

# Aboriginal and Torres Strait Islander Social Justice Commissioner – Fifth Report 1997

## Report to the Federal Attorney-General as per section 46C.(1) of the *Human Rights and Equal Opportunity Commission Act 1986*

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### Chapter 1: Co-Existence

*Long way back beginning, I think, right back beginning. When him been start, that Captain Cook, still thinking about to get more land. From London and Big England, that's his country. Lotta man in Big England, and they start there and looking for 'nother land. And get the sailing boat and get a lotta people and have a look at it: Australia. And when that Captain Cook been come through down to Sydney Harbour, well he's the one been hit the Sydney Harbour. And lotta people, lotta women, lotta children, they're owning that city...*

*And he don't askem for land. He don't say "good day". No. He say to him, ask him, "This your country?" "Yeah, this my country." "Ah yeah." He didn't askem really. "Pretty country", Captain Cook reckoned...*

*That means Captain Cook getting ready for the country, going to try to take it away. But he's the one been start up shooting them there now. Three weeks' time and pack his gear and put it in the sailing boat and keep going right round follow the sea...*

*When him got to Darwin ... Captain Cook come up, see that old fellow sit down makem spear there, hunting fish. And he don't ask him. Same thing. Ask him one bit of a story: "By Christ, that's good*

*land here. Your country, it's big one? Many people around here?", he said. "Big big mob Aboriginal people. This we country. We never look whitefellow come through here. That's first time you coming. We can be ready for you. Got a big mob spear. We don't want whitefellow." He start to hear that story. Captain Cook been hear that story. "Get ready for this, old fellow. We might start here." Start to put the bullet in the magazine, start to shooting people, same like Sydney...*

*Captain Cook reckoned, "I been want to clean that people right up. That's good country. I like to put my building there. I like to put my horses there. I like to put my cattle there..."*

*I know Captain Cook been little bit wrong for these people. "This no more blackfellow country. No more. Belong to me fellow country." he said... Him been bring lotta book from Big England right here now. They got that book for Captain Cook from England. And that's his law. Book belong to Captain Cook, they bring it Sydney Harbour. And lotta government got it in there from Big England.<sup>1</sup>*

These are fragments drawn from a longer story told by a very senior man of the Yarralin people of the Northern Territory. Like a parable it is a story which transcends a simple account to establish an ethical framework: to explain a world assaulted, thrown into confusion and pervaded by a sense of injustice.

Sir William Deane, Governor-General of the Commonwealth of Australia, referred to this story in his lecture *Some Signposts from Daguragu*. He described it as "*an allegory in which the application of European law is shown to have been aberrant in that it lacked the moral basis which characterises true law*".<sup>2</sup>

*In truth, of course, the Yarralin saga of Captain Cook is as much an accurate summary of historical fact and past legal perceptions as it is a fictional personification of the type which characterises true allegory. The Europeans who came to Australia after Captain Cook and whom he personified in the saga did dispossess, with violence, traditional owners who vainly sought to defend their tribal lands. The contemporary European law, based on a fallacious assertion of terra nullius, was aberrant in that it was a travesty both of truth and of the underlying morality which characterises civilised law. The Europeans did reach and take possession of the lands of the Yarralin and the Gurindji in the Victoria River region of the Northern Territory. From 1888 until well into the 1920s, there was bloodshed, including considerable slaughter of Aborigines.*

The story of the Yarralin and Gurindji peoples is just a splinter of the reality experienced by our peoples. The shattering effect of European intrusion, the loss of land and the collapse of a world which had timelessly drawn meaning and sustenance from that lost land, was universally endured by Indigenous Australians.

Dispossession has not come as one blow. It proceeds piece by piece – coupled with successive waves of coercive and humiliating laws, policies and practices – stripping us of our languages, our cultures and our children. We struggled to survive, to keep alive our unique presence in this land.

The lives of individuals, families, clans and communities are as varied as the circumstances they face. All are connected by the stories told, generation to generation, the histories of our experience. They

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<sup>1</sup> Rose, D.B., 'The saga of Captain Cook: morality in Aboriginal and European law', *Australian Aboriginal Studies*, 1984/number 2.

<sup>2</sup> Deane, Sir William, "Some Signposts from Daguragu", The Inaugural Lingiari Lecture, in *Public Law Review*, Vol 8 No 1, March 1997, p. 15.

live within our peoples and, under the “Great Australian Silence”<sup>3</sup>, kept alive the knowledge of another country. And whether a story was simply personal, about the individual callousness or kindness of an all-powerful white administrator, or whether it was a wider emblematic story of Captain Cook, they are all stories about justice, or its absence.

*We moved from South Gippsland to East Gippsland. By this time I was about 9 years old. My parents pulled me out of school because the Welfare was taking the Koori kids from school never to be seen again. My parents didn't want this to happen to us. That's why we always lived by ourselves.*

*My parents made a little mia-mia with bushes and sticks around our heads and our feet at the fire which would burn all night. We all shared the 2 big grey government of Victoria blankets and was a very close family. Our little jobs were to gather whatever we could while our parents were picking [bean and pea picking for a local grower].*

*We were never allowed to walk down to our camp the same way because our parents didn't want the welfare to find us. That's why we couldn't make a beaten track.*<sup>4</sup>

Collectively these are the stories of The Struggle.

Appeals to “*the underlying morality which characterises civilised law*”<sup>5</sup> have consistently surfaced throughout Australian history.

In 1846 “*the true Aboriginal Inhabitants of Van Dieman's Land*”<sup>6</sup> petitioned Queen Victoria, calling on her to honour the agreement which ended the ‘Black Wars’ in Tasmania. In 1938, 150 years after the First Fleet landed, William Ferguson and Jack Patten drafted a statement to mark a ‘Day of Mourning and Protest’.<sup>7</sup> In the same year William Cooper, a predecessor of the present Yorta Yorta native title claimants, wrote to Prime Minister Lyons seeking remedy for the dispossession and abuse of our peoples. The terms of these documents variously refer to the Bible, to the Honour of the Crown, to the fundamental principles of British law and justice, to common standards of humanity and civilized behaviour, to plain decency and fairness. More recently, Indigenous Australians have called on international law and universal standards of human rights to secure justice and protect our rights. But, in my view, the most powerful words remain those drawn directly from our lives. They are the words of people just trying to make ends meet and build something better for their children: stories of the struggle for justice in the rumpled cloths of everyday life. They are spoken in voices without the benefit of too much, if any, formal education. They speak of experiences that have broken the hearts and finished up many of our relatives.

They are also experiences which have formed and tested our resolve. So that there is one pre-eminent lesson to be learnt from our stories: we will survive. We will continue, as long as it is necessary, to fight.

It does not have to be a fight.

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<sup>3</sup> “The Great Australian Silence is how anthropologist W. E. H. Stanner in his 1968 Boyer Lectures, described the almost total exclusion of the Aboriginal point of view from accounts of national history and culture.” O’Donoghue, L. ‘Ending the Despair’, in Australian Journal of Public Administration, Vol 51 No 2, June 1992.

<sup>4</sup> Human Rights and Equal Opportunity Commission, Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, AGPS, 1997, p. 208.

<sup>5</sup> Deane, W., op. cit.

<sup>6</sup> Reynolds, H., Fate of a Free People, Penguin 1997, pp 7-14.

<sup>7</sup> Rowley, C. D., Recovery: The Politics of Aboriginal Reform, Penguin 1986, p 116.

The struggle of Aboriginal and Torres Strait Islander men and women can lie in the heart of a broader Australian story. In fact that is the only possible place. The real question is: How will we tell that story? Will it continue to be perceived as a burden and a source of unending accusation? Or will the experience of our peoples, and the values which have sustained us, be recognised as a source of energy and pride to be shared by all Australians?

The potential conflict in the Indigenous and non-Indigenous stories of this country can be compressed into two words: invasion and settlement. Each word carries a train of implications. They are highly descriptive. They carry entire historical perspectives and a range of moral judgements. Moreover, the judgments implied by the words are frequently taken to be absolutely conclusive about the 'rightness' or 'wrongness' of subsequent Australian history.

This leads to a cul-de-sac of understanding. For a very long time the decisive legal basis of native title was seen to turn on the question of 'conquest' or 'settlement'. In the event the High Court found it to be irrelevant to the question.<sup>8</sup> Absolute, oppositional views of Australian history are not useful. They only serve to lock past conflicts into the present.

This is not to say that history is neutral territory or that past events do not give rise to strong moral imperatives in the present. But it is fundamental to our ability to understand our history that we approach the past with a mind open to its complexity and its variety of voices.

This throws up a particular challenge for non-Indigenous Australians. The history of this country has overwhelmingly been told from the non-Indigenous perspective. Our perspective, told in our own voices, is just beginning to be heard. Our stories filled with pain and loss are frequently heard as nothing more than accusations or demands. The decisions in the *Mabo* and *Wik* cases have been perceived to gratuitously re-write history, with very tangible implications for vested interests. Responses to the stories of the Stolen Generations clearly demonstrate the difficulties in absorbing the deeply traumatic facts of Indigenous lives without pulling down defensive shutters.

History cannot be approached as a rearguard action. The experiences of Aboriginal and Torres Strait Islander men, women and children are inextricably part of the story of Australia and an essential part of the future of this country. The co-existence of Indigenous and non-Indigenous Australians is not a novel concept. We have always co-existed, we are bound in a relationship by our common presence in this land. The fresh prospect is our opportunity to negotiate the nature of that relationship, to place the terms of our co-existence on the basis "*both of truth and of the underlying morality which characterises civilised law*".<sup>9</sup>

One thematic response to our stories is to hear them as a total denigration of the history, values and achievements of other Australians. The Prime Minister, the Hon. John Howard continues to refer to the 'black armband view of our past' and describes it as a view reflecting "*a belief that most Australian history has been little more than a disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination*".<sup>10</sup> I have previously considered the politics of such exaggerated statements and reject such an interpretation.<sup>11</sup> What I would like to draw from the Prime Minister's words in the present context is the degree to which they reflect genuine fear.

<sup>8</sup> "...the preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land", *Mabo and Others v The State of Queensland [No:2]*, (1992)175 CLR 1, per Brennan CJ, p. 41; see also Dean and Gaudron, p. 61 and Toohey, p. 143.

<sup>9</sup> Deane, W., *op. cit.*

<sup>10</sup> The Prime Minister, the Hon. J. Howard, MP, 1966 Sir Robert Gordon Menzies Lecture, *The Liberal Tradition: The Beliefs and Values Which Guide the Federal Government*, 18 November 1996.

<sup>11</sup> See, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, AGPS, 1996, pp. 14-17.

It is notable that these particular words were spoken in delivering the 1996 Sir Robert Gordon Menzies Lecture - *The Liberal Tradition: The Beliefs and Values Which Guide the Federal Government*. The challenge to absorb a new, deeply etched understanding of contemporary Australia and its origins is not that it is difficult to accept the patently obvious facts of Indigenous experience: it is that a full acceptance of our experience is seen as a challenge to the core values which the Prime Minister believes cohere and unite his party, his government and the nation as a whole. If this were so there may be a legitimate cause for fear. It is a fear without legitimacy.

One of the most pregnant ironies of Australian history was first pointed out by Noel Pearson, Chairman of the Cape York Land Council. He referred to it in an address, *An Australian History for All of Us*, delivered only two days after the Prime Minister's lecture.

*And the challenge for ordinary Australians today is this: that the foundation for compromise ... comes from their own legal and constitutional heritage. The Mabo decision is not a product of Indigenous heritage. Rather, more fundamentally, it is the product of the country's English heritage: it is a product of the genius of the common law of England.*

*If there is one thing about the colonial heritage of Australia that Indigenous Australians might celebrate along with John Howard with the greatest enthusiasm and pride: it must surely be the fact that upon the shoulders of the English settlers or invaders, call them what you will, came the common law of England and with it the civilized institution of native title. What more redemptive prospect can be painted about the country's colonial past? It just confounds me that this golden example of grace in our national inheritance is not the subject of national celebration. After all, Indigenous people are entitled to say: it is your law!<sup>12</sup>*

And so it is: a recognition by the Australian common law of rights to land in accordance with our traditional laws and customs. This is not divisive law which challenges unity. It is the synthetic law of co-existence: one law respecting and acknowledging the equality, scope and integrity of different traditions.

And, if guidance is needed as to the substantial disturbance caused by the belated recognition of our rights, it is deep within the liberal tradition that we find robust support. In the words of John Locke:

*The Inhabitants of any Country, who are descended, and derive a title to their Estates from those, who are subdued, and had a Government forced upon them against their free consents, retain a Right to the Possessions of their Ancestors...*

*If God has taken away all means of seeking remedy, there is nothing left but patience. But my Son, when able, may seek the Relief of the Law, which I am denied: He or his son may renew his Appeal, till he recover his Right... If it be objected this would cause endless trouble: I answer, No more than Justice does, where she lies open to all that appeal to her.<sup>13</sup>*

This is the essence of the question posed to Australia in 1997. It is not about special pleading. It is not about sympathy, sorrow or guilt. It is not about 'preferential treatment' for a 'clamorous minority' which distorts and threatens Australian beliefs and values. Stripped down to its essential form it is a question of whether the governments and people of Australia will reaffirm their core values and belief in Justice.

<sup>12</sup> Pearson, N., Address to the Chancellor's Club Dinner, University of Western Sydney, 20 November 1996.

