed that some of these claims are valid and reliable; namely that wilderness and survival programs do lead to improvements in self-concept and reductions in recidivism rates for participants.*[560]

Like programs and others that could involve placements within Aboriginal communities and "employment" on Aboriginal owned stations should be investigated and, if appropriate, introduced. The success of the Kalunga Aboriginal school could also have application to diversionary programs for Aboriginal juvenile offenders.

Detention

It has been widely recognised that detention should be avoided for young offenders. For Aboriginal offenders there are additional reasons for utilising incarceration as a last resort. These include geographic, family and cultural isolation. Rather than detention, the primary focus of juvenile justice for Aboriginal youth must be towards diversion and other forms of placement that are more geographically and culturally appropriate.

The Ministry of Justice recognises that its "clients" and their families have certain rights and entitlements. These include that the offender and his/her family be provided with information concerning the range of services to which they are entitled, that parents or other responsible adults be given the opportunity to be heard and participate in decision making in regards to their child, and that offenders and their families are entitled to know of complaints procedures for the voicing of grievances.[561]

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560 In Potas, I., Vining, A., and Wilson, P., *Young People and Crime: Costs and Prevention*, Australian Institute of Criminology, Canberra, 1990, p88.

561 Ministry of Justice, *Management Philosophy: Juvenile Justice Division*, Ministry of Justice, Perth, 1996, p4.

The Ministry of Justice in a letter to the ALSWA, dated 16 February, 1996, stated:

- *policies and procedures have been developed to ensure parental and family involvement in developing sentencing options for the court and in the implementation and management of Orders. This commences at the preventative and diversionary stages with family participation being the key, particularly in family meetings conducted by the Juvenile Justice teams. Families are actively encouraged to participate in all aspects of sentence planning and attend sentence planning meetings both in the community and at detention centres. The Supervised Release Review Board expects parents or other significant adults to participate in the Board meeting prior to the release of all juveniles from detention.*

- *The Juvenile Justice Division has actively supported community initiatives designed to foster cultural links between juveniles and their families. A recent example involved funding a group of young people to visit Roelands mission with members of their families, many of whom had been resident at the mission. It provided the young people with an insight into past policies the impact so profoundly on Aboriginal people.*

- *A current project being undertaken by the Juvenile Justice Division in conjunction with the State Aboriginal Affairs Department relates to the identification of members within Aboriginal family groups who may be able to provide support and assistance to juvenile offenders. This involves the mapping of relationships between immediate and extended family members. The project recognises the need to encourage collective responsibility for the care of family members and demonstrates a commitment to empowering the family in their interaction with the Justice system.*

It remains unclear as to how effectively the Ministry of Justice has implemented its policies and procedures and whether they significantly benefit their intended recipients. Comments provided to the ALSWA from incarcerated Aboriginal juveniles would indicate that the Ministry of Justice has a long way to go to ensure a culturally appropriate environment.

> *I hate it inside. The guards look down on us Aboriginal kids. I know its not good for the white kids but we have it worse. They treat us like animals. They don't think we have a brain. They think all Aborigines are crooks. I remember last time I got out of jail, one of the guards said he looked forwarding to seeing me back soon. He had a smile when he said it.*[562]

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[562] Jason, aged 15 years.

It is hard for my family to visit me. They are scared of prison and white authorities. Dad has been in prison a few times and mum was at New Norcia. Dad was in a mission up near Broome. It was just like a prison. My brother is in Casuarina now. When my mum and dad come to visit me they get really upset and scared. It must be all the bad memories from their childhood and dad's stay in prison. The prison officers don't help. They are not friendly. We don't trust them.[563]

Recommendation 161

That all involved agencies maintain criminal justice statistics, so as to facilitate the monitoring of Aboriginal interaction of the system and the success of various programs.

Recommendation 162

That relevant government and non-government agencies develop program objectives and performance indicators so that the success or failure of programs can be assessed and policy development be enhanced.

Detainees are entitled to certain conditions and provisions including management in the least restrictive manner appropriate with their circumstances, contact with families and significant others and the ability to fulfil cultural or religious obligations. In regards to the particular needs of Aboriginal youth, it is not clear that these entitlements are consistently received.

Principles and guidelines are important for they create standards. However, of more importance is the application of principles and guidelines in ensuring that rights are protected and applied. Mechanisms for measuring the conditions of incarcerated young people need to be developed to report on the conditions and opportunities afforded young people, particularly Aborigines in detention.

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[563] Peter, aged 14 years.

Western Australia is particularly guilty of not establishing juvenile detention centres closer to Aboriginal communities in the north of the State. This inhibits the ability of the Aboriginal child's family and/or relatives to visit him/her. It should be noted that for the last few years the ALSWA has been reluctant to advocate juvenile detention centres in country locations for fear of increasing the level of detention. However, with a new detention centre being established in Perth the ALSWAs position needs to be reconsidered.

> *The separation from the juveniles' extended family can result in making the period of detention more emotionally draining and alienating for many Aboriginal juveniles and be detrimental to the juveniles rehabilitation.*[564]

Cultural isolation is another key factor in the undesirability of sentencing Aboriginal youth to custodial sentences. Justice Muirhead in *Jabaltjari v Hammersley*,[565] stated that "the young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration.[566] His Honour concluded:

> *that the prospects of this boy's rehabilitation by training and discipline administered by his own people are much greater than a goal experience which is quite barren and which serves if anything to weaken his ties with his own people and culture - ties which at the present time may offer him some prospects of a decent existence...*[567]

If there is no alternative but to award a custodial sentence, it is essential that links are maintained between the juvenile and his/her people and culture. Further appropriate and meaningful rehabilitation and enrichment programs should be provided for Aboriginal youth in custody. These aspects of Aboriginal juvenile incarceration should be provided for in juvenile justice legislation. Legislative reform should also provide for greater involvement of Aboriginal people

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564 Sweeney, D., *op.cit.*, (1993), p41.

565 (1977) 15 CLR 1994.

566 *Ibid*, at 98.

567 *Ibid*, at 101.

and communities in post-sentencing decision making, and the provision of services to Aboriginal youth in prison, such as counselling, social, cultural and educational programs.

Possible Remedies

Aboriginal juvenile offending is a direct cause of the dysfunction of Aboriginal society, and the breakdown of family, kinship and community relationships. The past assimilation policies and practices dramatically tore apart families and communities, which had and continue to have a great negative impact on individuals, families and communities. As the governments of Australia are in a large degree responsible for the current state of Aboriginal society, through the promulgation of assimilation policies, it can be convincingly argued that a heavy onus now rests with Australian governments to commit themselves to solving the problems of Aboriginal juvenile offending. The onus is even heavier considering ongoing over representation of Aboriginal youth in the Western Australia juvenile justice system in detention centres. The associated removal of children, institutionalisation and state intervention outcomes, as is clear, are devastating. This negative pattern is circular and spiralling outwards as Aboriginal society becomes weaker and the Aboriginal "problem" becomes bigger.

The New Zealand government responded to problems being faced by Maori peoples and their youth in an almost revolutionary fashion. The *CYPF Act* is to be commended. In terms of the government recognising persistent indigenous juvenile interaction with the juvenile justice system, engaging the Maori community in consultation when considering and constructing the Act, and in including indigenous cultural and resolution procedures and incorporating Maori views and perspectives in the ensuing legislation, the New Zealand approach makes Australia's response to juvenile justice look archaic. Even more impressively, as reported in the previous chapter, the New Zealand Department of Justice reported the decrease in youth offending was greater than expected after the introduction of the *CYPF Act,* [568] demonstrating that the system of indigenous consultation, recognition and inclusion impacted positively on both indigenous and non-indigenous society.

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[568] Zegers, J., and Price, C., *op.cit.*, 1994, p803.

One of the most progressive aspects of the *CYPF Act* is that it is not dominated by a law and order agenda. Rather the Act draws from indigenous concepts of justice, resulting in a synthesis of the strengths of both perspectives. Accordingly:

> *The CYPF Act adopts both welfare and justice approaches: welfare - treatment of offenders; justice - individual accountability for actions. The justice model emphasises reintegration rather than rehabilitation - recognition that a young person is a product of their social environment; that where possible problems are most appropriately dealt with by leaving young people in their community so that the young person may be assisted to accept responsibility as a member of their community. The problem of the welfare approach was that it failed to make young folk accountable for their actions - it had the effect of cushioning young people from the human, social and economic consequences of their behaviour.*[569]

The Act imposes responsibility on the family, not just the individual, therefore strengthening the sense of reciprocal group obligation. The family is empowered by being encouraged to address their own shortcomings, yet at the same time the authority of the family is affirmed as they are expected to take responsibility for their young. This reflects the Maori ideals of group control and responsibility that operate within a weave of kinship obligations. Admittedly the Act places a great deal of responsibility on the family. As such it is vital that families are aware of what is expected of them. However, this surely must be one the tenets of self-determination; the devolving of responsibilities to individuals, the empowerment of Aboriginal people to control their own lives. In this respect the Western Australian adoption of the New Zealand system of family conferencing is welcomed.

Unfortunately in other key respects the *Young Offenders Act 1994* (WA) does not mirror the *CYPF Act*. Nor could it as the Aboriginal condition in Western Australia is different to the particular nuances and distinctions of the Maori situation and culture. However, much could be transposed from the New Zealand Act and applied to the Australian situation. Similarly much could be learnt from the formulation process of the *CYPF Act*. Instead, the *Young Offenders Act* tacitly borrows the concept of Family Group Conferences, but fails to let the system operate to its fullest potential. The *CYPF Act* and its provision for family conferencing differs in a number

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[569] *Ibid*, p805.

of significant ways from the provisions of the *Young Offenders Act 1994* (WA). Under the *CYPF Act:*

- the family group conference origins derive from the practices of indigenous peoples;
- no juvenile justice teams exist within the youth justice system. The family group conference is convened by the youth justice co-ordinator;
- family group conferences deal with indictable offences; and
- family group conferences allow the family to meet separately from victims and professionals to discuss a penalty plan.