<sup>13</sup> Locke, J., *Two Treatises of Government*, Cambridge 1988, pp. 386, 394..

If the future co-existence of Indigenous and non-Indigenous Australians is to rest on secure and prosperous foundations it must rest on justice.

To frame this prospect of co-existence in terms of a unifying national belief in justice is not naive rhetoric. It is obvious that individual views of what is balanced, what is fair and what is just are highly diverse. They are influenced by self-interest and individual perspective. The Commonwealth Government's legislative response to the *Wik* decision will be precise. It will lock down interests in land and define legal rights. But before any detailed evaluation of such legislation can be usefully advanced, the ground rules must be clear: and it is in the framing of these rules, the perspective which shapes and informs these rules, that our understanding of Australian history becomes critically important.

Historical events are not the real issue. It is the way in which we comprehend these events now: how we read their implications for the future.

The Prime Minister speaks of a 'balance sheet' of history, as though it were possible to make a static appraisal of where we have come from as a country and where we will go.

In grappling with the past, present and future the Prime Minister uses the image of a 'pendulum' which in his view has swung out of balance in favour of the interests of Indigenous Australians and other minority groups, away from the core interests and values of the mainstream. It is a view shaped by the shallow perspective of contemporary politics.

*And for too long this country had a government that was pushed and pulled in every direction by the noisiest minority that happened to be in town at the particular time.*<sup>14</sup>

Of course, our minority has been in town for a relatively long time, but the most telling aspect of this remark is the notion that there is a centre to the Australian nation that is somehow put upon, badgered and browbeaten by factional groups who would pull the centre apart by appeal to special interests. It is essentially a defensive position which, while acknowledging that Australia's history is blemished, asserts that the overall score card is pretty good and that examples of ill-treatment and discrimination are simply the whistles and banners of a street demonstration designed to re-open the past to gain contemporary political leverage.

Sometimes I imagine that our Prime Minister conceives his role as being purely to defend the community chest of vested interest. The armoury of Indigenous attack is not strong – unexpectedly supported by an 'adventurous' High Court – but the basic weapon draws on guilt and a sanctimonious reading of history: "*premised solely on a consuming sense of national guilt and shame*".<sup>15</sup>

This is of course a caricature of the Prime Minister's approach. I have no doubt that his endeavours to deal with the *Wik* decision and *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families* are informed by a much deeper appreciation of their import, the interests and the values at issue.

Yet I think there is something of the Prime Minister's approach which this caricature draws out and makes more clear. It is a perspective which places a fundamental division between the interests of Indigenous people as a minority and the interests of the mainstream of Australian society, as though recognising our rights entails a distortion of the underpinnings of national cohesion.

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<sup>14</sup> The Hon., the Prime Minister, J. Howard, MP, Address to the 61st Annual State Conference of the National Party, Queensland, 20 July 1996.

<sup>15</sup> *Ibid.*

*Governments exist to represent the values and aspirations of the mainstream of the Australian community. Not in a way that is insensitive or indifferent to minority groups in the community but in a way that ultimately gives expression to the aspirations and the hopes of the mainstream of the Australian community.*<sup>16</sup>

The flaw in this construction of the ultimate purpose of national government is that it places minority groups outside the values and aspirations of the mainstream of the Australian community. While asserting sensitivity to minority groups, our values, aspirations and hopes are seen to be essentially divergent.

As one commentator has put it:

*He [the Prime Minister] regards the 'politically correct' brigade as being committed to an agenda designed to advance the agenda of particular groups over the interests of the community by giving them special privileges and justifying this by vilifying the institutions and values on which Australia was built ...*

*Howard sees his mission as being to dismantle these structures and return Australia to what he believes it could be again – a nation intensely proud of its history, committed to hard work, self-sufficiency and decent values and a society in which the family unit is restored as the focal point for all these good things.*<sup>17</sup>

The narrowing of national vision caused by the Prime Minister's belief that core Australian institutions and values are under attack from the fringe is graphically demonstrated by his response to *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

The Prime Minister's appreciation of the centrality of family life is beyond question. There is evident warmth in his language when he speaks of it.

*I believe that Australian families not only provide the greatest source of emotional and spiritual comfort to Australian individuals but beyond that a functioning, united, coherent family is the most effective social welfare system that any nation has ever seen...*

*And the widening gap between rich and poor, much of the social disintegration of this country and much of the unemployment of this country can be traced to the disintegration of family life.*<sup>18</sup>

These perceptions were expressed to the Annual State Conference of the National Party. They were not brought to bear at the First Reconciliation Convention when the Prime Minister touched on the question of Indigenous children separated from their families.

It is difficult to imagine a more relevant or important context for an Australian Prime Minister to speak of his belief in the centrality of family life and the consequences of its disintegration. Particularly where such disintegration was the result of past government policies based on race.

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<sup>16</sup> The Prime Minister, the Hon. J. Howard, MP, speech to Australian Liberal Students Federation, Sydney University, 8 July 1996.

<sup>17</sup> Kitney, G., 'PM's New Face for Australia', *The Sydney Morning Herald*, 20 June 1997, p. 19.

<sup>18</sup> The Prime Minister, the Hon. J. Howard, MP, *op. cit.*, 20 July 1996.

However, rather than start from the inclusive position that the family is “*the greatest source of emotional and spiritual comfort*”, the Prime Minister’s basic reaction at the Reconciliation Convention was to minimise the damage, to avoid the full recognition of the emotional and structural repercussions of the disintegration of Indigenous families over generations. And I suggest the reason flows from his essentially divided construction of Australia as a mainstream community with shared values under siege from minorities such as Aboriginal peoples and Torres Strait Islanders.

If there is one focal point of the National Inquiry and its report *Bringing them home*, it is family life. If there is one cohering theme of the report it is to trace the effects of the purposeful disintegration of Aboriginal families and to recommend measures to deal with the aftermath and to heal the trauma.

I do not question the Prime Minister’s personal expression of sorrow. I do not question his right to critically assess the findings and recommendations of the National Inquiry: they are legitimate matters for debate. However, the failure to perceive the deep human commonality of emotions and values which unite both Indigenous and non-Indigenous Australians in their celebration of family life is a national loss. The Prime Minister’s audience at the Reconciliation Convention was restive. But the very fact that the pain and anger is still so fresh from the laws, policies and practices which selected children on the basis of race for removal, is the strongest imperative for a national leader to identify a common starting point for our response to this terrible part of the Australian story.

Government practices not only separated Indigenous children from their families: they separated, on terms of gross discrimination, Indigenous people from the rest of the Australian people. If we are, as the Prime Minister clearly desires, to share a common future of equality, it can only be achieved by the unequivocal recognition that Indigenous Australians are no longer peoples to be accommodated or tolerated as a special interest group separated from the rest of the community. It requires an affirmation that we share values that are common to all Australians. It entails a commitment to respect the human rights of all Australians by simple virtue of our humanity.

To affirm a common belief in family values in the context of stolen children results in a significant shift in perspective. It can reconcile views of the past. Instead of hearing our stories from the outside, as accusation, it is possible to enter into our experience: to feel something of the pain, to imagine the loss and to recognise our lives as part of the experience of this country.

For the many non-Indigenous Australians who have now read the stories and cried, grieving with us for the loss of our babies and children, I know it has been difficult to sift through the emotions that arise: but for the first time in this country this intimate experience of our people has come directly within their knowledge.

It has been “*estimated that 100,000 children were forcibly removed from their families. Official records have been acknowledged by a number of State Governments to underestimate the number of children removed,*”<sup>19</sup>

This knowledge should not give rise to guilt. It should expand our understanding of the past, and give deeper insight into the problems and responsibilities of the present. It should build our absolute resolve to ensure the future of this country is based on the protection of human rights which flow from our common humanity.

The *Convention on the Rights of the Child*, (CROC) ratified by Australia in 1989, affirms basic values and states the rights and obligations which follow from these values.

*Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be*

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<sup>19</sup> The Hon. D. Williams, Attorney-General, House of Representatives, Hansard 406, 10 February 1997.



*afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,*

*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,*

*Article 14*

*States Parties shall respect the right of the child to freedom of thought, conscience and religion.*

*Article 30*

*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 practise his or her own religion, or to use his or her own language.*

The recognition of human rights commonly enjoyed by Indigenous and non-Indigenous people must be our starting point. This perspective unites us. It affirms common values which must form the heart of the Australian nation.

However, this affirmation does not obliterate difference. It does not mean that people of differing cultures must surrender the distinctive substance of their cultures in order to merge into some homogenised notion of the 'mainstream'. Article 30 of *CROC* explicitly states that Indigenous children are entitled to enjoy their unique heritage and beliefs.

This is not a special privilege forced by special pleading. It is a right essential to the substantial enjoyment of a common entitlement to freedom of conscience and freedom of religion.

In the past Chinese joss-houses and the people within them were attacked with impunity. There were prohibitions against Catholics and Jews holding public office. We have grown beyond overtly sanctioned religious discrimination into a country which holds Greek Orthodox churches, Buddhist temples, mosques and synagogues, as well as Protestant and Catholic churches and cathedrals. Official policies to suppress Indigenous spiritual beliefs have given way to some appreciation of our distinct ceremonies. Yet because our places of ceremony lie unstructured within the landscape of this country and commercial interests find them inconvenient, those places are still not accorded equal respect as consecrated ground.

Because the forms of our religious practices are different, the substantive protection of our common human right to religious practice is regarded as divergent. To protect our sacred sites is regarded as some kind of special concession which can be adjusted and varied at will: deprived of the protection of the *Racial Discrimination Act 1975*.<sup>20</sup>

To recognise and protect the particular form of Indigenous religious belief, which entails a distinct form of legal protection for sacred sites, does not challenge core Australian values: it affirms our collective respect for freedom of religion.

Precisely the same principle holds true for property rights: for native title rights.

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<sup>20</sup> *The Hindmarsh Island Bridge Act 1997*, which amends the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984* was passed by the Australian Parliament. The Coalition Government refused to accept an amendment that the *Racial Discrimination Act 1975* would prevail over the provisions of the Act.

A distinct form of protection for our title is not a special privilege extended to Aboriginal peoples and Torres Strait Islanders. It is a necessity to achieve the substantive enjoyment of our right to property which is the human right of all Australians. To frame laws which do not protect the exercise and enjoyment of native title according to its distinct character is discriminatory. To propose such laws not only denies equality and justice to Indigenous Australians, it erodes respect for commonly held human rights and corrupts our national values.

And this is the danger I see in the convolutions which have shaken Australia over the last year. The Coalition Government believes its role is to support and strengthen the central institutions and values of Australia but, ironically, its reaction to the decision in the *Wik* case and its proposed treatment of native title threaten those very institutions and values.

The Deputy Prime Minister, the Hon. Tim Fischer, is the most straightforward and undisguised in his language. His first reaction, when Acting Prime Minister, was not merely to attack the implications of the *Wik* judgement, it was to attack the majority judges in an endeavour to erode the credibility of their conclusions which are so unpalatable to his constituency.<sup>21</sup> He followed on with remarks which must necessarily affect the standing of the Court itself. The Deputy Prime Minister's public statement about the need for the Coalition Government to appoint a "*capital C conservative*"<sup>22</sup> to the bench undermines the independent standing of the judiciary and damages the constitutional principle of the separation of powers.

*The general strategy is one of a concerted public campaign to denigrate the highest appellate or constitutional court, in particular by resurrecting what should have been long discredited complaints about judicial activism.*<sup>23</sup>

More extreme echos of these views came from the State Premiers, together with a call for States to be given a right of veto over High Court appointments. In an environment where divisions based on race are already inflamed, these remarks were profoundly unhelpful and blurred the boundary between maintaining respect for the courts, the judiciary and the law, and the exercise of executive power in an attempt to guarantee judgments responsive to political persuasion and vested interests.

There can be no issue taken with the latent power of the Australian Parliament to review and amend the common law as declared by the courts, provided such power is exercised within lawful constraints. But the fact that such lawful, constitutional constraints on the Parliament are interpreted and declared by the High Court makes it imperative that the forms of the separation of powers are scrupulously observed. To do anything less is to diminish respect for democracy under the rule of law.

Beyond the Constitution there are other restraints on the untrammelled exercise of power by the Australian Parliament.

On 30 October 1996, the House of Representatives passed a bipartisan resolution:

*That this House  
Reaffirms its commitment to the right of all Australians to enjoy equal rights and be treated  
with equal respect regardless of race, colour, creed or origin.  
Bucket loads of extinguishment.*<sup>24</sup>

<sup>21</sup> 'Fischer's *Wik* attack dilutes republican plan', *The Australian*, 13 January 1997, p. 4.

<sup>22</sup> The Deputy Prime Minister, the Hon. T. Fisher, reported in "Conservative to fill High Court vacancy", *The Australian*, 13 August 1997.

<sup>23</sup> McGregor, C., "Courting Trouble", *The Sydney Morning Herald*, 22 March 1997.

In this crude but accurate image the Deputy Prime Minister of Australia compressed the vision of the Coalition Government in responding to the *Wik* decision. It diminishes our stature as a nation.

The Prime Minister is more circumspect in his language. He claims his 10-point plan, translated into the Native Title Amendment Bill 1997, resists the sustained call for ‘blanket extinguishment’. At the same time the Prime Minister discounts respect for the *Racial Discrimination Act 1975*, saying there is nothing ‘sacrosanct’ about its provisions, knowing his amendments will override the operation of that Act.

Against the backdrop of a public debate which has careered down a widening fault line based on race, these statements by Australia’s elected leaders are profoundly disturbing.

There is a clear distance between the Prime Minister’s assertion that his response to the *Wik* decision does not involve blanket extinguishment and his Deputy’s assertion that it delivers bucket loads of extinguishment. This distance creates confusion in the public mind as to precisely what it is that the Government intends, and what values inform its intentions.

The cold reality is that both statements are true. The disparity between them is filled with several hundred pages of amendments and schedules which, in their volume, totally overshadow their target: the *Native Title Act 1993*. The crude and blatantly discriminatory device of blanket extinguishment is avoided by a cascading series of amendments which cut away the protection of native title and deliver individual ‘buckets of extinguishment’ through various ‘validation’, ‘confirmation’, ‘acquisition’ and other provisions expanding pastoral rights over land, diminishing and destroying the remnant native title estate and consistently preferring non-Indigenous interests in land over those of Indigenous Australians.

The Bill is a plain mockery of justice. My Native Title Report for this year descends into the technical thickets which camouflage the Government’s broad assault on Indigenous rights. The amendments are purposefully obscure. It is necessary to break into open ground away from the jargon to see how the Coalition Government’s approach to native title conforms with its general perspective in which the values, interests and rights of the mainstream are seen as being in essential competition with the values, interests and rights of Aboriginal and Torres Strait Island peoples.

The ‘balance’ which the Prime Minister perceives in his proposed amendments is profoundly affected by this perspective. Despite his rhetoric, native title is not accorded equal protection as a property interest in its own right. It is regarded as a divergent and disruptive interest in land which must be accommodated in some form or other, but the terms of its accommodation are basically a matter for his Government to determine at will, unconstrained by the provisions of the *Racial Discrimination Act 1975*.

The rights at issue are not peculiar to Aboriginal people and Torres Strait Islanders. Article 17 of the *Universal Declaration of Human Rights* states:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

If the Government’s amendments were bleached of colour the enormity of the Native Title Amendment Bill 1997 would be transparent immediately. The compulsory acquisition of private

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<sup>24</sup> The Deputy Prime Minister, the Hon. T. Fisher, MP, reported in Brough, J. “Wik draft threat to native title”, *The Sydney Morning Herald*, 18 June 1997, p. 3.

property by governments is not welcomed by any citizen. But where it is done for a public purpose, it is understood. It is an entirely different proposition for the government to confiscate your land to enhance the title of another person. Such state intrusion on private property in order to blatantly preference the interest of one citizen over another would ordinarily be regarded as an outrage.

Yet this is precisely what is proposed for native title. It is one of the several means to extinguishment. The right to negotiate prior to compulsory acquisition will be removed and the Commonwealth will provide 75% of the compensation payable for the acquisition of native title by the States, for the purpose of pastoralists upgrading their titles.

State governments will have to amend their land acquisition legislation to achieve this. Western Australia has already done so.<sup>25</sup> This power of acquisition for the benefit of a third party will potentially affect all citizens, but the entire proposal is specifically designed to facilitate extinguishment and to clear the ground of native title where it currently co-exists on pastoral leases.

Because the power could be applied to anyone it can be passed off as ‘neutral’ and ‘non-discriminatory’. The strategy is typical of the disingenuous way in which the amendments work. They offer the illusion of ‘formal equality’ while in substance they relentlessly, parcel by parcel, continue the historical dispossession of Indigenous Australians.

The *Wik* decision confirmed pastoral rights and provided that, where they conflict with continuing native title rights in the same land, the rights of the pastoralist will prevail. The National Indigenous Working Group have accepted this position and made clear its acceptance of the existing rights of pastoralists to operate and develop their leases without the requirement to negotiate about such uses. And still there are implacable demands to extinguish our rights.

These demands intensify perceptions that Australia has not stepped free of the racism that disfigured its past. No ‘elite unit’ in the Department of Foreign Affairs and Trade creating ‘Images of Australia’ will be able to hide the reality of native title legislation.

The Government claims that its amendments are not racially discriminatory. This is given the lie by the Government’s own refusal to expressly extend the protection of the *Racial Discrimination Act* 1975 to cover its proposals. The Prime Minister simply asserts that his Bill is fair. He refuses to provide a sound legislative guarantee of that assertion.

The Prime Minister says his Bill will deliver ‘certainty’. But, while his legislation can override the *Racial Discrimination Act* 1975, it cannot escape constitutional challenge. The first fruit of this legislation will not be ‘certainty’: it will be protracted litigation. We will all return to the courts.<sup>26</sup>

But strict legal issues are only part of the story.

We stand at a critical point in the continuum of Australian history. A precise entry is about to be made in the Prime Minister’s ‘balance sheet’. It will define our national values, not only for the world to assess, but for our children to absorb and carry forward in shaping the future of this country.

If political power, parliamentary numbers and vested interests prove to be the raw determinants of Australia’s treatment of native title, then Australian law will once again be cut loose from “*the underlying morality which characterises true law*”.

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<sup>25</sup> Public Works Act 1902 was amended and re-named the Land Acquisition and Public Works Act 1902.

<sup>26</sup> I examine the various bases of constitutional challenge and the non-discrimination principle in the first chapter of my current Native Title Report, July 1996 – June 1997.

The prospect of co-existence between the Indigenous and non-Indigenous peoples of this country, founded on justice and respect for human rights, will be lost. The synthesis of law and morality represented by *Mabo* and *Wik*, the possibility of assuaging the history of Indigenous dispossession, the potential to find “*grace in our national heritage*”,<sup>27</sup> will be squandered.

This is not an abstract issue of human rights. It has the most far reaching practical implications. It is not purely, or even primarily, a question of land.

The weight of denial in Australian history is a profound burden on this country, which has been carried by each generation in one way or another. There has been a continual awareness of a problem. At times the ‘Aboriginal problem’ has penetrated public consciousness, more frequently it has formed a subliminal awareness of something waiting, beyond the field of vision. Something awaiting resolution. Constantly present. Constantly avoided. As the late Professor Bill Stanner expressed it in his Boyer Lectures:

*...inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale... the Great Australian Silence; the story of the things we were unconsciously resolved not to discuss with them or treat with them about...<sup>28</sup>*

The angry attempts to deny, suppress and extinguish native title rights continue this tradition: ‘not to discuss with them or treat with them’. Not even to name or recognise ‘them’. The ‘others’ who lie outside ‘us’.

The ‘Aboriginal problem’ has been approached in many ways. The expectancy of our demise called forth the kindness to soothe the dying pillow. Apprehension at the growing number of ‘half-caste’, ‘quadroons’ and ‘octoroons’ stimulated the removal of children for assimilation so that the descent lines of Indigenous culture would be cut and we would be absorbed without trace. Policies of segregation, assimilation, integration are all various manifestations of the same attitude: that our people form a troublesome vestige of the past and a reminder that our “*dispossession underwrote the development of the nation*”.<sup>29</sup> From this perspective the very presence of our people constitutes a black armband on the nation. And there is no freedom for any of us. There is only the mutual burden of separation. Denial on one side and the Struggle on the other side. And a waste of energy.

*You mightn’t be one of us, but you won’t be free until we are free.*<sup>30</sup>

There is another thread in the history of this country. In the very process of observing “*the simple forgetting of other views*”, Bill Stanner kept alive another perspective. In the act of describing the Great Australian Silence he broke that silence. From the very first there have always been Australians who recognised that the Struggle of our people embodies and invigorates values that we all celebrate. In this regard I can agree with the Prime Minister. There is an ‘heroic’ aspect of our shared history. In 1831, J.E. wrote to the Launceston Advertiser:

*Much as I am prejudiced against the savages, I cannot on principles of justice and humanity, refrain from coming forward on this occasion as their advocate ... the Aborigines were*

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<sup>27</sup> Pearson, N., *op. cit.*

<sup>28</sup> Stanner, W., *The Boyer Lectures*, 1968.

<sup>29</sup> *Mabo and Others v State of Queensland*, 107 ALR, Brennan J, p. 92.

<sup>30</sup> Australian Reconciliation Convention, personal observation by Pearl Gibbs recalling the 1967 Referendum campaign.

*originally the rightful owners and possessors of the island... What we call their crime is what in a white man we would call patriotism. Where is the man amongst us who would not avenge the murder of his parents, the ill-usage of his wife and daughters, and the spoilation of all his earthly goods, by a foreign enemy, if he had the opportunity? He who would not do so, would be scouted, execrated, nay executed as a coward and a traitor; while he who did would be immortalized as a patriot. Why then should we deny the same feelings to the Blacks? How can we condemn as a crime in these savages what we would esteem as a virtue in ourselves?*<sup>31</sup>

Even in the nineteenth century, at time of open warfare and bloodshed, there was an ability to imaginatively enter into the perspective of our 'savage' mind and recognise that our cause was based on the 'principles of justice and humanity' which are common to us all.

In 1996 the same principles guided the Cape York Heads of Agreement which stepped beyond abstract ideals about justice to find a practical basis for co-existence between pastoralists and Aboriginal people who share interests in the same land. It is an agreement premised on precisely the same foundation as J.E. wrote of in 1831: simple 'esteem'. It respects each other's rights, each others' way of life and draws them together in a vision of common prosperity.

Noel Pearson was one of the architects of the Cape York Agreement and there is honesty in his statement that:

*It is a troubling business coming to terms with our history, both for Aboriginal people and non-Aboriginal people. For our Aboriginal people, it is a troubling business because there is the imperative to never allow anyone to forget the truths of the past, but we must also be able as a community to rise above its demoralising legacy and to reach for the future.*<sup>32</sup>

Co-existence is not merely a question of who has what rights to land. It holds the potential to recast the relationship between Indigenous and non-Indigenous Australians. It can set down a new framework in which the mutual enjoyment of our land is determined by discussion and agreement: not by the exercise of raw power with the demoralising legacy that the denial of justice inevitably leaves behind.

My first report as Aboriginal and Torres Strait Islander Social Justice Commissioner was published in 1993. The High Court's initial recognition of native title was still fresh. The voices of denial were strong. They are even stronger now. There is no necessary course of progress in any nation's history. This is my last report and the issues posed by *Wik* are precisely the same as those originally posed by *Mabo*.

*The deepest significance of the judgment is its potential to hold a mirror to the face of contemporary Australia. In the background is the history of this country. In the foreground is a nation with a choice. There is no possibility to look away. The recognition of native title is not merely a recognition of rights at law. It is a recognition of basic human rights and realities about the origins of this nation: the values which informed its past and the values which will inform its future.*<sup>33</sup>

## **Chapter 2: 1967 - 1997**

*Somewhere I would come under restrictive laws which demand that I get approval – from a*

<sup>31</sup> *Launceston Advertiser*, 26 September 1831.

<sup>32</sup> Pearson, N., *op. cit.*

<sup>33</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, AGPS, 1993, p. 16.

*magistrate, policeman or public servant – just to exist on that very spot.*

*Here is another example: I may legally enter a hotel in New South Wales, yet doing the same thing in Queensland could mean trouble with the police because technically I am breaking the law. Here in Sydney I can go where I like. If I go to Queensland I become the subject of a Government Department which can order me around, confine me to a certain area of the State or even separate me from my family...*

*Dogs, horses, cattle and sheep get counted in the census. So do TV sets and motor cars. But not Aborigines. ...*

*We don't exist officially – yet we pay taxes.*

*We don't exist – yet we are subject to a net of restrictive laws.*

*We don't exist – yet we have to serve in the Army and accept the other responsibilities of citizenship.<sup>34</sup>*

Prior to 1967, Aboriginal and Torres Strait Islander peoples' lives were regulated by the laws and policies of the states and territories. To control Aboriginal people, all states except Tasmania<sup>35</sup> had established bureaucracies headed by Chief Protectors (in Queensland, the Northern Territory and South Australia), a Commissioner of Native Affairs (Western Australia) or the executive member of the boards for the Protection of Aborigines (New South Wales and Victoria).<sup>36</sup> While the regimes varied from state to state, throughout Australia our lives were subject to extensive discriminatory control and limitation. For Indigenous people, life in Australia was akin to life in South Africa under the apartheid policy.

Up until the mid-1950s, a myriad of laws and bureaucratic regulations dictated who we married, where we lived, where we worked and what we did with our earnings – if we were actually paid for our work at all. We had no industrial protection, and were neither guaranteed a minimum wage nor eligible for social security benefits.<sup>37</sup> We were not entitled to an Australian passport and had to have permission to travel within and between states. In Western Australia, for example, a 1941 law prohibited any Aboriginal person who lived north of the twentieth parallel, which roughly crosses Port Hedland, to travel south of that parallel.<sup>38</sup> Association between Indigenous and non-Indigenous people was severely restricted.<sup>39</sup> Official policies forbade the speaking of Indigenous languages and the practice of traditional ceremonies. Aboriginal and Torres Strait Islander peoples were prohibited from drinking alcohol and excluded from the education system. Our children could be legally removed from their families solely on the grounds of their race.

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<sup>34</sup> Chicka Dixon, "I Want to be a Human Being", *Sun-Herald*, 21 May 1967. Quoted in Attwood, B., & Markus, A. in collaboration with Edwards, D. & Schilling, K., *The 1967 Referendum, or When Aborigines Didn't Get the Vote*, Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 116.