The Western Australian model differs substantially from the New Zealand model. At a structural level, and certainly in terms of diverting offenders from the juvenile justice system, the New Zealand model is more inclusive and advanced. Further, there are questions about the status of the conferencing system's implementation in Western Australia in regards to Aboriginal juveniles. Some teams have reported that they do not receive enough Aboriginal referrals to warrant the inclusion of an Aboriginal representative.

It must be stressed that family conferencing models do not address the fundamentals of the disempowerment and social vulnerabilities that confront young indigenous people. Family conferencing can be seen as an important step in attempts to develop a more just juvenile justice system. Family conferencing models partially address the concerns of Aboriginal people, but are not entire answers to the problem. Underlying issues that result in Aboriginal children being involved with criminal justice systems must be identified and acted on.

It is clear that policy makers and practitioners in the juvenile justice arena must find a different perspective when trying to understand and deal with offending Aboriginal youth. The New Zealand consultative process for the formulation of the *CYPF Act* should be considered as a model.

Such vital consultation must be complemented by sustained research on juvenile offending, the absence of which proves to be a severe limitation to the development of suitable policies. Family conferencing in Western Australia, for example, has not yet been adequately assessed. Its success in diverting Aboriginal offenders from the courts while simultaneously providing a more appropriate response to youth offending remains speculative. Clearly there is a need to undertake independent research to evaluate family group conference actions for all parties.

More emphasis must be placed on developing preventative schemes and addressing underlying causes of Aboriginal juvenile offending. From a justice perspective, a special juvenile prosecuting unit with prosecutors trained in youth and Aboriginal affairs might act as a countervailing force to the present law and order focus of the Police and Children's Court. Further, greater accountability and training is required in the Police Service if it is going to adequately fulfil its obligations to Aboriginal society.

Such recommendations, and many others which are more detailed, have been researched, formulated and publicised over the last five years and seemingly to no avail. Gains have been made, and these must be recognised, but for Aboriginal people the situation has changed little. To repeat the oft-stated, Aboriginal levels of interaction with the juvenile justice system are excessive, as are levels of Aboriginal juvenile incarceration. Although the situation is urgent, it will not benefit from quick, knee-jerk, unplanned or unco-ordinated programs. A real, substantial and dedicated collaborative response is required which recognises, includes and devolves power to Aboriginal people. This cannot be emphasised enough.

Recommendation 163

That the State government use the Children, Young Persons, and Their Families Act 1989 (NZ) as a model to enact new juvenile justice legislation.

Recommendation 164

That the State government ensure that new juvenile justice legislation guarantees the rights of children as recognised under international law.

Recommendation 165

That the State government ensure that new legislative reform provides for major involvement of Aboriginal people and communities in post-sentencing decision making and in the delivery of services to juvenile Aborigines in prison, such as culturally appropriate counselling, social, cultural and educational programs.

Recommendation 166

That the Ministry of Justice work with Aboriginal communities to examine the desirability of and the need for juvenile detention centres in regional locations.

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APPENDIX A

AMENDED SUBMISSIONS OF THE INTERNATIONAL COMMISSION OF JURISTS (AUSTRALIAN SECTION) ON THE QUESTIONS RESERVED [IN THE CASES OF KRUGER & ORS V THE COMMONWEALTH OF AUSTRALIA NO. M21 OF 1995 AND BRAY & ORS V THE COMMONWEALTH OF AUSTRALIA NO D5 OF 1995]

A. Introduction

1. The Australian Section of the International Commission of Jurists (ASICJ), whilst supporting the plaintiffs' submissions, wishes to make submissions in the following areas for the assistance of the Court:

(1) The drawing of implications in the Constitution in respect of fundamental freedoms;

(2) The extent to which the family is entitled to implied immunity from undue state interference in a free society governed by the principle of representative government;

(3) Whether the Aboriginals Ordinance is either directly or indirectly incompatible with the implied freedom to discuss government or public affairs as enunciated by the Court.

(4) The right to damages for breach of implied constitutional limitations on legislative competence.

B. Drawing of Implications from the Constitution

2. The decisions of the court reveal a divergence in approaches to the drawing of implications from the Constitution in respect of laws said to abrogate human rights and fundamental freedoms.

3. Firstly, there is the narrow view that any implied freedoms such as freedom of speech, must arise from the words of Sections 7 and 24 of the Constitution and hence be limited to the electoral process (*Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 203 per McHugh J).

4. This view, however, was rejected by the majority in *Theophanous and Stephens v Western Australia Newspapers Ltd* (1994) 182 CLR 211. The implication arises not from the mere words but from the doctrine of representative government which is found in the structure of the Constitution as a whole (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134 per Mason CJ):

> *... the doctrine of representative government which the Constitution incorporates is not concerned merely with electoral process ... [The doctrine] also presupposes an ability of the people of the Commonwealth as a whole to communicate, amongst themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf. (National News Pty Ltd v Wills (1992) 177 CLR 1 at 72 per Deane and Toohey JJ).*

5. Once this is recognised it is legitimate to give effect to the doctrine "by reference to the conceptions of representative government and responsible government as understood by informed people in Australia at the time of federation" (*Australian Capital Television* at 230 per McHugh J). The doctrine of representative government entails consequences which will not always be obvious (*Australian Capital Television* at 211 per Gaudron J). Its interpretation ought take account of the "increasing appreciation and assertion of the intrinsic equality of all human beings" (*Theophanous* at 174 per Deane J) and of the

general law, including the common law. (*Australian Capital Television* at 211 per Gaudron J; *Nationwide News* at 69 per Deane and Toohey JJ).

6. Viewed in this light, the implied freedoms that arise from the doctrine of representative government which is part of the "fabric on which the written words of the Constitution are superimposed" (*The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413 per Isaacs J), cannot logically stop at merely the freedom to communicate. It must be logically extended to all freedoms which predicate and upon which is predicated "a free society governed in accordance with the principles of representative parliamentary democracy" (*Australian Capital Television* at 210 per Gaudron J). The doctrine of representative government encompasses all those preconditions necessary for ensuring that the government is truly representative of the people and accountable to them (*Nationwide News* at 70 per Deane and Toohey JJ, *Australian Capital Television* at 137 per Mason CJ).

7. The view that the doctrine of representative government may encompass freedoms beyond merely communication has already been expressed by members of the Court (McHugh J in *Australian Capital Television* at 227; Gaudron J in *Australian Capital Television* at 212 and Murphy J in a number of cases cited by Gaudron J and Dawson J in *Australian Capital Television* at 212 and 185 respectively).

8. Such freedoms as are implied in the Constitution have the effect of placing limits on the legislative competence of the Commonwealth Parliament (see Brennan J in *Nationwide* at 51-2 and *Australian Capital Television* at 149-150). Parliamentary sovereignty, in the Diceyan sense of legally unlimited legislative power, has never applied in Australia (see D Kinley, "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law" (1994) 22 FL Rev 194 at 195, 197-202). Rather, the scope and, to an extent, the form of the Commonwealth Parliament's legislative competence is bounded by the terms of the Commonwealth Constitution, whether expressly stated or implied.

C. The Aboriginals Ordinance

9. The Aboriginals Ordinance empowered officers of the Crown to institutionalise Aboriginals. Sections 6, 7 16 and 45 and Part IV provided the following powers:

(a) to trespass upon premises;
(b) to take any Aboriginal into custody;
(c) to detain Aboriginals in locations of the choosing of the Crown and to decide when and how such persons may be able to leave such institutions;
(d) to assume legal guardianship of Aboriginal children;
(e) to control the marriage and sexual relations of Aboriginals; and
(f) to control Aboriginals' property and ability to work and be employed.

10. Such power was able to be exercised by officers of the Crown in a way that was:

(a) summary - in that there was no due process of law involved;
(b) arbitrary - in that the powers exercised were at the discretion of the relevant officer; and
(c) discriminatory - in that it applied to citizens on the basis of their race.

11. It is submitted that such interference by the state in the lives of those affected by the Aboriginals Ordinance was so great that the legislation is necessarily inconsistent with the notion of a free society governed in accordance with the principles of a parliamentary democracy. Apart from the matters raised by the Plaintiffs, this can be demonstrated by focusing on the role of family and community in relation to public affairs.

12. The ASICJ submits that the doctrine of representative government must encompass some immunity from undue state interference with families generally and the parent and child relationship in particular.

D. The Role of Family and Community in a Democracy

13. The preservation of the family unit including its protection from undue State interference has long been regarded as a fundamental right in international law: see

Article 12 of the United Nations Universal Declaration of Human Rights 1948;
Article 17, 23 and 27 of the International Covenant on Civil and Political Rights 1966;
Article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966 describing the family as "the natural and fundamental group unit of society"'
Article II of the Genocide Convention 1949;
Article 16 of the United Nations Convention on the Rights of the Child 1989;
Article 8 of the European Convention on Human Rights 1950;
Article 16 of the European Social Charter 1961 describing the family as "the fundamental unit of society";
Article 11(2) of the American Convention on Human Rights 1969;
Article V of the American Declaration of the Rights and Duties of Man 1948;
Articles 18 and 29 of the African Charter on Human and Peoples' Rights 1981.

14. Of the above, Australia is a signatory to the first four conventions. These documents are of course binding in international law. And whilst they are not binding in Australian law, they maybe, and have been, called in aid when interpreting and applying domestic law, including the Commonwealth Constitution (see for example, *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 42, per Brennan J (with whom Mason CJ and McHugh J agreed); *Dietrich v The Queen* (1992) 171 CLR 292 at 305-11 per Mason CJ and McHugh J, 321 per Brennan J, 337 per Deane J and 346-8 per Dawson J; and *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569 per Kirby P. See also Justice MD Kirby, "The Australian use of International Human Rights Norms: From Bangalore to Balliol - A view from the Antipodes" (1993) 16 UNSWLJ 363; compare also *State v Makwanyane & Anor* (1995) (3) S.A. 391 at 413-414 per Chaskalson P).

15. The jurisprudence of the European Court of Human Rights would suggest that the Aboriginals Ordinance is clearly in breach of this human right (*W. v United Kingdom* (1987) 10 EHRR 29; *Olsson v Sweden* (1988) 11 EHRR 259; *Ericksson v Sweden* (1989) 12 EHRR 183, *R v The United* Kingdom (1987) 10 EHRR 74; *B v The United Kingdom* (1987) 10 EHRR). It is submitted that respect for the family unit is a necessary precondition to a system of representative government for a number of reasons.