<sup>35</sup> Tasmania endorsed the historical fiction that it had no Aboriginal people, see *Citizenship in Australia: Democracy, Law and Society*, S. Rufus Davis (ed.), Constitutional Centenary Foundation, 1996, p. 179.

<sup>36</sup> See for more discussion Markus, A., "Under the Act", in B. Gammage & P. Spearitt (eds.) *Australians 1938*, Sydney, 1987, pp. 47-53.

<sup>37</sup> In 1959 most of the restrictions which had prevented Indigenous people from receiving social security were removed, however 'nomadic or primitive' Aboriginal people were still denied social security, see S. Rufus Davis (ed.), *op. cit.*, p. 179.

<sup>38</sup> *Ibid.*, p. 180.

<sup>39</sup> See Markus, (1987), *op. cit.*

## Rights enjoyed by Aborigines on settlements and reserves in five States and the Northern Territory

	NSW	VIC	SA	WA	NT	QLD
Voting rights (State)	Y	Y	Y	N	Y	N
Marry freely	Y	Y	Y	N	N	N
Control own children	Y	Y	N	N	N	N
Move freely	Y	N	N	N	N	N
Own property freely	Y	N	Y	N	N	N
Receive Award wages	Y	N	N	N	N	N
Alcohol allowed	N	N	N	N	N	N

Source: Attwood, B. & Markus, A. in collaboration with Edwards, D. & Shilling, K., *The 1967 Referendum, or when Aborigines didn't get the vote*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997, p. 13.

From the late 1940s and particularly in the early 1960s, states and territories began to dismantle their discriminatory regimes. By 1957 Victoria had repealed all directly discriminatory legislation, similarly for New South Wales by 1963 and South Australia by 1966.<sup>40</sup> Restrictions on the right to vote in state elections<sup>41</sup> and legislation sanctioning the removal of children on the basis of race were removed from the late 1950s and through the 1960s.<sup>42</sup> However, right up until the 1967 Referendum, and indeed beyond that time, all states and territories, most particularly Queensland and Western Australia, continued to sanction the violation of our human rights.<sup>43</sup>

During this period there was a marked increase in political activism fuelled by national and international social change such as the civil rights movement, women's liberation and the Vietnam War Moratoriums. Indigenous activism in particular was consolidated in the 1960s<sup>44</sup> when Aboriginal people formed organisations to agitate for civil and land rights, and to protest against Australia's discriminatory laws, policies and practices. The most influential of these was the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI),<sup>45</sup> a large body constituted of affiliated organisations including churches, trade unions, student bodies, Labor councils and various committees and councils for Aboriginal rights.<sup>46</sup> This organisation, and in particular members like Faith Bandler and Jessie Street, was instrumental in the vigorous campaign for the 1967 Constitutional Referendum.

<sup>40</sup> Markus, A., *Australian Race Relations 1788-1993*, Allen and Unwin, 1994, p. 177.

<sup>41</sup> Aboriginal people obtained the right to vote in Western Australia in 1962 and Queensland in 1965. The first anti-discrimination legislation was enacted by South Australia in 1966. Equal pay for Aboriginal workers in the pastoral industry was granted by the Arbitration Court in 1965. For further discussion see Markus (1994), *op. cit.*, pp. 174-222.

<sup>42</sup> In NSW the enactment of the *Aborigines Act* in 1969 abolished the Aborigines Welfare Board and children under the Board's care became wards of the state. After the enactment of the *Aboriginal Affairs Act* 1962 the Aboriginal Protection Board in South Australia was replaced by the Aboriginal Affairs Board. The new Board ceased to be the legal guardian of Aboriginal children. For further information see Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, AGPS, 1997, Appendices 1-7.

<sup>43</sup> Markus (1994), *op. cit.*, p. 177.

<sup>44</sup> See Lippman, L., *Generations of Resistance; Aborigines demand Justice*, Longman Cheshire, 1991, p. 47.

<sup>45</sup> The Federal Council for Aboriginal Advancement (FCAA) developed from a meeting of interested groups in Adelaide in 1958. The meeting drew up a series of goals relating to Indigenous citizenship, living standards, education and land ownership. In 1964 the Council was renamed FCAATSI. The Council ceased to exist in 1970.

<sup>46</sup> Bandler, F., *Turning the Tide: A personal history of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders*, Aboriginal Studies Press, 1989, p. 72.



## Referendum

There are many myths surrounding the 1967 Referendum, in particular, that it gave Indigenous peoples the right to vote: that it gave us citizenship.<sup>47</sup> These beliefs are misguided. In fact the Referendum amended the Commonwealth Constitution to allow Federal Parliament to make laws for Aboriginal people and to ensure that Indigenous Australians were counted in the national Census. Looking back at the campaigns and commentary at the time of the 1967 Referendum, it is clear that the legal technicalities of the vote were far less important than the message Australians believed a 'Yes' vote was sending to their governments. It was a vote by the Australian people for something to be done about the state of Aboriginal lives by the national government.

When the electorate voted in the Referendum it agreed that Aboriginal and Torres Strait Islander peoples should enjoy the same rights as non-Indigenous Australians. A Morgan Gallup poll of 19 May 1967, a week before the Referendum, found that people thought the chief effects of the amendments would be 'better opportunities' and 'improved conditions' for Aborigines.<sup>48</sup> The 'Yes' vote affirmed that Indigenous Australians should have running water, nice houses, good education and access to health services.

During the Referendum campaign the public saw posters of Aboriginal children poorly dressed, standing in front of a humpy: "*End Discrimination – vote 'Yes' on May 27*", of a baby framed by the slogan "*Right wrongs write 'Yes' for Aborigines on May 27*". Australians were voting to feed that baby, to give those children a better life and to reassure themselves that Australia was the decent society they believed that it was.

The Referendum was contested against an historical backdrop of gross discrimination suffered by Aboriginal peoples. The most common belief was that if adverse discrimination stopped in areas such as employment, housing and education then equality would be achieved.

On 27 May 1967 Australians were asked:

*Do you approve the proposed law for the alteration of the Constitution entitled – "An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal race in any State and so that Aborigines are to be counted in reckoning the Population?"*

The Referendum asked Australians whether they wished to amend section 51(xxvi) and section 127 of the Constitution. The amendment to section 127 would delete the words which excluded Aboriginal people from being counted in the national census.

Prior to 1967 Section 51(xxvi) empowered the Commonwealth to pass legislation with respect to the people of any race, *other than the Aboriginal people of any state*. The amendment meant that the Commonwealth would be able to make laws specifically relating to Indigenous peoples, which previously had been the exclusive domain of state governments, under section 51(xxvi) (the 'race power'). The Commonwealth could have played a greater role in Indigenous affairs prior to the amendments, for example, through the provision of grants to the states, however it chose not to.

The official 'Yes' campaign told voters that a positive result would enable the Commonwealth to:

*...co-operate with the States to ensure that together we act in the best interests of the*

<sup>47</sup> For a full discussion see Attwood et al, *op. cit.*

<sup>48</sup> Morgan Gallup Poll, 19 May 1967 quoted in Attwood et al, *op cit.*, p. 39.

*Aboriginal people in Australia.*<sup>49</sup>

The people of Australia, with an unprecedented majority of 90.77%, overwhelmingly gave the Commonwealth that power in their ‘Yes’ vote to the 1967 Referendum.

The hopes of those Aboriginal people advocating a ‘Yes’ vote were high. In the words of Faith Bandler:

*For Aborigines an overwhelming yes vote can mean a new life of hope. When you write yes in the lower square of your ballot paper, you are holding out the hand of friendship and wiping out 200 years of injustice and inhumanity.*<sup>50</sup>

The people who campaigned for the ‘Yes’ vote were justifiably euphoric, having achieved a mandate they believed would place pressure on the Commonwealth to act. In August 1967 Prime Minister Holt told Cabinet that “*the electorate will undoubtedly look increasingly to the Commonwealth Government as the centre of policy and responsibility on Aborigine questions*”.<sup>51</sup>

### **Thirty years on...**

It is now a good time to step back and reflect on the country we have travelled since 1967 and some of the landmarks of that journey. It is all the more urgent because we are a nation at a crossroads regarding Indigenous affairs and the principles which define Australia’s national identity.

In the last thirty years Indigenous peoples have experienced momentous change in official policy, bureaucratic arrangements, the law, the status of our organisations and communities, media representation and public perception. The ‘Aboriginal Advancement’ associations of the fifties and sixties which sought to end discrimination against Aboriginal and Torres Strait Islander peoples would hardly recognise the politics of Indigenous affairs in 1997.<sup>52</sup>

Have Indigenous people achieved the ‘advancement’ hoped for in the 1950s and 1960s?

I have asked many people, Indigenous and non-Indigenous, who have been around for some time what they thought had changed for Indigenous peoples since 1967. The most frequent answer I received was: ‘everything and nothing’. My own answer to the question is the subject of this chapter.

To claim that nothing has changed would be foolish and harmful. Of course things are different today for Indigenous people. But the contours of change have been complex and multi-dimensional. In some areas there have been improvements, in some areas nothing has changed. In other areas the situation has deteriorated. Indigenous affairs exist in the context of a changing Australia and a changing world. As some obstacles are overcome, others come into play. As some problems are addressed, their shape changes.

In 1969 when I went to university in Melbourne I was the only Aboriginal person at law school and on campus. Today there are more than 5,500 Indigenous students in higher education across the

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<sup>49</sup> “Constitution Alteration (Aboriginals) 1967: Argument in favour of the proposed law”, in Commonwealth of Australia, *Referendum to be held on Saturday, 27th May 1967*, Commonwealth Government Printer, Canberra, May 1967, pp. 11-12.

<sup>50</sup> quoted by the Hon. M. Wooldridge, MP, Minister for Health, House of Representatives, Hansard, 27 May 1997, p. 4122.

<sup>51</sup> Attwood et al, *op. cit.*, p. 60.

<sup>52</sup> Up until the late 1960s many Aboriginal organisations called themselves Progress or Advancement Associations, and had in their charter the objective of Aboriginal advancement.

county.<sup>53</sup> But you don't have to move far off campus to find Indigenous children and teenagers whose prospects of ending up in a lockup, a detention centre or a hospital after an attempted suicide grossly exceed their prospects of making it through secondary school, let alone university.

Indigenous and non-Indigenous Australians alike are confused and frustrated by why the change since 1967 has been so patchy. They question whether years of talk, a forest of reports, a proliferation of bureaucracies and several cycles of sincere promises and efforts have really made a substantial difference to the lives of Indigenous people.

*The referendum not only removed the barrier which prevented Aborigines from telling about their lives on the fringes of white society, but it also broke down those barriers which had prevented the media from bringing the true picture before the Australian public... Yet these were not the sorts of revelations and images that white Australia wanted to hear – infant mortality rates, imprisonment rates, poignant pictures of Aboriginal parents and children standing barefoot in rags in front of shacks constructed from material from local dumps! ... The white public, having responded positively to the referendum, became bewildered when that wasn't the end of the problem. Indeed, it seemed to many to be the beginning of a problem.*<sup>54</sup>

While some people are aware of the difficulties and complexities involved in achieving real change in Indigenous affairs, superficial answers are far more popular.

'Buckets of money', 'tax-payers' dollars' and 'throwing money at the problem', have all become part of the vernacular when Indigenous people are discussed. We apparently get more, take more and waste more – but do less, care less and contribute less than other Australians.

*Any sensible thinker must believe that the Australian Aborigine gets right royal treatment.*<sup>55</sup>

In contrast, there is also a tendency by others to say that since the Referendum governments have not really lifted a finger to assist Indigenous peoples. The lack of substantial and sustained improvement in areas such as health and education are used to justify this position.

I believe that simplistic responses such as these are both damaging and unhelpful. If Australia is to fulfil the aspirations of 1967, a more considered appraisal of the last thirty years is required. The following discussion explores the dynamic of change in Indigenous affairs and seeks to offer some explanations for both the stagnation and the improvements of the last three decades.

## **After the Referendum: business as usual**

Following the announcement of the Referendum result, Australians anticipated that the Commonwealth would act decisively to change the lives of Indigenous peoples. By September 1967 however, it became clear that as far as the Commonwealth was concerned, it was business as usual. The Commonwealth recognised the expectation that it would legislate for the benefit of Aboriginal people but decided that the administration of Aboriginal affairs should remain with the states. The Commonwealth announced that it would work "*as we have in the past, in co-operation with the states*".<sup>56</sup>

<sup>53</sup> Australian Bureau of Statistics, 1996 Census data, publication pending, see, Statistics, page 188.

<sup>54</sup> Bandler, *op. cit.*, pp. 161,164.

<sup>55</sup> McManis, B., Waitara, Letter to the Editor, *Sydney Morning Herald*, 12 June 1997.

<sup>56</sup> Goodall, H., *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*, Allen and Unwin, 1996, p. 327.

To mark the occasion it established a small, underfunded and powerless Office of Aboriginal Affairs – a genuinely token acknowledgement of the Commonwealth’s new constitutional power. The Sydney Morning Herald referred to the actions of the Commonwealth as “*a mockery of the referendum of May*” and described the new Office of Aboriginal Affairs as “*an empty office*”.<sup>57</sup>

We can see looking back over the last thirty years that the Commonwealth has not fully taken up the power it obtained in 1967 to protect Indigenous Australians from ongoing discrimination perpetrated by the states and territories. Although the passage of the *Racial Discrimination Act (Cth) 1975* prevented states and territories passing discriminatory legislation, on numerous occasions the Commonwealth has implicitly condoned states’ discrimination through its inaction.

Further, successive Commonwealth governments have failed to make significant use of the race power to pass national legislation designed to ensure comprehensive protection of the human rights of Aboriginal and Torres Strait Islander peoples.

Immediately following the Referendum a Joint Committee in New South Wales tabled a report criticising the Protection Board for being too slow and too timid in tackling discrimination. The Queensland Government continued labour exploitation and gross violation of the civil rights of Aboriginal and Torres Strait Islanders. The Commonwealth did nothing, setting a pattern for the next thirty years.

## **Yirrkala**

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*Until we give back to the black man just a bit of the land that was his and give it back without provisos, without strings to snatch it back, without anything but complete generosity of spirit in concession for the evil we have done him – until we do that, we shall remain what we have always been so far, a people without integrity; not a nation but a community of thieves.*<sup>58</sup>

Until 1966 no Aboriginal person held title to their traditional land.

The year after the Referendum, the Federal Parliament passed the *Mining (Gove Peninsula Nabalco Agreement) Act 1968 (NT)*, granting a 42 year lease with a right to renewal for a further 42 years, to Nabalco to mine Aboriginal land on the Gove Peninsula. The legislation was clearly for the benefit of the mining company. Its passage so soon after the Referendum is a somewhat ironic translation of the message the Government had received from the electorate.

The Yolgnu people including Gumatj elders, Milirrpum and others of Yirrkala took legal action against Nabalco Pty Ltd and the Commonwealth of Australia in 1970.

In 1971 the court decided, in *Milirrpum v Nabalco Pty Ltd*,<sup>59</sup> that Indigenous land laws were incapable of recognition by the Australian common law and that native title did not form and had never formed part of the law of Australia. It stated that even if native title did exist then native title rights would have been extinguished.

Justice Blackburn went on to say that even if native title did exist the Yolgnu could not prove the elements he considered necessary to establish native title. This judgement of a single judge of the Supreme Court of the Northern Territory was highly significant.

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<sup>57</sup> Attwood et al, *op. cit.*

<sup>58</sup> Xavier Herbert, quoted in Commonwealth House of Representatives, *Parliamentary Debate*, Vol. 134, (1983), p. 3489.

<sup>59</sup> (1971) 17 FLR 141

It was thought to represent the law on native title for 22 years until corrected by the High Court in *Mabo*.<sup>60</sup>

The Office of Aboriginal Affairs conducted an inter-departmental study to provide advice to the Government. The report was generally supportive of the Yirrkala people's right to claim royalties from Nabalco, favoured leasehold ownership of reserves in all States and advocated providing funds to buy land outside the reserves in the States and the Northern Territory.<sup>61</sup> Prime Minister McMahon rejected the advice.

On 25 January 1972 McMahon announced that the Yirrkala people would receive royalties from the bauxite mining on their country, but at a trivial rate. He also announced that the Government would allow a weak form of Aboriginal leasehold over some reserve areas in the Northern Territory. He stressed that traditional ownership was not, however, to be regarded as the reason for the renewed tenure of any reserves and that these actions were not to be construed as the recognition of land rights.

Very little money was to be available for land purchase and no reference was made to any land acquisition outside 'traditional' areas nor to any compensation for dispossession. Mining companies could continue to mine unimpeded on Aboriginal reserves.<sup>62</sup>

## The Politics of Federalism

Ironically, the 1967 amendment to section 51(xxvi) did not simplify Indigenous affairs at all. By making the administration of Indigenous affairs a concurrent responsibility, it added yet another complication to our lives and placed Indigenous affairs on the fault line of federalism. Since 1967 not only have we had to contend with the perennial conflicts associated with the recognition of Indigenous rights, for example control over lands and resources – we have also become caught up in the tug of war and confusion which characterises commonwealth/state relations.

Elsewhere I have explored in detail how a lack of co-ordination between the three tiers of government and between different portfolios has contributed to the failure to achieve better outcomes for Indigenous peoples.<sup>63</sup> Lack of co-ordination may sound like a dry administrative critique. In fact, its effects are felt in the most practical and personal aspects of our lives. This was amply borne out by the findings of the Royal Commission into Aboriginal Deaths in Custody.

While I will not develop this criticism in the current context, I note that in general, attempts at co-ordination in Indigenous affairs have been hampered because co-ordinating bodies have not had the power to substantively influence policy.<sup>64</sup> In this regard I look forward to seeing more outcomes from the recently established Health Framework Agreements between the Commonwealth, the states/territories and ATSIC. Unlike the loose co-operative arrangements of the past, these

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<sup>60</sup> McRae, H., Nettheim, G., and Beacroft, L., *Indigenous Legal Issues*, LBC Information Services, 1997, p. 205.

<sup>61</sup> Goodall, *op. cit.*, p. 338.

<sup>62</sup> *Ibid.*

<sup>63</sup> In an earlier report I analysed how the lack of co-ordination interfered with providing adequate health care for Indigenous peoples and with implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, AGPS, 1995.

<sup>64</sup> ATSIC regional councils, for example, are often seen as the bodies which co-ordinate the various agencies involved in policy development and service delivery for Indigenous communities. In fact, they have no influence over, and sometimes no knowledge of what the various arms of government are doing. The same has been the case for the plethora of working groups, inter-departmental committees and national advisory bodies that have been set up on Indigenous issues in the last thirty years.

agreements spell out the responsibilities of the various parties and establish substantive links between governments and Indigenous community-controlled health care services. Unfortunately, such positive examples are rare in Indigenous affairs and their survival has been dependent on the personal commitment of individual Ministers, parliamentarians or heads of department rather than the result of sustained cross-portfolio, cross-government structures.

The politics of federalism lie behind some of the most significant failures to advance or protect our rights in the last thirty years: the Fraser Liberal/Country Government's failure to take action in relation to Aurukun when it came into conflict with the Bjelke-Peterson Queensland Country Party Government; the Hawke Labor Government's failure to enact national land rights legislation when pressured by the Burke Labor Government in Western Australia; and now the Howard Liberal/National Government's response to *Wik* in the face of state pressure, particularly from the Queensland National Government.

In 1978, when the Queensland Government announced that it would take over the Mornington Island and Aurukun Aboriginal reserves, against the express wishes of the communities, the then Commonwealth Minister for Aboriginal Affairs, Ian Viner, declared that he would take all necessary steps to ensure Aborigines "*a policy of self-management and freedom of choice*".<sup>65</sup> He claimed that the Commonwealth would legislate to free Aboriginal people from the Queensland *Aborigines Act*, in keeping with the race power. The events which followed are now a matter of historical record.<sup>66</sup> Although the Commonwealth initiated action and even passed legislation specific to Aboriginal reserves in Queensland, as soon as it became clear that standing by its commitments would mean a major conflict with the Queensland Government, the Fraser Coalition failed to fulfil its responsibilities regarding the Aboriginal communities involved.

The Canberra Times on 17 March 1978, in the context of the Aurukun dispute, commented that the Commonwealth Government:

*...can hardly belabour governments in other parts of the world for their discriminatory racial policies if it fails to use its own powers to see that justice is done to Australia's black people.*<sup>67</sup>

In 1986, following the Seaman Inquiry, the mining lobby launched a campaign against land rights in the face of proposed Western Australian and national land rights legislation. The mining lobby claimed that land rights legislation slowed down mineral exploration and as a result caused unemployment, slowed economic development and accorded Aboriginal people rights that no other Australian enjoyed.<sup>68</sup> Western Australian home owners were told that "*your right of ownership could be under threat*".<sup>69</sup> The campaign showed black hands building a wall across Western Australia and putting up a notice stating: "*Keep out – this land is part of Western Australia under Aboriginal claim*".<sup>70</sup>

In the wake of this campaign, the Hawke Labor Government's promise of national land rights legislation came to nothing. Both the Commonwealth and Western Australian Labor parties feared that the passage of either Western Australian or national land rights legislation would do irreparable damage to the election prospects of both Governments.

<sup>65</sup> 3 *Commonwealth Record*, 13-19 March 1978, p. 223 quoted in Tatz, C., *Race Politics in Australia*, University of New England Publishing Unit, 1979, p. 68.

<sup>66</sup> See the Aurukun case study at pages 33-34.

<sup>67</sup> quoted in Tatz, *op. cit.*, p. 69.

<sup>68</sup> See Lippman, L., *Generations of Resistance; Aborigines Demand Justice*, *op. cit.*

<sup>69</sup> See McRae et al, *op. cit.*, p. 198.

<sup>70</sup> *Ibid.*

The arguments put about the *Wik* decision in 1997 that: non-Aboriginal people will be shut out of their own country; backyards are under threat; the national economy and interest are in danger; and that land rights are inverse racism are all too familiar – resuscitated from the 1986 and 1993 post-*Mabo* campaigns.<sup>71</sup> As Hawke’s position was shaped by Western Australia in 1986, so the Howard Government’s ten-point plan significantly reflects state interests. The branches of the Queensland National Party and the Western Australian Liberal Party have brought enormous pressure to bear and have substantially influenced the content of the Commonwealth response to *Wik*. The ambit claims and scare tactics of the Queensland Government, in particular, have been taken up by the Howard Government to shift the debate and redefine any position, other than outright blanket extinguishment, as moderate.

The Ministerial Deaths In Custody Summit is another example of the Commonwealth’s failure to assume a leading responsibility for Indigenous issues. Although all governments of Australia officially supported the recommendations of the Royal Commission into Aboriginal Deaths in Custody, rates of deaths in custody and the number of Indigenous people in prisons since then have reached their highest recorded levels. Both Western Australia and the Northern Territory have passed laws which increase the likelihood of imprisoning young Aboriginal people. At the Deaths In Custody Summit the Commonwealth demonstrated its co-operative approach by hiring a room so the states and territories could announce what they intended to do, then made defensive noises about criminal justice being a state responsibility and sent the Ministers home to get on with the job.<sup>72</sup> The states and territories were not required to agree to uniform minimum standards regarding deaths in custody. No deadlines were set by the Commonwealth for an evaluation of the success of state/territory action or for the parties to meet again.

Faith Bandler’s assessment that the Prime Minister in 1967 was “*in fact ... giving the power back to the states*”<sup>73</sup> is as apt now as it was then.

## **Aurukun**

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The Queensland Government retained the Aboriginal reserve system up until the early 1980s and consistently resisted or circumvented all Commonwealth attempts to confer greater rights on reserve residents.

In March 1978, the Queensland Government announced that it would take over the Mornington Island and Aurukun reserves from the Uniting Church. This decision was contrary to the express wishes of the communities and of the Church. On 16 March, the Aurukun Aboriginal Council announced that it wished the Commonwealth Government to take charge of the reserve in conjunction with the Uniting Church.

The Commonwealth initially adopted a tough-sounding position in response to the Queensland announcement. Viner, Minister for Aboriginal Affairs, declared that he would take all steps necessary to ensure Aborigines “*a policy of self-management and freedom of choice*”<sup>74</sup> and that the Commonwealth would legislate to “*free them*” from the Queensland *Aborigines Act* 1971, an action

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<sup>71</sup> In 1993, following the High Court decision in *Mabo*, the mining industry launched a campaign against native title which bore a striking resemblance to the one used by the Western Australian Chamber of Mines in 1986. Full page advertisements were taken out by the mining lobby which showed a map of Australia with large areas of land blacked out as if under native title claim.

<sup>72</sup> See Appendix 1, Ministerial Summit on Indigenous Deaths in Custody, page 136.

<sup>73</sup> Aboriginal-Australian Fellowship, *Newsletter*, June 1967.

<sup>74</sup> Viner quoted in 3 *Commonwealth Record*, 13-19 March 1978, p. 223 quoted in Tatz, *op. cit.*, p. 68.

consonant with the 1967 Referendum power.<sup>75</sup> A Commonwealth enactment to enable Aboriginal self-management would be “*an honourable and proper course of action*”.<sup>76</sup> The Minister asserted that officials and governments should no longer decide “*what is in the best interests of Aboriginals*”; they “*must be free of paternalistic, bureaucratic control*”.<sup>77</sup>

In response to the Queensland Government’s position the Aurukun people occupied the airstrip entrance and various buildings. The Aurukun Chairman put a sign on a fence: “*These premises are occupied by Donald Peinkinna, an Aboriginal, and permission to enter is subject to his consent*”.

### ***an honourable and proper course of action***

On 29 March, following meetings between the Commonwealth and Queensland governments and without consultation with the Aboriginal people involved, the Commonwealth decided that the Queensland Government and the Uniting Church should share control of the two communities. The deal was widely condemned.

On 10 April, however, in apparent response to the Queensland Government’s hailing of the deal as a victory over the Commonwealth, and because the Queensland Government had allegedly breached the terms of the agreement, the Federal Parliament passed the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act*.<sup>78</sup>

The Act was “*to give Aboriginal people in Queensland the right to be able to manage, direct and determine their own future*”.<sup>79</sup> The legislation allowed, with majority community agreement, an Aboriginal Council to govern a reserve and gave it extensive local government powers. The Queensland Government stated unequivocally that it would not permit Commonwealth control of the reserves.