16. Firstly, the family unit whilst essential for social development also serves an important political function. It is through the family that "political discussion" (in the broad sense as identified by the High Court in its free speech cases, in particular in *Theophanous* at 124 per Mason CJ, Toohey and Gaudron JJ) are disseminated, fostered and perpetuated.

17. The same can be said in terms of the role of small communities and social groups such as the Aboriginal community in the Northern Territory (see Article 27(1) of the United Nations Universal Declaration of Human Rights, Article 27 of the International Covenant on Civil and Political Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights on the right to participate in the cultural life of the community). Respect for family and small community life, like freedom of communication, is necessary in a representative democracy, because it allows people to build and assert political power.

18. The great vice in the Aboriginals Ordinance, so far as it constituted a threat to democracy, is that it allowed the Crown to remove people from their families, communities and social groups not because such persons were a threat to society but in order to remove such persons from the political influences that their families and communities if left intact, would have upon them. The legislation aimed at denying Aboriginals the ability to participate in and associate with their families and communities to share the values that such families and communities would foster.

19. The legislation was designed to remove Aborigines from the influence of their own natural political leaders and families (see *Theophanous* at 124 per Mason CJ and Toohey and Gaudron JJ where discussion of the views of Aboriginal leaders is given as an example of protected free speech).

20. The Constitution prevents a government from restraining the dissemination of ideas of a political or public nature through the mass media. A fortiori, the Constitution must prevent a government from being able to prevent the formation of values and the dissemination of such values by uprooting families and communities which are important sources of such values. As Deane and Toohey JJ put in *Nationwide News* at 72: "The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person." It is important to bear in mind that prior to the enactment of the Aboriginals Ordinance, Barton J in this Court recognised that the very fact of federation "assures to every free citizen the right ... of due participation in the activities of the nation" (*Rex v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 109-110).

21. Secondly, the freedom of parents to decide upon the education of their children without undue government interference is a necessary precondition to a free society governed by a representative democracy. This is so because otherwise the main political ideas fostered in society would be ones directed and controlled by governments themselves. For the marketplace of ideas in a democracy to work the marketplace must be one free from control and domination by government.

22. The Supreme Court of the United States in two early cases clearly decided that the state could not interfere with the rights of parents to decide what their children should study and where they should be educated (see *Meyer v Nabraska* 262 US 390 (1923); *Pierce v Society of Sisters* 268 US 510 (1924)). Whilst such cases are commonly regarded as expounding a constitutional right to privacy which is not expressly covered by the US Constitution, the Supreme Court appeared to call in aid a broader notion of the rights to life, liberty and the pursuit of happiness claimed for the Declaration of Independence, holding that the Constitution protected the rights:

> *to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long*

recognised at common law as essential to the orderly pursuit and happiness by free men. (Myer v Nabraska at 399).

(See also Article 26(3) of the United Nations Universal Declaration of Human Rights; Article 13(3) of the International Covenant on Economic, Social and Cultural Rights on the rights of parents to decide upon their children's education).

23. Thirdly, the arbitrary institutionalisation of children into the care of the state and enforcing their separation from their parents is incompatible with the doctrine of representative government. This is because the underlying thesis of the doctrine is the sovereignty of the governed (*Theophanous* at 172-173 per Deane J). The government is to reflect the will of the people, take account of their needs, wishes and respond to them (*Australian Capital Television* at 138 per Mason CJ). The relationship therefore can be characterised as a public trust. (See PD Finn "A Sovereign People, A Public Trust" in PD Finn (ed) *Essays on Law and Government, Volume 1: Principles and Values* (1995), 1 at 9-14).

24. When the state assumes such total control over the lives of its citizens, as in the case of institutionalisation, the relationship between the two cannot meaningfully be one of the sovereignty of the governed and accountable representatives. The government then stands impossibly as both parent/guardian and servant of the people. Having such control over the citizens, even if only whilst a minor to the exclusion of the person's parents, amounts to an illegitimate abuse of the trust relationship.

25. This is the hallmark of totalitarianism and is the antithesis of representative government.

26. Fourthly, the psychological trauma occasioned by the forced separation of a child and parents is necessarily so great as to rob those involved of that essential quality of human dignity and personal security necessary for such persons to meaningfully be able to participate in political life through free election or otherwise. This may explain the absence of challenge to the law for many decades. Such action requires sufficient confidence in one's personal safety which the law took from those involved. Forced separation abrogates the right to due participation recognised in *Rex v Smithers Ex parte Benson* by Barton J (referred to in paragraph 20 above).

27. In *Brown v The Board of Education* 347 US 483 (1964) the Supreme Court in rejecting the doctrine of "separate but equal" underlying the practice of segregation, relied heavily upon the deep psychological scarring and sense of inferiority state backed segregation engenders in minority races. Similarly, the European Court of Human Rights in *Gaskin v United Kingdom* (1989) 12 EHRR 36 recognised that knowing about one's family background fulfils an important psychological need for children and adults and must be respected by the state. Knowing where one comes from is a significant element in one's sense of identity which in turn allows a person the confidence to participate in public life. This sense of identity has an important public dimension in shaping the values and views of the people involved.

28. In conclusion, the Aboriginals Ordinance in allowing the wholesale institutionalisation of a social group in order to control such persons and shape their values and outlook involved an unconstitutional interference in those fundamental freedoms of inter alia, participation, association, communication and family life necessary to the working of a representative parliamentary democracy.

E. Freedom to Discuss Government

29. If contrary to the above submissions the Court is of the view that the wider constitutional freedoms do not exist or do not apply, the ASICJ submits the issues raised can be approached from a narrower perspective.

30. It appears to be now authoritatively established that Australian constitutional law recognises an implied freedom to discuss government. This implied freedom operates as a limitation on the legislative powers of the Commonwealth Parliament (*Australian Capital Television*). It also limits the powers of state legislatures (*Stephens v West Australian Newspapers Ltd*) as well as the common law (*Theophanous*).

31. It is submitted that the implication also confines the Commonwealth Parliament's legislative powers with respect to internal territories and accordingly restricts the powers which may be conferred upon the organs of government of those territories (see Dean J. in *Theophanous* at p 164). Common sense suggests this result. The analogous implied freedom of movement to, and access to, the organs of representative government would seem to apply to all persons within the Commonwealth (*Rex v Smithers: Ex parte Benson*).

32. Accordingly, it would follow that the implied freedom of government discussion operated as a limitation on the powers of the Governor-General in enacting the Aboriginals Ordinance in June 1918 and also of those authorities enacting the subsequent amendments.

33. The relevant powers purported to be given by the Ordinance are those contained in Sections 6 and 16. It was made an offence for an "Aboriginal" or "half-caste" to refuse to be removed to or kept in a reserve.

34. The Aboriginal people of the Northern Territory in respect of which the Ordinance was made had at the time of the original acquisition of that Territory by the British Crown long been settled there. They had their own social customs and methods of group decision making. They at all relevant times had a legitimate interest in the manner in which they were to be governed. They were entitled to engage in politics and political discussion and the Australian Constitution limited the extent to which restrictions could be placed on their participation in political discussion.

35. It is clear that the formation of a political judgment may be affected by a variety of factors (see Brennan J in *Theophanous* at 150). In the case of a racial group or groups such as the Australian Aborigines in 1918 important factors included the education of Aboriginal children by their parents and other members of the group and free movement and interaction between different Aboriginal groups. Clearly the removal of Aboriginal children from their parents and members of their tribe and their detention elsewhere was calculated and likely to have a substantial disabling effect on the ability of those children to absorb the customs and political attitudes of their group and to form political opinions and engage in group political discussions and questions of government.

36. It is a well established principle that what cannot be done directly cannot be done indirectly (DK Singh, "*What Cannot be Done Directly Cannot be Done Indirectly: Part I*", (1959) 32 ALJ 374 and DK Singh, "*What Cannot be Done Directly Cannot be Done Indirectly: Part II*", (1959) 33 ALJ 3; see also *Commonwealth v State of Queensland* (1920) 29 CLR 1 at 15; *Toohey v Gunther* (1928) 41 CLR 181 at 195 and *R v Gough; ex parte Australasian Meat Industry Employees' Union* (1965) 114 CLR 394 at 422). It is submitted that this principle is applicable to the restrictions resulting from implied constitutional freedoms including the freedom of government discussion. It is submitted that given the position of Aboriginals in the Northern Territory in 1918 subjecting the children of Aborigines to the legal disability of removal and detention away from their group necessarily affected their capacity to form political opinions and engage in political discussion.

37. Consequently, by whatever route this conclusion is reached, the power to enact the Aboriginals Ordinance 1918 and the amendments to it were subject to the freedom and/or immunity referred to in paragraph 29(b)(iv)B of the Plaintiffs' Amended Statement of Claim. The terms of the Ordinance show an evident intention that the powers given by sections 6 and 16 were to be exercised in respect of substantial number of Aborigines. Their effect in restricting and inhibiting the forming of political opinion by Northern Territory Aborigines were calculated to be substantial. While sections 6 and 16 did not in terms prohibit or restrict discussion about government they clearly were calculated to have significant indirect restrictive effects on such discussion. Those sections therefore infringed the constitutional freedom of government discussion and were void.

F. The Right to Damages for Breach of Implied Constitutional Limitations or Rights

38. Infringements of the Constitution such as are claimed by the Plaintiffs are breaches of constitutional limitations on legislative competence (see *Australian Capital Television* at 150, per Brennan J). The question as to whether a remedy of damages is available as a consequence of such breaches cuts across the perceived divide between public and private

law. Is the private law remedy of damages available in the event of a public law infringement?

39. In addressing this question, the ASICJ submits that the reasoning of the European Court of Justice in the case of *Francovich v Italian Republic* (Case C6/90 and 9/90) [1991] ECR I-5357 may be enlightening. In this case the European Court of Justice established that the principle of state liability for harm caused to individuals by breaches of Community law for which the state can be held responsible "is inherent in the system of the Treaty [of the EEC]" (at para. 35). In the event, an order for compensation was obtained by Francovich against the Italian Republic.