On 6 April the Queensland Government had degazetted both Mornington Island and Aurukun as reserves, making them Crown land and effectively removing them from the operation of Commonwealth legislation.

On 11 April an agreement in principle was reached between the Commonwealth and Queensland – Queensland was to pass special legislation with regard to Aboriginal leases and if this was unsatisfactory to the Commonwealth it would “*use its constitutional powers of acquisition in order to ensure that the rights and interests of the two communities are protected*”.<sup>80</sup>

In May, Queensland passed the *Local Government (Aboriginal Lands) Act* (Qld), granting a fifty year lease to the Mornington Island and Aurukun communities, and allowing administration by an Aboriginal Council but with provision for veto by the Queensland Government by way of “*a coordinating and advisory committee to assist in control and management*”.<sup>81</sup> The Committee consisted of one Commonwealth and two Queensland representatives. The Queensland Government maintained considerable powers under this legislation.

<sup>75</sup> *Ibid.*, pp. 68-69.

<sup>76</sup> Viner reported in *The Sydney Morning Herald*, 23 March 1978, quoted in Tatz, *op. cit.*, p. 69.

<sup>77</sup> Viner quoted in 3 *Commonwealth Record*, 20-26 March 1978, pp. 259-260 quoted in Tatz, *op. cit.*, p. 69.

<sup>78</sup> Tatz, *op. cit.*, p. 71.

<sup>79</sup> *The Age*, 28 March 1978 quoted in Lippman, *op. cit.* pp. 63-64.

<sup>80</sup> *Commonwealth Parliamentary Debates (Senate)*, 12 April 1978: 1165 quoted in Lippman, *op. cit.*, p. 64.

<sup>81</sup> *Ibid.*



*the right to be able to manage, direct and determine our own future*

Despite the fact that serious concerns were expressed regarding the proposed legislation, the Commonwealth did not act to protect the rights and interests of the communities involved as it had promised in April.

The Commonwealth, without the communities' support, agreed instead to accept the provisions of the Queensland legislation for a six month trial period.

The communities were violently opposed to these developments but finally agreed to the six month trial despite their serious misgivings.

*We are still extremely unhappy with legislation. We are disappointed and sad you could not get what you promised. Legislation has taken away self-management. We are worse off than before. We are prepared to work under legislation subject to review in six months by you.*<sup>82</sup>

In August, before the six month trial period had elapsed, the Queensland Government dissolved the Aurukun and Mornington Island Councils, replacing them with its own administration. Despite significant public outcry the Commonwealth failed to intervene even when a liquor canteen was established at Aurukun against the wishes of the people.

*Has there got to be bloodshed, civil riots, turmoil and legal challenges before the Fraser government moves?*<sup>83</sup>

The Commonwealth later justified its actions claiming that a confrontation between the Commonwealth and Queensland Governments would not have been in the best interests of the Aboriginal people concerned.<sup>84</sup> This clearly contradicted the Minister's own recent commitment to self-management.

## **Hawke land rights regime**

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In 1983 the Hawke Government came to power with a strong commitment to land rights. Five principles which would set minimum standards for the enactment of land rights legislation in each state and territory were proposed. The principles were included in a resolution (never put to the vote) in Federal Parliament which called for:

*...the recognition by this Parliament of Aboriginal and Torres Strait Islander people's rights to land, in accordance with the following five basic principles:*

- (i) Aboriginal land to be held under inalienable freehold title;*
- (ii) protection of Aboriginal sites;*
- (iii) Aboriginal control in relation to mining on Aboriginal land;*
- (iv) access to mining royalty equivalents; and*
- (v) compensation for lost land to be negotiated.*<sup>85</sup>

It was envisaged that these principles would be embodied in Commonwealth legislation which would force the more recalcitrant states to comply with these principles in passing land rights legislation.<sup>86</sup>

<sup>82</sup> Telegram to Mr Viner from the Aurukun-Mornington Island Councillors cited in *3 Commonwealth Record*, 15-21 May 1978, 539-568, quoted in Tatz, *op. cit.*, p. 76.

<sup>83</sup> Senator Gietzelt, ALP, reported in *The Sydney Morning Herald*, 17 August 1978, quoted in Tatz, *op. cit.*, p. 78.

<sup>84</sup> See Lippman, *op. cit.*, pp. 62-66 for an extensive discussion of the Aurukun and Mornington Island dispute.

<sup>85</sup> Commonwealth House of Representatives, *Parliamentary Debate*, Hansard, Vol. 134 (1983), p. 3846.

<sup>86</sup> McRae et al, *op. cit.*, pp. 199-200.

Introducing this proposal, then Aboriginal Affairs Minister Clyde Holding said:

*To restore to Aboriginal people a proper form of land rights... is the solemn duty of this Parliament...*

*This generation of non-Aboriginal Australians may ask why they should be the ones to right the wrongs of our forebears. The answer is that, until this great issue is settled, and these legacies of the past redressed, Australians – all of us – can never truly be free, never live in harmony and with a sense of equality...<sup>87</sup>*

In 1984 Prime Minister Hawke reneged on an ALP promise that the Northern Territory Aborigines' right to veto minerals exploration and extraction would be generalised to all states.

The policy of national land rights was abandoned in 1986. The Prime Minister, under pressure from the mining lobby, the pastoral industry and the Western Australian ALP cited a less compassionate public as his justification for this decision.<sup>88</sup> Land rights was shifted from the Commonwealth agenda back to the states.

The world will judge the Commonwealth Government on race relations in Australia, not the states and territories. Australians travelling overseas, whether they are on holidays or on a trade mission, are increasingly asked why Australians treat Aboriginal people so badly. I doubt that the person asking the question is likely to be satisfied with the answer that the Commonwealth Government is not directly responsible for the situation of Indigenous Australians.

The United Nations' Treaty Committees have repeatedly criticised Australia's reliance on the politics of federalism to justify failing to fully implement our human rights commitments.<sup>89</sup> In response to Australia's 1994 report on the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*, the Committee said:

*[i]t is noted with concern that, although the Commonwealth Government is responsible for ratifying international human rights instruments, the implementation of their provisions requires the active participation of states and territories which have almost exclusive jurisdiction over many of the matters covered by the Convention and cannot be compelled to change their laws. Programmes and strategies designed at a federal level, to promote reconciliation and social justice and to address the problems associated with Aboriginal deaths in custody, could be jeopardised by lack of cooperation from state and territory governments. The committee will follow up with concern any relevant developments in the relations between the governments in Australia.<sup>90</sup>*

What we have seen since 1967 is a consistent unwillingness on the part of the Commonwealth to advocate the rights of Indigenous peoples when placed within the political considerations of federalism. As soon as the states put pressure on the Commonwealth, or state party branches speak of electoral prospects, the Commonwealth backs off and replaces principled policy with inaction.

<sup>87</sup> Commonwealth House of Representatives, *Parliamentary Debates*, Hansard, Vol. 134, (1983), p. 3489.

<sup>88</sup> A critique of the findings of the Australian National Opinion Poll taken in 1984 regarding land rights and used by Hawke to justify his retreat from national land rights can be found in Goot, M. & Rowse, T., "The 'backlash' hypothesis and the land rights option" (1991) 1 *Australian Aboriginal Studies* 3, pp. 5-6.

<sup>89</sup> See for example the United Nations, Report of the Committee on the Elimination of Racial Discrimination, "Australia" UN doc A/49/18 (1994), paras 512-551, also Banton, M., *International Action Against Racial Discrimination*, Clarendon Press, 1996, p. 283.

<sup>90</sup> United Nations, Report of the Committee on the Elimination of Racial Discrimination, "Australia" UN doc A/49/18 (1994), para 542.

Any Commonwealth response has tended to be a diluted version of initial aspirations and promises – the course least likely to offend state governments or party branches. It is in this context that the rights of minorities, such as Indigenous Australians, are inadequately protected by democratic processes.

The current Prime Minister's faith that "*the nation's commitment to principles of democracy and racial tolerance*"<sup>91</sup> is sufficient to defend us against racism gives us little comfort. Mere tolerance is insufficient to advance the recognition of our rights beyond the existing status quo.

Principled leadership at the Commonwealth level is essential. Which in turn is the reason why the most dramatic advances in acknowledging our rights have not been achieved in the political arena. The most fundamental right – our right to land – has come through the justice of the courts. Ironically, while the Commonwealth continues to justify its inaction on matters falling within the areas of states' responsibilities, the states and territories have taken full advantage of the Commonwealth's entry on the scene since 1967 to wash their hands of their own responsibilities regarding Indigenous peoples. The establishment of Indigenous-specific authorities at the Commonwealth level has contributed to the impression that all matters affecting Indigenous peoples have been centralised – and if not directly handled, then at least co-ordinated by the Commonwealth.

Before 1967 the provision of housing, health care and education and the administration of criminal justice were state responsibilities, and the states failed to ensure equitable outcomes in these areas to Indigenous peoples. After 1967 they remained state responsibilities, even if they were now within the jurisdiction of the Commonwealth. While the time is long overdue for the Commonwealth to take up its responsibility in all areas affecting Indigenous peoples, the states have consistently failed to play their part in 'righting the wrongs'. All levels of government, including local government, will continue to bear responsibility for our human rights, even when self-government is achieved for some Indigenous people.

As Lois O'Donoghue recently stated:

*Since 1967, when the Commonwealth took up its special responsibility towards indigenous Australians, the States and Territories have been reluctant to provide for the special needs of indigenous people from within their own budgets.*

*Instead they have looked to the Commonwealth, and the Commonwealth's specialist agency, to provide services and facilities that are their own proper responsibility and that other Australians receive as a matter of course.*

*As Malcolm Fraser admitted recently: 'there are many occasions when main line government departments provide services to non Aboriginals and not to Aboriginals'.*

*In a 1993 report on access and equity the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs condemned a situation where indigenous funding had to be 'diverted to top up mainstream service funding – a mainstream service which discriminates against Aboriginal citizens'.<sup>92</sup>*

...

*Governments must be called to account.*

<sup>91</sup> The Prime Minister, the Hon. J. Howard, MP, reported in, Millet, M., "Howard Defends Trip", *The Sydney Morning Herald*, 20 June 1997, p. 4.

<sup>92</sup> O'Donoghue, L., *1997 Spann Oration: The case for indigenous rights: reflecting on a contentious area of public administration*, Institute of Public Administration Australia, Sydney, 12 August 1997, p. 4.

*As Fred Chaney has written: The positive social policy of self-management should cease to be the excuse for failing to provide Aboriginal people access to the conditions which are necessary to ensure health and welfare.<sup>93</sup>*

## **Self-determination or delegating the headaches**

*Indigenous Affairs has had to operate across cultural barriers; it has had to defend itself in the face of waning public support and extraordinary scrutiny. More than any other area of government activity, it has had to contend with the charge of failure...*

*This seeming failure is too often attributed in the popular mind to simple causes – waste and mismanagement are perennial favourites.*

*The result is that accountability has become a catch-cry, indeed an obsession.<sup>94</sup>*

When the Whitlam Government came to power in 1972, Australia saw a major change in Commonwealth policy regarding Aboriginal affairs. The policy of assimilation was replaced, officially at least, by the policy of self-determination.<sup>95</sup> Since that time, every Commonwealth government has adopted some variation of that policy, variously called self-management, self-help or self-empowerment.

The two main expressions of these policies have been direct Commonwealth funding of incorporated Indigenous organisations and communities and the establishment of elected Indigenous advisory or policy-making bodies within the bureaucracy.<sup>96</sup> In each of these the inadequacies of Australia's official version of self-determination are evident.

Indigenous organisations have effected some of the most significant improvements in our lives in the last thirty years. The impact they have had on the way Indigenous peoples see ourselves, and are seen by other Australians, cannot be underestimated.

By making us agents instead of passive recipients, Indigenous organisations started to transform the relationship which exists between non-Indigenous bureaucracies and Indigenous peoples. As we took control, both policy and service delivery became more appropriate to our needs and cultures. The last twenty five years also gives us ample evidence that Indigenous organisations deliver more effective services than those available in the mainstream.<sup>97</sup>

The proliferation of Indigenous organisations and the diversification in their roles have largely been due to the availability of direct Commonwealth funding<sup>98</sup> and the introduction of incorporation legislation,<sup>99</sup> under which organisations could take on a number of local government and service delivery functions.

*Incorporation has provided means for the Aboriginal voice to be heard. It facilitates contacts*

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<sup>93</sup> *Ibid.*, p. 9.

<sup>94</sup> *Ibid.*, p. 3.

<sup>95</sup> O'Donoghue, L., "Ending the Despair", (1992) 51 *Australian Journal of Public Administration*, p. 214.

<sup>96</sup> See table, page 4.

<sup>97</sup> See for example the discussion of Congress Alukura in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994, op. cit.*, pp. 114-118.

<sup>98</sup> I note however that some Indigenous organisations operate with no or minimal government funding.

<sup>99</sup> *Aboriginal Councils and Associations Act 1976* (Cth)

*with public and private organisations and with private persons. It has largely broken down the practice of government departments automatically passing on any matters concerning Aboriginals to the Department of Aboriginal Affairs.*<sup>100</sup>

Government support and legislative regimes for incorporation have not, however, been without their disadvantages. They have brought with them expectations, conditions and accountability requirements which at times contradict our objectives and methodologies and frustrate the very autonomy we are attempting to gain.

In the worst cases, some of the larger Indigenous organisations which have taken on a more overtly political role have been warned in no uncertain terms that they should stick to the agenda set by the Government of the day, or look elsewhere for their funding. In 1996 when the Coalition Government cut \$470 million from the ATSIC budget and quarantined CDEP, housing and infrastructure, it was not naive to the fact that ATSIC's more 'political' activities would be the most affected.<sup>101</sup>

In other cases, the conflict is more subtle. Incorporated organisations which receive government funds find themselves constrained by the policy and funding guidelines set by government departments and ministries with disparate and remote agendas and little understanding of the context in which the Indigenous organisations operate.<sup>102</sup>

Indigenous organisations and the people working in them find themselves with conflicting expectations.<sup>103</sup> On the one hand, communities see their role as providing culturally appropriate services according to local protocols. On the other hand, the funding body emphasises accountability and management styles which conform with alien bureaucratic systems and cultures. The implicit demand from government is that "*Aboriginal people change their ways.*"<sup>104</sup>

The 1985-86 Department of Aboriginal Affairs annual report noted that:

*Aboriginal people tend to see the Department as "their" department and accountable to them. This presents difficulties for Aboriginal and non-Aboriginal departmental officers whose primary responsibility is to the Minister and the Government.*<sup>105</sup>

In addition, a sole Indigenous organisation or worker may find themselves expected to meet all the needs of a whole community – needs which mainstream agencies neglect. It is not difficult to understand why so many Indigenous workers are burnt out and so many organisations have folded.

Yet it is these under-funded, over-burdened and ambiguously constituted organisations that are held up as examples of self-determination. So when they find themselves operating in an untenable situation or fail to deliver what all Australian governments put together have failed to achieve, we are told that self-determination is the wrong approach.

Some Indigenous people feel that government funding has caused more harm than good –

<sup>100</sup> Rowley, C. D., *Recovery: The politics of Aboriginal reform*, Penguin Books, 1986, p. 241.

<sup>101</sup> See O'Donoghue, L., *Past Wrongs, Future Rights*, Speech to the National Press Club, Canberra, 29 January 1997, p. 6.

<sup>102</sup> See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, *op. cit.*, pp. 99-175.

<sup>103</sup> Sullivan, P., *Aboriginal Community Representative Organisations: Intermediate Cultural Processes in the Kimberley region, Western Australia*, East Kimberley Working Paper 2, CRES, ANU, Canberra, p. 1.

<sup>104</sup> O'Donoghue, L., *1997 Spann Oration*, *op. cit.*, p. 6.

<sup>105</sup> DAA, Annual Report, 1985-86, p. 13, quoted in Rowse, T., *Remote Possibilities; the Aboriginal domain and the administrative imagination*, NARU, 1992, p. 6

undermining the principles of self-government and self-determination. The ability of Indigenous people to experiment or trial strategies which do not fit into pre-existing bureaucratic frames has been stifled. Some people believe that the more public silence from many Aboriginal organisations and individuals stems from their dependence on government money for their survival.<sup>106</sup>

While I do not believe that government funding has entirely deprived our organisations of their independence or political voice, it has created problems that are not easily resolved, given that the vast majority of Indigenous communities do not have an independent economic base.<sup>107</sup> Doubts about the competency of Indigenous organisations and accusations of mismanagement and fraud followed hot on the heels of government funding.

Within a year of its establishment in 1972, the Auditor General referred to deficiencies in the Department of Aboriginal Affairs' grant expenditures.<sup>108</sup> The Department's procedures were again investigated by the Joint Committee of Public Accounts in both 1975 and 1976. In 1979 the House of Representatives Committee on Aboriginal Affairs established an inquiry into Aboriginal Legal Aid, the Ruddock Report. In 1984-85 the House of Representatives Standing Committee on Expenditure conducted an Inquiry into the Aboriginal Development Commission. In 1988-89 the Department of Prime Minister and Cabinet conducted an Inquiry into Allegations concerning the Administration of Aboriginal Affairs. In 1989 the Department of Finance conducted an Inquiry into the Financial Management of the Aboriginal Development Commission.

These inquiries rarely found any mismanagement. The Ruddock Report found that Aboriginal Legal Services, like the Aboriginal Medical Services, were far more cost efficient than other similar services.<sup>109</sup>

Regardless of the findings, political parties and some in the media know that allegations that blacks are again ripping off Australian taxpayers makes good press.<sup>110</sup> Immediately on taking office the Howard Government perpetuated the stereotype by casting new doubt on the ability of Indigenous organisations to manage their affairs and balance their budgets.<sup>111</sup> The Prime Minister announced in his first Canberra press conference that scrutinising ATSI's accountability would be among the first actions of his Government, and during its initial months in office the Coalition Government maximised the political mileage to be made from stories about robbing and fraud. The sub-text was that black babies are dying in 1997 because black bureaucrats are squandering taxpayers' money meant for health services to buy four wheel drives and take off on overseas jaunts. The implication is that if Indigenous peoples could be made accountable, the perennial problems of Indigenous affairs would be solved. Rarely is the link made to the main stream government departments which are, in fact, responsible for the health and welfare of all Australians.

The audit of Indigenous organisations commissioned by Senator Herron, the Minister for Aboriginal and Torres Strait Islander Affairs, and later found by the Federal Court to have been invalidly constituted, reviewed 1,122 organisations and cleared 95% of them for funding.<sup>112</sup> In comparison, a

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<sup>106</sup> Perkins, C., "Aboriginal Australia and Public Administration", (1992) 51 *Australian Journal of Public Administration*, p. 232.

<sup>107</sup> See for example, O'Donoghue, L., *Past Wrongs, Future Rights*, *op. cit.*, p. 1.

<sup>108</sup> Auditor General, supplementary report 1972-3, referred to in Rowse, T., *op. cit.*, p. 7.

<sup>109</sup> John Newfong, 'Why Aborigines need separate Legal Services' *The Australian*, 21 October, 1986, p. 13.

<sup>110</sup> See for example, "Black Money; What happens to the \$2 billion Australian taxpayers pour into Aboriginal programs every year? And why isn't it ever enough?", *Australian Bulletin Magazine*, March 1995, pp 36-57.

<sup>111</sup> For example, interview with Fran Kelly, ABC Radio National, 2 April, 1996.

<sup>112</sup> Department of Prime Minister and Cabinet, *Report of the Special Auditor*, October 1996, Executive Summary, 1.1. Although the report found that a high number of organisations did not strictly comply with grant and loan terms, non-

1997 survey on company fraud showed that roughly half the 490 large Australian companies surveyed had experienced significant fraud in the last two years.<sup>113</sup>

Double standards? No!

## **From Assimilation to Self-determination: bureaucratic developments**

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### **1967 Office of Aboriginal Affairs (OAA)**

#### **Council of Aboriginal Affairs (CAA)**

Following the Referendum, the Holt Government established the OAA and the CAA to advise the Commonwealth Government on national policy and to recommend ways that the Commonwealth and state governments could co-operate over Aboriginal issues.

The CAA was often a voice of dissent within the Government – it advised the Commonwealth Government to support the right of the Yirrikala people to claim royalties and was in favour of leasehold rights for Aboriginal people over reserves. It also advocated funds to buy land outside reserves. The McMahon Government rejected the Council's advice on these matters.

### **1972 Department of Aboriginal Affairs (DAA)**

The DAA, which replaced the OAA and the CAA, was established in line with the Whitlam Government's decision to create an Aboriginal Affairs portfolio. The aim of the DAA was to improve the lot of Aboriginal people by:

- ensuring access to the full range of welfare and other services available to non-Indigenous Australians; and
- funding special programmes to address Indigenous Australians' particular disadvantage.

### **1973 National Aboriginal Consultative Committee (NACC)**

After a national conference of Aboriginal people, the NACC was formed to ensure that Aboriginal views were taken into account in developing policy and implementing programmes. The Committee was free to comment on any area affecting Aboriginal peoples. In November 1973, 41 delegates to the NACC were elected, by over 36,000 Aborigines to represent 800 communities. The NACC only held a one or two week meeting annually and was dependent on the DAA for the timing and servicing of the meeting.

The NACC never met the expectations which surrounded its establishment. Plagued by practical and resource problems the Committee was unable to establish itself as the voice of the Aboriginal community – the electorates were too large and the resources of the Committee members and candidates vying for election were too small to assure majority support in the electorate.

Members and candidates had *“a lack of adequate transport facilities, of secretarial assistance, and sometimes of a clear understanding of their task”*.<sup>114</sup>

In 1976 the Hiatt Inquiry into the NACC, convened by Viner, Minister for Aboriginal Affairs,

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compliance mainly took the form of minor technical breaches, such as the late submission of financial and management reports.

<sup>113</sup> KPMG 1997 Fraud Survey, reported in “Industry's \$20bn fraud bill - and that's just the tip”, *The Sydney Morning Herald*, 23 July 1997.

<sup>114</sup> Rowley, *op. cit.*, 1986, p. 40.

concluded that it had “*not been effective on either the consultative level or in providing advice to the government. Failure was attributed to lack of a statement of aims on the government’s part, resentment by members of their limited role, and hostility between the NACC and DAA*”.<sup>115</sup> Recommendations made by the Inquiry regarding reform of the Committee’s structure and functions were rejected by the Government.

### **1977 National Aboriginal Conference (NAC)**

The NAC was set up to replace the NACC as a channel of communication between the Commonwealth Government and Aboriginal communities. Unlike the NACC, which was free to comment on any area affecting Aboriginal peoples, the NAC could only advise on matters referred by the Minister.

The Coombs Report into the NAC in 1984 found that it was a flawed body. Coombs proposed a new representative body, the National Aboriginal Congress and advocated  
**1985** consultation with Aboriginal communities over the form this should take. In February 1985 a joint DAA-NAC task force was set up to report on restructuring but in April the Minister announced that the Government would not extend its term. Holding appointed Lois O’Donoghue to consult with Aboriginal communities on their preferences for an organisation to replace the NACC, and to then advise the Government. Neither her recommendations nor those of the task force were ever implemented. The NAC was disbanded in 1985.

In July 1987 the Labor Government announced its intention to ‘restore’ Aboriginal administration. In August 1988, Hand, Minister for Aboriginal Affairs introduced the Bill to establish the Aboriginal and Torres Strait Islander Commission (ATSIC). The final Bill was  
**1990** passed on 2 November 1989. ATSIC was established in March 1990 bringing together functions previously handled by the DAA and ADC.

The various Indigenous advisory bodies set up by Commonwealth governments since the 1970s have suffered the same conflicting stress as Indigenous organisations. They have also been subjected to unrealistic expectations and misunderstandings about their roles and powers. Even at the time of their establishment, it was clear that the earliest advisory bodies, the National Aboriginal Consultative Committee and the National Aboriginal Conference, could never be instruments of self-determination. Their remoteness from decision-making, their lack of actual power to influence government policy, their lack of independent resources and their total dependence on the Department of Aboriginal Affairs, made them little more than token attempts at Indigenous participation in Indigenous affairs.<sup>116</sup>

The establishment of ATSIC undoubtedly marked a momentous, albeit imperfect, shift in Commonwealth administration of Indigenous affairs. For the first time the departmental arm (previously the DAA) and the elected arm (previously the NACC) would be joined, and elected Indigenous representatives would be responsible for setting priorities and policies. It was a marriage between government bureaucracy and Indigenous decision-making: it has not been an easy alliance.

Without a doubt the establishment of ATSIC has placed Indigenous peoples in a position where we have more control over some aspects of our lives, and specifically over some of the policies and programmes previously controlled by non-Indigenous bureaucrats. Today most of ATSIC’s budget is directed to approximately 1,100 community controlled service delivery organisations such as community councils, housing co-operatives and Aboriginal legal services.<sup>117</sup>

<sup>115</sup> Lippman, *op. cit.*, p. 62.

<sup>116</sup> See Lippman, *op. cit.*, p. 62; and Tatz, p.48.

<sup>117</sup> O’Donoghue, L., *Past Wrongs, Future Rights*, *op. cit.*



One of the goals of ATSIC was to bring decision-making closer to the people concerned and to overcome some of the problems which arise when a centralised authority devises policy for as diverse a group as Aboriginal and Torres Strait Islander peoples. Needless to say grass roots participation and self-determination at a local level are ideals not easily achieved after over 200 years of marginalisation. Nor can ATSIC achieve self-determination in isolation within a broader context which still precludes Indigenous control and decision-making. A regional council deciding whether to spend its small budget on repairing dilapidated houses, employing a health worker or putting in a road sounds more like a delegated headache than self-determination.

ATSIC is a much misunderstood, much maligned and over-burdened authority.

The commonly held belief is that ATSIC is responsible for everything that happens for Indigenous peoples. If policies are failing or service delivery is inadequate, it is ATSIC's fault. If Indigenous peoples' health status is not improving, if houses are not being built, it is ATSIC's fault. Rarely do ATSIC's critics point out that it has been in existence for only seven years. Nor is it acknowledged by such critics that its mandate is to address the most significant and long standing social and economic problems this country faces.

When government departments are asked why the more than \$400 million allocated to them to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody has not led to a decrease in rates of incarceration or death, they point to the gravity and enormity of the problem. When our organisations do not solve the gamut of problems faced by Indigenous peoples the problem is apparently, lack of accountability.