40. The responsibility of the Member States' in this instance is to abide by the obligation imposed on them by Articles 5 and 189 of the EEC Treaty (now the EC Treaty) and implement in their respective jurisdictions Community legislation enacted pursuant to Article 189. Such obligations effectively determine the boundaries of the Members States' legislative competence in respect of the area concerned. As these obligations arise out of the EC Treaty, they have the effective status of constitutional limitations on Member States' legislative competence (see *Costa v ENEL* (Case 6/64 [1964] ECR 585 at 593-4 and GF Mancini, "*The Making of a Constitution for Europe*" (1989) 13 Common Market Law Review 595 at 605-6). The reasoning of the ECJ in deducing from the Treaty such a principle of state liability provides an analogous precedent that may be adopted in Australia.

41. In the alternative, should it be found that there lie implicit in the Constitution *rights* to equality, freedom of movement, association and free speech, the ASICJ submits the following argument. It is an incident of international human rights instruments that where states agree to observe fundamental human rights, the states involved must not only ensure domestic law is in conformity with such rights but that persons who have those rights interfered with have an effective remedy. See for instance:

Article 8 of the United Nations Universal Declaration of Human Rights 1948;
Articles 2(2) and 2(3), 9(5) of the International Covenant on Civil and Political Rights 1966;

Article 13 of the European Convention on Human Rights 1950;
Articles 1, 2 and 25 of the American Convention on Human Rights 1969.

42. In practical terms, the true enjoyment of rights and freedoms ultimately depends on securing the existence of an effective remedy for an individual who claims there has been a violation of his or her rights. International human rights tribunals have stressed that the obligation to provide an effective remedy requires the state to take such measures as are necessary to remedy the violation. The remedy must involve the determination of the claim to ensure that future violations do not occur, as well as providing for the possibility of redress, which includes paying adequate compensation.

Article 50 European Convention on Human Rights 1950;
Klass v Germany (1978) 2 EHRR 214;
Silver v United Kingdom (1983) 5 EHRR 347;
Views of the United Nations Human Rights Committee in *Mpandanjila v Zaire* UN Doc A/41/40 p.121 at para 11; *Hermoza v Peru* UN Doc A/44/40 p.200 at para 131.

43. To the extent, that implied constitutional rights protect the rights of individuals by curbing the Commonwealth's power, it follows that individuals whose lives or rights have been affected by the abuse of power must have an effective and appropriate remedy. An award of damages is both an effective and appropriate means of address.

44. Even if it is held that there is no right in Australian law to damages for breach of implied constitutional freedoms per se there will often be a right to damages at common law arising out of the application of an implied constitutional immunity. In the present case the result of the invalidity of sections 6 and 16 of the Aborigines Ordinance is that the removals pleaded in paragraphs 1 to 6 of the Plaintiff's Amended Statement of Claim constituted (without more) the tort of wrongful imprisonment for which damages are recoverable at common law. The onus is on the defendant to establish justification (see inter alia, *Carnegie v State of Victoria & Ors* unreported decision of Victorian Full Supreme Court 14 September 1989 at p.4).

G. Statute of Limitation

45. The ASICJ does not wish to make submissions on the issues of which, if any, statute of limitations applies. If any statue does apply, the ASICJ submits that the appropriate approach to discretionary extension of time limits pursuant to such legislation in cases such as the present is exemplified by *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 per Kirby P(as he then was) at 514-515.

APPENDIX B

HOMESWEST CASE STUDIES

Tenant A

1. Chronology of history with Homeswest tenancies

In May 1990 the tenant applied to Homeswest for a transfer of tenancy from her Homeswest rental accommodation at 10 Rick Street, Koongamia due to health problems being exacerbated from the harassment by a neighbour. At the same time she also applied for rental assistance. At that time her intellectually disabled adult son and two grandsons were residing with her. She requested a transfer to Midvale, Midland or York.

In October 1991 the tenant was offered accommodation at 15 Pope Street, York, but at that time she elected to decline the offer due to the following reasons:

- location of the property in relation to transport (she does not have her own transport); and
- property too far from town centre, and in particular from medical services required for her medical problems, including heart condition and arthritis.

A second offer for this Pope Street property was made on 27 December 1990. When no other properties were offered after the second offer, the tenant had no choice but to accept the Pope Street property and signed the Homeswest Tenancy Agreement on 3 January 1991.

Upon moving into the property in Pope Street, York the tenant found the isolation a definite problem. By February 1991 the tenant was having difficulty reaching medical services, shopping and social facilities. The tenant had no transport of her own and there was no public transport. Her severe health problems rendered her unable to walk the distance of approximately two

kilometres into the town centre. Dr N. Stanley-Cary and Dr P. Bastian respectively, both wrote to Homeswest in February 1991 stating the severe health problems of this woman required her to have housing within reasonable close proximity to medical facilities, or good access to public transport.

5 April 1991 - The tenant was advised by letter from Homeswest that they had withdrawn her request for rental assistance due to a vacated debt from her previous tenancy at Koongamia.

15 April 1991 - Betsy Buchanan of the Sussex Street Community Law Centre wrote to the Minister for Housing stating the tenant had no telephone or transport and that apart from her own serious health problems, the tenant was caring for two young foster children and her intellectually disabled adult son who can become dangerously ill. The letter also stated that the house in which Homeswest had placed the tenant had no heating and was totally unsuited to the tenant's needs. Regarding the debt owing on the tenant's previous rental property at Koongamia, Betsy Buchanan stated the tenant was prepared to declare herself bankrupt (for the second time) in order to clear that debt. Sussex Street Community Law Service pleaded this case be drawn to the attention of the Minister as a matter or urgency as the tenant could not cope in her current tenancy.

29 April 1991 - Homeswest, Merredin, received a request from the Homeswest Parliamentary Liaison Officer. He requested sufficient information to enable a draft response to be prepared for the Minister for Housing.

29 April 1991 - Memo from Andrew Smith, Homeswest Northam to Brett Croker, Homeswest Merredin in response to Betsy Buchanan's letter to the Minster for Housing. Andrew Smith first mentioned the tenant's debt position, stating that the rental account was two weeks in advance less $1.10, with no payments being made off the vacated debt. He then stated that Sussex Street Community Law Service had mentioned the tenant's son was living with her, but Andrew Smith claimed as of 15 March 1991 the son was not residing at the property. He claimed there was only the tenant and her two foster children residing at the property. Andrew Smith described the Pope Street, York property in question as being approximately 35 years old and constructed of asbestos on a timber frame with an iron sheet roof, and being on the outskirts of town approximately 1.5 to 2 kilometres from the centre of York. Andrew Smith, Northam Homeswest also declared that

when the property was offered to the tenant she would have been aware of the location and the proximity to the town centre. He made no mention of the tenant having rejected the property on initial offer in October 1990 due to it being unsuitable, however he did mention this in a later memo on 30 May 1991 to Attilla Menschelyi, Homeswest Merredin. Andrew Smith also suggested to Brett Croker that due to the outstanding arrears on the account, he felt that a transfer application should be declined. He suggested that should the arrears be cleared either through a payment or being declared bankrupt, then an application should be lodged. He added that in relation to the room heating situation, consideration may be given to installing a room heater at the property.

1 May 1991 - Letter to David Kirton, Homeswest Parliamentary Liaison Officer Co-ordinating Homeswest from Brett Croker, Assistant Regional Manager, Homeswest Merredin, giving comments from Andrew Smith in relation to the tenant's request for a transfer. Mr Andrew Smith commented that the tenant transferred from her tenancy at Koongamia to York fully aware of her medical conditions (see 30 May 1991 memo below). Should the offered tenancy in York not be suitable, she was at liberty to discuss the allocation with Homeswest. Andrew Smith also commented that the tenant would also have been aware of the lack of public transport and inferior medical facilities in country centres. He stated that should the tenant clear her arrears or lodge an appeal to the Practice Review Committee, further consideration would then be given to her request. A fresh application would have to be lodged at this time.

21 May 1991 - Robin Barrow, Senior Policy Officer, Office of the Minster for Housing sent a memorandum to Greg Joyce, Acting Executive Director, Homeswest, declaring that the tenant's medical problems had not been taken into account in the recommendation of Homeswest.

Robin Barrow stated concern about the winter weather and the appropriateness of the accommodation and whether a more appropriate property could be allocated.

Robin Barrow also accepted that the tenant initially declined the offer of the house, and was advised that no other options would be available to her if she did not accept the property. He believed the tenant therefore thought that she had been forced into housing she knew to be inappropriate. In regard to her tenant liability, Robin Barrow confirmed the tenant had been

advised to declare herself bankrupt. He considered such a practice to have serious ramifications both for Homeswest and the tenant. He considered it would seem worthwhile for him to address the tenant's housing needs to prevent such action being necessary, and so that Homeswest could come to some agreement over payment of her debt. He requested a reply from Homeswest by 27 May 1991.

May 1991 - Memorandum as a reply from Greg Joyce, Acting Executive Director, Homeswest to Robin Barrow, Senior Policy Officer, Office of the Minister of Housing. Greg Joyce confirmed that the tenant was first offered the Pope Street, York property on 24 October 1990, and that she declined the offer, giving her reasons as:

. no transport of her own;
. the property being too far from the town centre; and
. medical problems, being a heart condition and arthritis.

Greg Joyce stated he was advised by the Branch Manager Northam (Andrew Smith) that there was absolutely no coercion by Homeswest staff in the tenant's acceptance of the second offer on the same property. Mr Joyce recognised that the tenant had serious medical problems and that she perhaps warranted a more central location. He stated that the transfer application was declined because of the previous debt from Koongamia as per Homeswest policy. Mr Joyce also said that he had been advised by the Northam Branch (Andrew Smith) that no arrangement for payment had been made in respect of the $1,889.71 vacated debt. Mr Joyce confirmed that due to the tenant's circumstances, Homeswest would (now) list her for a priority transfer on medical grounds, however that would be contingent upon an agreement to repay the debt in affordable instalments and subject to alternative accommodation being available.

In May 1991 Homeswest was advised that one of the tenant's sons commenced tenancy at 12 Row Road, York, a property which backs onto 15 Pope Street. Homeswest stated her son had transport and Homeswest considered this would assist in alleviating the tenant's isolation from medical facilities. Homeswest also stated further consideration would be given to a request for transfer if the tenant cleared her arrears, or lodged an appeal to the Practice Review Committee. A fresh application would have to be lodged at that time.

8 June 1991 - The Health Department Northam Branch of the Community Health Services wrote to Andrew Smith, Homeswest Northam in support of the tenant's need for a heater to be installed at her place of residence. Health Worker Shirley Thorne commented on this elderly woman's severe medical problems, and stated that she had visited the house in Pope Street, York, and had noticed the dampness and cold inside the house. She requested favourable consideration to heating being provided.

30 May 1991 - Memorandum from Andrew Smith Homeswest Northam to Attilla Menschelyi, Homeswest Merredin. In this memo Andrew Smith viewed the situation sympathetically. He was of the opinion that the tenant's medical condition would best be helped if she was moved to either Northam or back to the metropolitan area describing the medical facilities in York as poor. He also stated that her medical situation should be treated at either a regional or metropolitan hospital. In this memo, Andrew Smith also attached the copy of the offer card for the Pope Street, York property, which the tenant declined on 24 October 1990. He also enclosed a copy of the offer of 27 December 1990 which she accepted. Andrew Smith stated that he felt there was no justification in the claim that the tenant was "forced" to accept the accommodation. He agreed in this memo that the 24 October 1990 offer was declined for the same reasons the tenant is now requesting a transfer, stating that she was therefore fully aware of the location of the property in relation to transport and medical assistance.

28 June 1991 - Letter from Jim McGinty, MLA Minister for Housing to Betsy Buchanan, Sussex Street Community Law Service concerning the tenant's request for transfer. Mr McGinty stated the tenant's application had been considered sympathetically and due to her difficult circumstances, he had instructed Homeswest to grant her a priority transfer to more suitable accommodation. This priority transfer would be granted on the understanding that the tenant would make an agreement with Homeswest to repay the debt in affordable instalments and subject to alternative accommodation becoming available. He confirmed that there were limited properties available in the area so could not ascertain when an offer would be made.

5 August 1991 - Homeswest transferred the tenant to accommodation situated at 11 Wellem Street, York.

4 September 1991 - Homeswest Northam Office sent the tenant an account for $2,496.72, claiming tenant liability for maintenance work required after the tenant had vacated 15 Pope Street, York. The tenant was requested to make an arrangement to pay this account within fourteen days.

17 March 1992 - Homeswest was given notification of five additional persons living at Wellem Street, York, one female adult and four children.

On many occasions the tenant has applied for Homeswest to provide heating in her rented accommodation. Despite her serious health problems and many requests from medical personnel her requests were not fulfilled.

16 June 1992 Dr Maxwell Gethin Jones completed a certificate confirming his belief that 'this poor lady is a diabetic and needs some heating at home'.

17 June 1992 - Homeswest Northam stated that careful consideration had been given to her application, but due to insufficient funds, Homeswest could not comply with her request at the time.

7 July 1992 - Andrew Smith, Homeswest Northam sent a memo to Brett Croker, Homeswest Kalgoorlie confirming two medical certificates which he "considered general," and which he considered did not relate to any reasons for an urgent need for heating to be supplied to this property due to (the tenant's) health. The tenant's name was to remain on the waiting list, and if half her vacated debt was not paid by the time her turn was due, then the application would be withdrawn, and the tenant would be made to reapply for wait-turn heating assistance.

8 July 1992 - Re Vacated Debt. Message on file stating that Jeffrey Pollard of Homeswest was querying the validity of the tenant liability on 15 Pope Street, York against the previous tenant, as the house was to be demolished or sold.

20 April 1993 - Homeswest Job Order finally installed a Wundowie Boxer Heater at the tenant's Wellem Street, York property.

30 July 1993 - Report from Dr Paul Bastian, Midland to Homeswest on behalf of his patient - the tenant. Dr Bastian advised that the tenant had been his patient since 1981 for treatment of her insulin requiring diabetes, mild aortic stenosis and angina. The reason for this letter to Homeswest was to advise Homeswest that the condition of the tenant's current Homeswest house was very poor, with a lot of water beneath the house which was causing major problems. Dr Bastian confirmed that the tenant had requested better housing and stated he would support her application on health grounds.

29 October 1993 - Homeswest Mirrabooka Branch wrote off the debt of $288.32 which referred to the Koongamia property.

2. Chronology of eviction action by Homeswest

29 July 1993 - Record of complaint against tenant at 11 Wellem Street, York, claim of drunken brawling between male occupants, missiles being thrown, damage to properties resulting from brawling and foul language.

8 September 1993 - Record of complaint against tenant at 11 Wellem Street, York claiming offensive language, loud thumping noises, screaming from both male and female occupants, behaviour continuing until early hours of the morning. The police were notified and attended.

Not dated. Record of complaint against tenant at 11 Wellem Street, York, throwing of missiles onto private property.

10 March 1994 - A complaint was made to Homeswest about the tenant and anti-social activity. Loud shouting and abusive language, and a car roaring up and down the street. The York police were called. Evidence of over-crowding and difficulties with groups of children fighting in the street. The tenant was not at the property on this date as she was in Perth. A female relative of the tenant claimed to be a resident in the property and asked why the police had been called the previous night. Homeswest person advised the female relative that if the trouble continued the tenancy could be at risk of termination.

11 March 1994 - Homeswest liaised with Assistant Shire Clerk, confirmed the Shire records indicate call outs to property were for dog control problems.

15 March 1994 - Record of a complaint against tenant at 11 Wellem Street, York comprising claims that missiles were thrown onto property and threat to trash the house. Police called and attended.

Not dated - Complaint against tenant of 11 Wellem Street, York claiming tyres screeching, and offensive language. Police called and attended.

17 March 1994 - Complaint against Homeswest tenancy at 11 Wellem Street, York claiming occupants arguing, becoming loud and objectionable, and fighting. Police attended.

17 March 1994 - Tenant is served with a Form 20, Notice of Breach of Agreement under Section 62 of the *Residential Tenancies Act 1987* (WA) claiming breach of the agreement under Section 39(B) - "shall not cause or permit a nuisance". A letter was also sent by separate mail by Mr D Gorham, Assistant Accommodation Manager Homeswest Northam threatening a court order to evict if there were further breaches of the conditions of the tenancy agreement.

18 March 1994 - Complaint against tenancy of 11 Wellem Street, York claiming fighting, yelling and screaming, foul language, missiles thrown at property, and continuous anti-social behaviour.

23 March 1994 - Record of complaint against tenancy at 11 Wellem Street, York claiming nuisance calls at property, and missiles thrown at property.

23 March 1994 - Further complaint claiming woman screaming and banging door, death threats directed towards other third parties and fear for personal safety.

23 March 1994 - Further complaint claiming continuous claims of starting fights and stealing from private property. Police called and attended.
23 March 1994 - Further complaint claiming damage to property and throwing missiles onto property.

25 March 1994 - Phone call from Sussex Street Community Centre, the tenant and two of her sons were there explaining that alcohol was a problem. Over-crowding was also a major problem. There were now eight people living in a two bedroom one sleepout house. The tenant was told that if the sons came back to 11 Wellem Street under the influence of alcohol, or alcohol was being consumed at this address, the police would be called and arrests would be made. Alcohol on the premises would be confiscated.

6 April, 1994 - The tenant was served by post with a Notice By Owner of Termination of Agreement. This termination notice requested vacant possession by 14 April 1994. The notice cited breach of Section 3(3) of the Tenancy Agreement and Section 39(B) of the *Residential Tenancies Act 1987* (WA) causing or permitting a nuisance.

No date - Complaint against tenancy of 11 Wellem Street, York claiming bottles being lined up against railway and broken, and broken bottles thrown onto vacant lot. Police were notified.

7 April 1994 - Letter from Homeswest Northam Assistant Accommodation Manager to Department for Community Services, Northam advising of Homeswest decision to terminate the tenancy and seeking the support of the Department for Community Services to help the tenant. The letter cited the 63 year old Aboriginal who had severe health problems as being the subject of the complaint.

21 April 1994 - The tenant was served by post with a Form 12 of the *Residential Tenancies Act 1987* (WA), and this was lodged at the Local Court in Northam. The reason cited: "failure to vacate the premises despite a Form 1 Notice of Termination requiring vacation by 14 April 1994". The application was set down for hearing on 9 May 1994.

9 May 1994 - *Re State Housing Commission T/as Homeswest v Tenant.* The matter was heard at Northam Local Court and the matter was adjourned.

12 May 1994 - E. Ovens, of Department for Community Development, Northam sent a letter to Homeswest, Kalgoorlie on behalf of the tenant. This letter explained the adverse living conditions that had contributed to over-crowding at the two bedroom one sleepout house at 11 Wellem

Street, York. At that time the tenant was carer for six children plus one granddaughter with an eight month old infant. She also had two of her sons living with her, including the one that is handicapped. This is a total of eleven people confined to an extremely limited housing area. Ovens observed that in this small house things are completely out of control and considered that the tenant should be on the priority transfer list. Ovens asked Homeswest to help with the matter as soon as possible.

18 May 1994 - Homeswest Northam replied by letter to the Department for Community Development stating that Homeswest's understanding was that the tenancy with him was in jeopardy and the prospect of transfer given the current circumstances was unlikely.

17 May 1994 - Record of complaint against tenancy at 11 Wellem Street, York, claiming screaming of obscenities. Police attended.

17 May 1994 - Welfare and Rights Advocacy Service, Brewer Street sent letter to Homeswest Central Regional Office, Kalgoorlie. The letter was to support an application by the tenant for assistance with a transfer of accommodation. The letter mentioned that the tenant had six grandchildren in her care and supported this by enclosing a statement of earnings from the Department of Social Security. She claimed her current dwelling to be totally inadequate for her current needs. Health problems suffered by the tenant were also mentioned.

22 June 1994 - ALSWA letter to Mr D. Gorham, Homeswest requesting transfer for tenant to a larger property in York due to over-crowding in present accommodation. Tenant was aware that four bedroom house in Grey Street, York was vacant. The tenant's problems were arising from over-crowding in her home, and compassion was sought in granting the tenant a transfer to the larger property.

26 April 1994 - complaint of racial discrimination against Homeswest was made to the EOC.

2 April 1996 - after much delay a conciliation conference between the tenant and Homeswest was convened by the EOC. The conference was adjourned to 2 June, 1996. Homeswest has given an undertaking to maintain the house in Wellem Street and to try to arrange a larger more suitable

house for the tenant. There was a house available in the past but the tenant was not moved there. The tenant maintains that there is a six bedroom house owned by the Aboriginal Housing Board (part of Homeswest) which is currently being occupied by a non-Aboriginal adult male and one child. Andrew Smith of Homeswest has confirmed the veracity of this statement. The matter is still unresolved.

Tenant B

1. Chronology of history with Homeswest tenancies

Between 1978 and 1991 the tenant was placed in seven different rental properties. On each occasion of transfer, Homeswest felt that the tenancy involved overcrowding, property damage, anti-social behaviour and rent arrears. The subject of this case study is the tenant's occupancy of a Homeswest property in Manning. The lease was entered into in July, 1993.

2. Chronology of eviction action by Homeswest

23 July 1993 - The lease is entered into by both the tenant and Homeswest. The rent payable is $93.30 per week. The tenant occupies the property with children aged 17, 15, 9 and 8. Two conditions of the tenancy are that the tenant's de facto partner and the father of her children are not to live at the property, that anti-social complaints will cease, and that she will be "closely monitored" by the Department for Community Development, who were to assist the tenant in managing her tenancy.

16 September 1993 - Letter from Homeswest Accommodation Manager to the tenant reminding her of the three conditions of the tenancy as outlined above and stating:

> *in accordance of the understanding that Mr Albany is currently residing at the property, which means you are in breach of your agreement with Homeswest.*

This peremptory finding of the Accommodation Manager came without warning and without any comment as to the source of the information, or any right or opportunity of the tenant to contradict or deny the material upon which the judgment was based or to clarify the situation. The tenant was told that a representative of the Department for Community Development would be in contact with her and that if she wanted any further information then she could contact the Accommodation Manager.

31 January 1994 - The Manager of Rental Services wrote a memo to the Accommodation Manager regarding the tenancy. He reported that he had discussed the complaints with the tenant. He noted that the tenant denied that her children had been involved in the throwing of stones at cars, or that there had been drinking and anti-social behaviour on the property. He reported that the tenant felt that it is a number of other Aboriginal families who have houses located very close to the tenant who were the source of the complaints, and that neighbours failed to discriminate between the occupants of the tenant's house and the other Aboriginal families. She also stated that her de facto does not visit the property, but, as the Homeswest officer points out, she then later said that it was he and a friend of theirs who fertilised the front lawn. The memo also described the property condition and stated that the front of the property was street standard average and free of litter and one of the children had hand watered the lawn. The rear yard standard was described as poor, and although the grass was cut, the yard was littered with beer bottles and there was a large stack of beer bottles on the fence line. There was a car in the backyard that belonged to the tenant but which was not working. The Homeswest officer also reported that there were clothes and toys lying about both in the backyard and in the house, and that telephone numbers had been written on the wall next to the telephone.

31 January 1994 - The tenant wrote to the manager of the applicable Homeswest office and stated that she had heard that there had been complaints from neighbours about her children's behaviour and the noise. She was sure that her children did not throw stones and said that some of the noise was her daughter playing her stereo loudly, but that she had spoken to her daughter who had agreed to keep it to a reasonable level. She stated that she thought that she was probably getting the blame for the loud noise from a private rental occupied by university students which was located next door to her.

10 February 1994 - The Accommodation Manager wrote to the tenant saying that she was being served with a Notice of Breach of Agreement because of noise and conduct displayed by members of her family or visitors to her home.

18 February 1994 - The tenant was served by post with a Notice of Breach of Tenancy Agreement. The Notice of Breach of Agreement merely states that it is a term of every agreement that the tenant shall neither cause nor permit a nuisance, and that the tenant is vicariously responsible for the actions of others who are on the premises leased by the tenant. No mention is made of the nature of any alleged breach, the time it occurred, where or who caused the breaches, or the nature of the complaints or allegations made by people to Homeswest. Not surprisingly, the tenant telephoned Homeswest to find out what the alleged nuisance entailed.

3 March 1994 - The Accommodation Manager made a written report and extracts of it indicate that he explained to the tenant that she was responsible for the behaviour of visitors to the property, and that he had contacted the local police who confirmed that they have been called out to the tenancy on an ongoing basis.

The Accommodation Manager also writes that shortly after, a local resident came into the Homeswest office to complain about the behaviour of people at the property. The person reports that the tenant's de facto was "continually staying" at the property and was responsible for most of the abusive behaviour. A representative from Department for Community Development who was at the Homeswest office at the time, assured the local resident that he would counsel the tenant about these problems.

17 March 1995 - Homeswest served the tenant with a Notice By Owner of Termination of Agreement. Homeswest elected to evict the tenant pursuant to Section 64 of the *Residential Tenancies Act 1987* (WA) whereby they do not have to give any reasons for the eviction action and are only required to give the tenant 60 days' notice.

19 May 1995 - The tenant was imprisoned at Bandyup Women's Prison because she posted surety for someone who defaulted on bail and could not afford to pay the money that was owing. On the same day she was taken to Royal Perth Hospital where she stayed until May 24 1994.

24 May 1995 - Tenant was transferred to Wooroloo Prison Hospital.

Early June 1995 - Police visited the tenant seeking information of the whereabouts of an Aboriginal man who was the ex-boyfriend of one of her nieces. The tenant only had heard that he was staying in a car at the back of one of the properties nearby that was being leased by Aboriginal people from Homeswest.

7 June 1994 - Tenant is released from prison and is told by staff of PAMS about the court case to evict her.

30 June 1994 - Homeswest's application for an eviction order came before the Local Court and the tenant was represented by the ALSWA, who successfully applied for an adjournment of the hearing on the basis that they had only just received instructions from the tenant, and wanted time to advise her. The hearing was adjourned to 12 July 1994.

12 July 1994 - The ALSWA representative informed the magistrate that they would like the matter to be adjourned pending the outcome of a Supreme Court challenge that the ALSWA had mounted, challenging the legal validity of the use by Homeswest of Section 64 of the *Residential Tenancies Act 1987* (WA). The magistrate agreed to adjourn the matter until August 22, 1994.

22 August 1994 - The tenant who was the subject of the Supreme Court action had vacated her Homeswest tenancy and the ALSWA was in effect left without a case with which to proceed. The magistrate refused to adjourn the matter any further.

10 September 1994 -The Small Disputes Division of the Local Court ordered that the tenancy agreement be terminated pursuant to the Section 64 notice.

16 September 1994 - Written reasons for the decision of Magistrate I.G. Martin were delivered. The magistrate mentioned that there was no evidence of any unpaid rent, and focused on whether or not procedural fairness has been afforded to the tenant. He noted that the notice of breach dated 18 February 1995 failed to specify the nuisance complained of as having been caused or permitted.

The magistrate accepted the evidence of Homeswest's Accommodation Manager and found therefore that the tenant would have been orally informed of the allegations made against her, and that she was given an opportunity to contest those allegations.

The magistrate made it clear in his reasons that he felt that Homeswest was not bound to accord the tenant procedural fairness.

28 October 1994 - Commissioner Martin QC in Chambers of the Supreme Court delivered the judgment that the tenant's application for a prerogative writ of certiorari be dismissed because it lacked an arguable case.

7 November 1994 - Homeswest are served with a Supreme Court Writ dated October 31 whereby the tenant, through the ALSWA, appealed the magistrate's decision on the basis that -

- Homeswest's use of Section 64 of the *Residential Tenancies Act 1987* (WA) is illegal as it offends the *Housing Agreement (Commonwealth and State Act) 1990* (WA); and
- alternatively Homeswest failed to accord the tenant procedural fairness before arriving at the decision to evict the tenant.

7 November 1994 - The Principal Legal Officer of the ALSWA received a letter from the Minister for Housing assuring her that the eviction action by Homeswest would not be proceeded with until the issues of the legality of the use of Section 64 of the *Residential Tenancies Act 1987* (WA) had been dealt with by the Supreme Court.

30 November 1994 - Pursuant to a chamber summons dated and filed on November 2 1994, Homeswest made an application for the claim of the tenant to be struck out because it disclosed no reasonable cause of action, or that in the alternative it was an abuse of process.

1 December 1994 - The Crown Solicitor, as solicitor for Homeswest, was informed by the Acting Principal Registrar of the WA Supreme Court that the application to strike out the tenant's writ had been listed for a special appointment on February 6 1995.

21 December 1994 - An application to extend the time in which the decision of Commissioner Martin could be appealed was filed and served on the Crown Solicitor's Office.

4 January 1995 - The Assistant Crown Solicitor wrote to the ALSWA stating that Homeswest had received the legal advice of Queen's Counsel on the matter, and that the advice is to the effect that Homeswest is obliged to accord the tenant procedural fairness in coming to a decision to evict them. It was suggested that the two parties meet and agree on a standard procedure to be followed before evictions were ordered which would satisfy the requirement of procedural fairness. The letter concluded in this way:

> *It is hoped that the agreed guidelines will prevent the expending of significant amounts of monies in relation to legal proceedings. In light of the above, Homeswest does not wish to proceed with [tenant] eviction; however, it is seeking to transfer [tenant] to alternative accommodation. Do you wish to proceed with your client's application for an extension of time? I look forward to your early response".*

1 February 1995 - The ALSWA wrote to the Civil Listings Section of the WA Supreme Court advising that Consent Orders would be entered on Monday 6 February 1995, and that the special appointment date could be vacated.

6 February 1995 - In a general chambers hearing, the two parties agreed that the tenant's action against Homeswest's use of Section 64 of the *Residential Tenancies Act 1987* (WA) be discontinued, and that the question of the costs of proceedings be reserved with each party being able to apply to the court on the question of costs, provided they give the other side seven days' written notice of such an application.

15 February 1995 - The Regional Manager of the Homeswest area wrote to the ALSWA offering the tenant a semi-rural type of property that Homeswest were about to purchase. He stated that settlement would take place at the end of February and asked the ALSWA to confer with their client and inform her whether this offer would be accepted.

Tenant C

1. Chronology of history with Homeswest tenancies

The main point of contention between the tenant and Homeswest during the first few years of the tenancy was the lack of proper maintenance by Homeswest and the charges that Homeswest, would levy on the tenant for water bills that Homeswest would pay and then recover from the tenant.

Water debts are still a common source of eviction action by Homeswest.

In mid July 1991, Homeswest changed the lock and the barrel on the door to the house at the tenant's request. It was always the tenant's position that this was done inadequately as the door could never be effectively locked.

On December 15 1993, Homeswest acknowledged that they incorrectly charged the tenant $96.00 for water which was incurred prior to her occupying the house.

In February of 1994 the tenant was advised that she had an excess water debt of $1026.49.

In December of 1993 the tenant was informed that her appeal against the excess water charge that has been levied against her had been unsuccessful. She had only been permitted to enter a written statement in the hearing of the appeal, which had found that her statement "did not raise any material fact which would justify the adjustment of the accounts".

Maintenance records show that the washers were changed on the taps at the property numerous times. In her submission to the appeal tribunal, the tenant wrote that "the taps in house are constantly leaking and they have not been properly fixed".

It is unclear, though perhaps doubtful, that the appeal tribunal ever visited the property to see whether the taps were leaking. The onus was clearly on the tenant to show that the bill was incorrect. The water authority bill was taken as prima facie evidence to show how much water had been used.

Homeswest notes on the file show that they checked with the Water Authority Metering Services Investigation Officer, and were told that if a back garden tap was leaking at full mains pressure for four hours it would cost $3.00 and would not account for the huge water debts. The reason that they only looked at this time frame was because they were the only leaks reported on the Homeswest property maintenance report. It clearly did not address the client's assertion that there were always leaking taps. It shows the tendency of Homeswest to make allowance for only that which appears on their files and to disregard tenant's advice as to the nature of the problem.

2. Chronology of eviction action by Homeswest

17 August 1993 - Homeswest posted the tenant a Notice of Breach of Agreement to Pay Rent. The tenant was $240.00 in arrears. It seems the primary reason for this was that the tenant had given the Department for Community Development the wrong details when authorising them to take her rent directly from her pension.

Homeswest records show that prior to serving this notice of breach on the tenant, an officer of Homeswest had posted a copy of the account to the tenant requesting payment, and called at the property twice leaving a card, because the tenant was not there. The breach was then served by mail and a list of financial counsellors and a Department for Community Development pamphlet were enclosed with the breach notice. The wisdom of sending these letters to the tenant without ever having actually met with the tenant is questionable. The Arrears Investigation Summary, completed by the Homeswest officer at the time, provides the following answers to the questions

stated:

> *The status of occupants-include only special problems.*
> *No known problems.*
>
> *What arrangements have been made if evicted?*
> *Not Known.*

Obviously then although the above inquiries are encouraged, they are not a prerequisite to eviction action. Nor is it a prerequisite that the Homeswest officer actually talk to the tenant in an effort to identify any possible causes before they institute eviction action. Certainly that was the case in this tenancy. As this case study shows, there were compelling reasons for unpaid rent at that stage.

25 August 1995 - Homeswest noted the tenant intended to hand in the keys due to rental arrears. The real cause of this intention (unbeknown to Homeswest) was so the tenant could escape the regular uninvited visits and beatings from her de facto.

29 August 1995 - Homeswest file notes indicate that the Accommodation Manager told the tenant that she would need to be prepared to accept accommodation in a high-turnover area, provide written documentation and wait six to eight weeks for Homeswest to re-house her.

31 August 1994 - Homeswest's Accommodation Manager wrote to the tenant stating that if she was to be considered a priority transfer she would have to submit supporting written documentation to verify her circumstances.

November 2 1994 - A letter was written from the social worker at the Osborne Park Hospital to the Applications Officer at the Homeswest office in support of the tenant's application for a transfer. The social worker stated that the tenant's situation was one of great concern and that a safe house would be necessary to allow counselling of the tenant to be effective.

November 22 1994 - A Memorandum was sent from the Manager of Rental Services to the parliamentary officer regarding an executive enquiry into the tenancy. The Manager of Rental Services stated that he called at the property and discussed the allegation with the tenant. He admits that she has had to call the police herself many times and writes:

> *She claims the problems are being caused by her de facto and other family/friends, who she did not want to visit the property.*
>
> *Due to the extent of the harassment and location next to another family at No. 38 with anti-social concerns, a priority transfer to the Greenwood zone is being negotiated.*
>
> *A natural justice letter (copy attached) has been forwarded to this tenant, however, no written complaints had been received on this tenancy, prior to the current action.*

November 23 1994 - The tenant received a letter from the Manager of Rental Services. Two phrases which are particularly indicative of the tone of the letter, are:

> *This letter serves as a FIRST AND FINAL WARNING against continuing behaviour of this nature, and*
>
> *If you wish to discuss this matter, you may contact me on ....*

One method that Homeswest employs in substantiating complaints against tenants is to telephone the police and ask them to confirm that they were required to attend a particular property on that day. The police do not tell them who made the request. Most requests to the police to attend this property were made by the tenant.

7 December 1994 - The Accommodation Manager received a phone call from the tenant in answer to the card he left at the property earlier that day, and told the tenant that she had received natural justice, that Homeswest have substantiated the allegation, were proceeding with the eviction and that if she felt she had been treated unfairly, then she should "approach management and state her case".

8 December 1994 - A letter was written by the Manager of Rental Services referring to the "first and final" warning letter dated 23 November 1994. The Manager of Rental Services stated that further complaints had been received about the tenant allowing or causing a nuisance to her neighbours by excessive noise, abusive swearing, foul language, aggressive behaviour and fighting "emanating" from her tenancy.

The tenant was also told that Homeswest were going to proceed to evict her under Section 64 of the *Residential Tenancies Act 1987* (WA) which allows them to do this without specifying any reason. The tenant was told that: "*The above complaints have been investigated by a Homeswest Officer and found to be substantiated*".

It is difficult to see how the tenant was either causing or permitting the violence to occur in her home. Homeswest had already been told that she was being regularly beaten by her ex-de facto who was gaining entry to the premises because the doors on the house would not lock. The tenant was $96.00 ahead in her rent.

One wonders if there is any real difference between excessive noise, abusive swearing and foul language.

There is not at this stage and there never was any written reply from Homeswest office about the tenant's request for a transfer.

16 December 1994 - A file note from the Manager of Rental Services describing his conversation with the tenant's mother reads as follows:

> *Furthermore she believes I am personally being unfair in not transferring (tenant) and am not aware of the Aboriginal culture to deal with this matter. I made it clear that on behalf of Homeswest we would not tolerate this sort of behaviour, furthermore if eviction on anti-social grounds took place, (tenant) may never be re-housed again.*

29 December 1994 - The Manager of Rental Services by post, served the tenant with a Notice By Owner of Termination Of Agreement based on the anti-social grounds and Section 62(1) of the *Residential Tenancies Act 1987* (WA). The tenant was given until January 11 to deliver up vacant possession of the premises.

5 January 1995 - A report was written on the tenant by the Scarborough District of the Department for Community Development referring to the injuries she had sustained as a result of domestic violence and self-mutilation she had practised as a result of extreme frustration arising from her domestic situation. Reference is made to "long standing psychiatric history/depression, which has never been comprehensively assessed". The report stated that a move to a safe residence would significantly reduce the stress and improve her chances of being able to act as an effective parent.

10 January 1995 - The tenant remained in occupation of the premises and instructed the ALSWA.

24 January 1995 - The ALSWA received a letter from the Manager of Rental Services confirming that there was a court hearing set down for February 7 1995 and that Homeswest would be seeking an eviction order based on the anti-social behaviour and Section 62 of the *Residential Tenancies Act 1987* (WA). The Manager of Rental Services stated that Homeswest had people who are willing to make statements in court.

2 February 1995 - In response to a letter from the ALSWA seeking more time and information to prepare their client's case, the Homeswest Manager of Rental Services stated that Homeswest would be continuing with its application for an order to evict and that "all information relating to the alleged incident will be explained in court". The ALSWA were told that they could seek an adjournment from the court if they feel they were not adequately prepared.

17 February 1995 - A letter was received by the ALSWA from the medical administrator of Royal Perth Hospital stating that the tenant has presented to the hospital on two previous occasions. The first time with a broken jaw which was wired for her, allegedly stemming from an assault on her, and the second time a laceration to the scalp from an alleged brawl.

24 February 1995 - Letter written from the Registrar of the Department of Plastic Surgery of Sir Charles Gairdner Hospital, to the ALSWA. It stated that she has been admitted there five times and that the first two occasions were for lacerations and infections. The third occasion was due to cuts to her forearm and its tendons and nerves sustained during a fight with her de facto. The fourth occasion was because the wound had become infected. The fifth occasion related to psychiatric problems and a past major depressive illness, and self-harm stabbing is also noted.

28 February 1995 - Homeswest failed to call any evidence relating to breaches of the tenancy agreement and instead relied on Section 64 of the *Residential Tenancies Act 1987* (WA) which states that the landlord does not have to give any reasons for the termination provided the tenant is given 60 days' notice. Homeswest had this option open to them because they had issued a Section 64 notice of termination on December 8 1994, effectively leaving their options open not to call evidence at the hearing and rely on the fact that if the notice has been given to the tenant, then the Magistrate has no discretion and must terminate the tenancy. This was despite indications from Homeswest given by the Manager of Rental Services to the ALSWA on 2 February 2 1995 that "All information relating to the alleged incidents will be explained in court".

The Magistrate made an order for the termination of the tenancy, suspended for fourteen days to enable the tenant to take out a restraining order against her ex-de facto. The tenant had previously attended the court for a restraining order but was unable to get one because she did not know of her ex-de facto's residential address.

APPENDIX C

RELEVANT STATE LEGISLATION ON CHILD WELFARE

1. Child Welfare Act 1947 (WA)

Preamble

> *An Act ... relating to the protection, guidance and maintenance of children in need of care and protection.*

Section 5

> *Minister has administration of the Act insofar as it relates to the preamble. Insofar as the control, treatment of, and provision of welfare to children offending against the law, or children who are in need of care and protection by reason of their likelihood arising from living conditions to lapse into a career of vice or crime, the Child Welfare Act is to be administered by the Minister for Justice.*

Section 6

> *It is the duty of the Director-General to delegate, under direction of the Minister to carry into operation the provisions of the Act.*

Section 10A

> *Any officer of the Department authorised by the Minister and any police officer may, without warrant, apprehend any child appearing or suspected to be in need of care and protection.*

Section 47B

> *Where it appears that a child is left without parental guardians or the whereabouts of parents or near relatives is not ascertainable, the Minister may, if the child is in need of care and protection, commit the child to the care of the Department.*

Section 52

Requires that every ward be regularly sent to school.

Section 138B

(1) Where any police officer, or an officer of the Department authorised by the Minister finds a child:

(a) which he has reason to believe is away from the usual place of residence of that child and is not under the immediate supervision of a parent or responsible person; and

(b) which is in his opinion in physical or moral danger, misbehaving or truanting from school, he may apprehend the child without warrant and forthwith take the child to its usual place of residence or school.

(2) An officer apprehending a child pursuant to subsection (1) shall make inquiries as to whether or not it may be necessary to make application to the court to declare the child to be in need of care and protection.

(3) Where on inquiry no responsible person can be found to take care of the child for the time being, the officer may cause the child to be detained at some convenient place until such time as the child can be returned to the care of a parent or responsible person.

The Director-General is under a mandatory "duty" to carry into operation the provisions of the Act (Section 6). However, the function of the Director-General to promote the welfare of the child (Section 10A) is discretionary ("may"). It may well be that permissive provisions of Section 10A are governed by the obligatory requirements of Section 6.

Further, considering the arbitrary powers of removal of children under Sections 29 and 138B, it may be that the Director-General does have an obligation to respond to a child in need, depending on the condition of the child. If a police officer can remove a child because of a perceived moral danger, then, presuming that the Director-General has knowledge, there may be an obligation that a child suffering from, for example, malnutrition, or a serious physical condition, be taken under the care of the Director-General. Further, the preamble of the Act emphasises that the Act is concerned with the protection, guidance and maintenance of children in need of care. Hence, the

tenor of the Act is that action is to be taken where a child is in need.

The powers of the child policing contained in Sections 29 and 138B are unregulated and open to abuse. Concerns have been expressed by many agencies who have daily contact with street youth and Aboriginal people over these sections.[572] Both sections should be stringently contained in a rights and responsibilities framework or repealed. Police should not have powers of arbitrary removal of children. In a case in the Children's Court concerning the exercise of powers under Section 138B, one police officer boasted that she had apprehended over 3000 young people pursuant to that power in the last so many years..

There is no adequate system of accountability for the actions of those delegated the power to make decisions regarding the custody of children under the Act. Although provisions may exist at the level of delegated legislation, accountability is of utmost importance and should be accordingly treated as an area that requires direct legislative regulation. A section regarding breach of statutory duty should be inserted into the Act, particularly in the light of past (and present) abuses of the Act in relation to Aboriginal children.

There is no reference made in the Act to the rights of the child or that any proceedings be undertaken in the child's best interests. Neither is there any provision for the Aboriginal Child Placement Principles or the special needs and consideration of Aboriginal children.

Community Services Act 1972 (WA)

Preamble

> *For the establishment of a Department for Community Services [Family and Children's Services], to promote individual and family welfare in the community.*

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572 Refer to Ice Cream Boy story in Chapter 13.

Section 10

The functions of the Department are:

(a) to promote individual and family welfare in the community;

...

(c) to co-ordinate, assist, and encourage the provision of social welfare services to the community, and for that purpose to confer and collaborate with other bodies and instrumentalities who offer or may offer a social welfare service;

(d) to conduct, promote and encourage research into the problems of community welfare;

(e) to conduct, promote and encourage programs of training or rehabilitation ... that are concerned with the advancement of the welfare of particular individuals or groups in the community who are disadvantaged;

(f) to consider and initiate, or to assist in the provision and development of new or additional welfare services, whether of a general or specific nature, for individuals or groups within the community who are needy or disadvantaged;

(g) to encourage the development of the greatest possible degree of service and administration at a local level, and to emphasise the value of preventative measures;

(h) to provide assistance where the Minister considers it to be necessary, when the welfare of any individual, family or group is threatened or in jeopardy.

Section 24

No civil liability shall attach itself to the Minister ... or any officer or delegate of the Department for any act or omission by him or it in good faith and in the exercise or purported exercise of his or its powers or functions ... under this Act.

Of the ten functions of the Department outlined in Section 10 of the Act, five concern the development of other agencies and services to compliment the services provided by the Department. Obviously the functions of the co-ordination and initiation were seen to be principal operations of the Department at the time of drafting and assenting to the Bill. The Department (now the Family and Children's Services) is currently held to be an unresponsive bureaucratic institution, particularly to the non-governmental sector, and resistant to change. Arguably, the Department does not adequately fulfil its legislative mandate.

The immunity of the Department to civil liability (Section 24) raised the question of the accountability of the Department and its employees. There is no adequate system of accountability for the actions of those delegated under the Act with the power to make decisions regarding, or having custody of children. Although provisions may exist at the level of delegated legislation, accountability is of utmost importance and there should be specific legislative provisions in this regard. A section regarding breach of statutory duty should be inserted into the Act, particularly in the light of past (and present) abuses under the Act in relation to Aboriginal children.

Aboriginal Affairs Planning Authority Act 1972 (WA)

Section 12

> *The Authority is charged with the duty of promoting the well-being of persons of Aboriginal descent in Western Australia and shall take into account the views of such persons as expressed by their representatives.*

Section 13(1)

(1) Functions of the Authority are to:

(a) provide for consultation with persons of Aboriginal descent;

(b) recognise and support as may be necessary the traditional Aboriginal culture;

Section 18

(1) Establishment of an Aboriginal Advisory Council which will advise the Authority on matters relating to the interests and well-being of people of Aboriginal descent.

(2) To consist of persons of Aboriginal descent chosen by and from persons of Aboriginal descent living in Western Australia in accordance with methods as the Minister may approve.

Section 19

(1) For the purposes of this Act there shall be a body, to be known as the Aboriginal Affairs Co-Ordinating Committee ...

...

(3) The function of the Committee is to co-ordinate effectively the activities of all persons and bodies, corporate or otherwise, providing or proposing to provide service and assistance in elation to persons of Aboriginal descent.

Section 48

Any officer of the Department for Community Services [Family and Children's Services], or any person generally or specifically authorised in writing by the Minister for that purpose may in any legal proceedings in any court to which a person of Aboriginal descent is a party, or in which a person of Aboriginal descent is indicted for a charge with any crime, misdemeanour or offence, address the court or the jury on behalf of that person and examine and cross-examine witnesses.

Section 49

(1) In any proceedings in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of 6 months or more the court hearing the charge shall refuse to accept or admit a plea of guilt at trial or an admission of guilt or confession before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission of guilt or confession.

The AAD is responsible for the promotion of the well-being of Aboriginal peoples (Section 12). Well-being is a word full of ambiguity and, as such, it may be difficult to assess the success of the Department in implementing this nebulous condition.

The powers of the AAD, which should facilitate the proper implementation of the Act, are contained in Section 14. It could be presumed that the promotion of the well-being of Aboriginal people would involve considerable work in law reform, and in critiquing and criticising legislative processes, government departments and utilities, and other agencies that fail to advance the cause of Aboriginal people, or that treat them in a discriminatory or disadvantageous way.

Clearly, the duties and responsibilities of the AAD are considerable. More than any other department the AAD is responsible for the co-ordination and instigation of initiatives that promote the well-being of Aboriginal people including Aboriginal children in this State (Section 13). This is a considerable and onerous task, which must continually be monitored and evaluated. Unfortunately, the necessary evaluation appears to be missing, or at least evaluation that is made available to the public is lacking.

CHILDREN'S COURT OF WESTERN AUSTRALIA ACT (NO.2) 1988 (WA)

Section 20

> *Subject to this Act, the Court has exclusive jurisdiction to hear and determine all complaints and applications made with respect to a child.*
>
> *(a) Under the Child Welfare Act 1847 (but not including Complaints of Offences under the Act committed by adult persons) ; and*
>
> *(b) Under Section 17, 17A, 17B, 18 and 20 of the Education Act 1928.*

It is a pity that the *Children's Court of Western Australia Act(No. 2)* 1988 (WA) contains no clause which mandates the need for the appointment of a cultural advisor to assist the court with hearings involving Aboriginal juveniles.[573]

Family Court Act 1975 (WA)

Section 21

Sittings of the court shall be held from time to time as required.

Section 39A

(1) In proceedings under this Division:

(a) the court shall consider any wishes expressed by the child in relation to the custody or guardianship of, or access to the child, or in relation to any other matter relevant to proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case; and

(b) the court shall take the following matter into account:

(i) the nature of the relationship of the child with each of the parents of the child and with other persons;

(ii) the effect on the child of any separation from:

(A) either parent of the child; or

(B) any child, or other person with whom the child has been living;

(iii) the desirability of, and the effect of, any change in the existing arrangements for the care of the child;

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[573] However, the Children's Court has instigated a program to enable the court more "user friendly for Aboriginal 'defendants' and their families".

(iv) the attitude to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent of the child;

(v) the capacity of each parent, or any other person, to provide adequately for the needs of the child, including the emotional and intellectual needs of the child;

(vi) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account.

Section 45

The court may, on being satisfied that it is for the welfare of the child, remove from his office any guardian ... and may appoint another guardian in place of the guardian removed.

Section 86

(1) The court may direct a welfare officer to furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable ...

(2) A welfare officer may include ... any other matters that relate to the welfare of the child.

The provisions of the Act concerning enquiries into, and subsequent decisions about the best interests of the child do not take into account the particular needs of Aboriginal children. A clause in the *Family Law Reform Bill* (Cth) makes particular reference to the need of the court to take into consideration the special needs of Aboriginal children. Such a recognition is in keeping with developments at common law. Although the recognition of the needs of Aboriginal children is welcomed, the Bill does not go far enough in recognising Aboriginal resolution processes, kinship obligations and other cultural needs.