In 1994 it was estimated that \$3.1 billion would be required just to cover the accumulated backlog of Indigenous housing and infrastructure needs – more than twice ATSIC's annual budget. At existing funding levels this would take 20 years: if the problem was static and the entire budget were devoted to this problem alone.<sup>118</sup> In response, the Commonwealth allocated an extra \$232 million to ATSIC to be spent over five years on Indigenous housing and infrastructure. You do not need to be a mathematician to work out that this figure will leave ATSIC and Indigenous peoples with the same problem for a very long time to come. Combined with population increase and the need to maintain existing housing stock, it is impossible to even preserve, let alone improve, the appalling conditions of the present.

It would come as a great surprise to most parliamentarians and the general public to discover the small part ATSIC is actually empowered or resourced to play in our lives, and the relatively small budget it receives in comparison to total government spending.<sup>119</sup>

*ATSIC exists mainly to top up the responsibilities of mainstream government. Its budget cannot cater for every need in Indigenous Australia, though its visibility as the principle Indigenous agency makes it the focus of expectations it cannot possibly meet. Farmers and miners receive more than the ATSIC budget as a fuel rebate. The Department of Veterans' Affairs disburses about \$6 billion a year on Veterans' issues while the Commonwealth spends less than \$1.5 billion on Indigenous issues.*<sup>120</sup>

Only a small portion of the decisions which affect our lives are within ATSIC's jurisdiction, let alone control. By far the majority of policies affecting us, or services we might wish to access in relation to health, education, employment, housing or infrastructure, are determined and controlled by

<sup>118</sup> Aboriginal and Torres Strait Islander Commission, *Annual Report*, 1994-95, AGPS, 1995, p. 148.

<sup>119</sup> For a detailed discussion of funding see Aboriginal and Torres Strait Islander Social Justice Commissioner *Fourth Report*, 1995, *op. cit.* Chapter 3, Indigenous Health, pp. 126-130.

<sup>120</sup> O'Donoghue, *Past Wrongs, Future Rights*, *op. cit.*, p. 4.

mainstream Commonwealth, state or territory departments or local government. In the past, ATSIC's involvement in these policies and services has been, at best, membership on an inter-departmental committee. It is only relatively recently, with the development of tripartite agreements between the Commonwealth, state or territory governments and ATSIC, that ATSIC has had the opportunity to influence mainstream policy decisions.

When it comes to some of the most crucial and contentious areas, such as land or resource management, ATSIC is permitted to play no more than a marginal role. In such matters ATSIC is seen as little more than the representative of another interest group, governments may consult, and whose recommendations it may accept or reject in the light of all other priorities and agendas.

At the same time, its Indigenous constituents think that ATSIC can press their concerns and ensure they are represented in formulating government policy and in service delivery. When this does not happen, they too frequently blame ATSIC.

Anticipating the experience of ATSIC, the Royal Commission into Aboriginal Deaths in Custody wondered whether it would be:

*...a cynical device created by Governments to transfer the hard decisions and the inevitable anger and enmity which would follow from them to Aboriginal shoulders; that it would be under-funded and thus ensure division between Aboriginal people; that it was merely the DAA a white bureaucracy disguised as a body responsive to Aboriginal aspirations...*<sup>121</sup>

Despite the fact that governments since 1972 have adopted self-determination or self-management as their official policy, I believe that those working in government have yet to understand what those terms mean.<sup>122</sup>

Indigenous control can only come if there is a shift in power. Often control is taken from Indigenous organisations and non-Indigenous structures are re-imposed in the name of efficiency or improved service delivery. In the short-term a government may believe this will establish a more effective service, run by non-Indigenous experts who can meet its criteria for efficiency and accountability. In the long-term it is breathing life into an oppressive relationship and recreating the problems we are trying to solve. Governments cannot justify taking back control particularly when the strategies of non-Indigenous governments and agencies have failed so miserably and so consistently to solve fundamental problems in Indigenous affairs.

No one would deny that our organisations, like any others, will make mistakes and operate imperfectly. How could it be otherwise when we are facing problems for which no one has a ready solution? How many of the great scientific discoveries of this century would have been made if scientists were taken out of their labs every time an experiment failed? And how many would have been made if results were expected overnight? Indigenous organisations need the opportunity to experiment and test different strategies. Effective development of our organisations will take time and patience – from both Indigenous and non-Indigenous people.

For Indigenous peoples the 1970s slogan 'doing it for ourselves' is still current. However, in the 1990s we have to move beyond our anti-establishment slogans and acknowledge the potential of partnerships. Many Indigenous organisations have always, and continue to operate in this manner, importing non-Indigenous expertise where appropriate and working alongside other bodies. Many more would, I believe, be willing to take a less hostile and suspicious stance if the political environment were one in which we were not made to fear that admitting any imperfection was

<sup>121</sup> Royal Commission Into Aboriginal Deaths In Custody, *National Report*, AGPS, 1991, pp 9-12.

<sup>122</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, pp. 41-65.

equivalent to inviting in the auditor.

In my submission to the Commonwealth Parliament on the proposed Social Justice Package I also explored at length the option of regional agreements as a means of co-ordinating all policy and programmes affecting Indigenous people in a given regional or geographic area. An Indigenous-controlled local or regional authority could co-ordinate service delivery and policy formulation for the region within all or some areas such as health services, environmental management or employment programmes. This type of structure is a viable option for achieving policy co-ordination, self-determination and effective delivery of services. Where regional authorities do not exist, the Commonwealth should as a matter of priority work in a co-ordinated manner with state, territory and local government and the relevant Indigenous organisations and communities.

This overview of the last thirty years gives some indication of the complexities and conflicts embedded in Indigenous affairs. We have made significant gains in some areas, yet some of our most serious problems remain, and many of our deepest-felt grievances are unresolved.

We have achieved significant protection for some of our rights. Others remain unrecognised, such as the protection of cultural property. More Australians than ever understand and are supportive of our aspirations, yet we are still confronted with ignorance, racism and resentment. All of us, Indigenous and non-Indigenous, feel exasperated about the failure to effect significant change in areas of great disparity, such as health status. However, the way some people respond to their frustration is at times less than helpful.

Everyone thinks they are an expert when it comes to Indigenous affairs. Those who look to solve problems in a short space of time say an electoral cycle, or to use orthodox strategies, have been quick to fix upon simplistic explanations and solutions.

For some, the persistence of problems is proof that current approaches are no good. Rather than examining in detail what it is about policies or practices that is not working well, they propose that we dump self-determination and return to assimilationist policies and practices. Not only is this approach based on a gross over simplification of the issues involved, its proponents have very short memories. Governments turned to self-determination precisely because assimilation failed so dismally and was so widely discredited.

For others it is not the policy approach that is at fault – it's just Indigenous people who get in the way of successful outcomes.

Of course, we too feel enormous frustration. But ours is a frustration born out of precisely this type of patronising and racist thinking. Even when we are told that we can now determine our own futures, we find ourselves marginalised in the management of our own lives. Often we feel like mere spectators as we watch yet another team of bureaucrats devising all too familiar strategies for our benefit. Again and again we hear promises made and forgotten, consultation feigned or discarded, old solutions reimposed.<sup>123</sup>

This failure to effect real progress in Indigenous affairs is complicated by the fact that people seem irritated when we don't change and resentful when we do. The apparent shift in focus of our political campaign in the last thirty years is seen as moving the goal posts or not playing fair. There is a perception that at the time people voted in the Referendum we were just seeking the same rights as other Australians but now in the 1990s we want recognition of our distinct rights. As though our

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<sup>123</sup> In my second report I detailed the sorry history of reports and political solutions to the problem of Indigenous health, see Aboriginal and Torres Strait Islander Social Justice Commissioner *Second Report 1994, op. cit.*, pp. 99-103.

demands are constantly growing.

This perception is false. Recognition of our rights to land, respect for our culture and identity have always been the substance of our aspirations. Whether they have been heard or heeded, we have expressed those aspirations repeatedly since 1788.

There has been an evolution in our political strategies and a change in the way these aspirations are articulated. But it is only sensible that we reform the way these aspirations are articulated within the context of broader social and ideological changes. Non-Indigenous people do this as a matter of course – why should Indigenous peoples be frozen in time?

Genuine willingness on the part of non-Indigenous people and governments to sit with us long enough to hear our aspirations and our ideas about appropriate mechanisms to support the enjoyment of our rights would go a long way. Governments must make an on-going commitment to genuine dialogue over time as we see strategies unfold and evaluate outcomes. Rapidly cutting off what appears to be failing will help no one develop an understanding of what might work. We need industry partners who are willing to go past paranoia and scare-mongering and come to the table to identify common interests. I know that can happen – I saw it in Cape York when the Cattlemen’s Union of Australia and others negotiated with the traditional owners over a Heads of Agreement. I am seeing it in some of the more enlightened mining companies. The landmark \$60 million agreement in March 1997 between the RTZ-CRA subsidiary Hammersley and the Gumala Aboriginal Corporation is an example of what can be achieved when Indigenous and non-Indigenous people are given the time and space to negotiate on matters of vital interest to all the parties involved.<sup>124</sup> I also see a willingness to talk and negotiate in the recent initiatives of the Commonwealth Minister for Health.

Attaching Indigenous policy to electoral cycles continues to serve us badly. Attaching Indigenous lives to political point scoring has been disastrous. Three or four years in the context of over two hundred years cannot possibly be sufficient to develop or test strategies. This is why it is a matter of utmost importance that the rights of Indigenous peoples are disentangled from the rivalries of party politics. In other parts of the world, people have agreed that improving the lives of Indigenous people should be an ongoing national project in which all interested parties work together to achieve optimum outcomes. It is imperative that politicians acknowledge the benefits for all Australians in respecting Indigenous peoples’ rights rather than feeding on stereotypes to undermine them.

Thirty years on, I look back and see that the Commonwealth has failed to make full use of its race power for the benefit of Indigenous peoples. Thirty years from now, will we look back and say that in 1997 the Commonwealth decided to use the Constitution to entrench racism in this country?

The Commonwealth has already used section 51(xxvi) to enact the *Hindmarsh Island Bridge Act* 1997. This legislation prevents the Minister for Aboriginal and Torres Strait Islander Affairs from considering any application under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) concerning Kumurangk (Hindmarsh Island). In effect this statute has made it impossible for the Ngarrindjeri people to claim heritage protection for their traditional land. At the time of writing, the Commonwealth plans to make further use of the race power to enact amendments to the

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<sup>124</sup> This agreement, the first under the right to negotiate provisions of the *Native Title Act* 1993 (Cth) concerning a major resource project, allows Hammersley to develop its Yandicoogina iron ore mine in the Pilbara. In return the company will contribute over the life of the mine to local trusts established for Aboriginal business developments, Aboriginal education and training, community development and for the protection of culture and the welfare of the Bunjima, Niapaili and Innawonga communities. Hammersley’s financial contributions will enable Aboriginal communities to participate in pastoral station operations, invest funds for the future, preserve Aboriginal access to non-operation areas of the mining lease and enable those suitably qualified to take up employment at the mine. See Sproull, R., “RTZ-CRA pact paves way for \$500m mine”, *The Australian*, 27 March 1997, p. 21.

*Native Title Act 1993* and implement the Howard Government's ten point plan. Such legislation will further encroach on Indigenous lands and cement our dispossession.

In 1967, Cabinet documents consistently stated that if the Referendum were successful in altering the wording of section 51(xxvi) of the Constitution, the Commonwealth would obtain the power to legislate for the benefit of Aboriginal people or to override discriminatory state legislation.<sup>125</sup>

The 'Yes' case was all about bettering the lives of Indigenous people, and unambiguously acting "*in the best interests of the Aboriginal people of Australia*".<sup>126</sup>

When Australians were asked to vote 'Yes', they did not imagine they were being asked to give the Commonwealth power to discriminate against Indigenous people. They were asked to right the wrongs – not perpetrate them.

The prospect of using the Constitution in this manner in 1997 is all the more disturbing because we seem to have come so far. The legislation passed in 1968 allowing Nabalco to mine the country of the people of Yirrkala and the subsequent 1971 *Gove Land Rights Case*,<sup>127</sup> which sanctioned that action would simply not be possible today.

At the time neither the Nabalco legislation nor the court decision of Justice Blackburn contravened the common law as then interpreted by the courts, or any domestic statute. Nor were they met by any significant public outcry on the part of non-Indigenous people. In the intervening years Australia has ratified a number of international human rights conventions condemning racial discrimination and the arbitrary deprivation of property. The Commonwealth has passed the *Racial Discrimination Act* of 1975, the *Land Rights (Northern Territory) Act* of 1976 and the *Native Title Act* of 1993. The judiciary has recognised the validity of domestic human rights and anti-discrimination legislation<sup>128</sup> and in *Mabo [No. 2]* overturned the doctrine of *terra nullius*. The public showed its commitment to the principles of non-discrimination when the Commonwealth Government raised the possibility of winding back the *Racial Discrimination Act* in 1993 to accommodate proposed native title legislation. Today, on the strength of these decisions and Australia's domestic and international legal obligations, neither the courts nor the legislature could so blithely override our rights as they did in 1968 and 1971. Or could they?

I am not the first, nor will I be the last, to point out that the Commonwealth will, in the wisdom of time, be judged by its treatment of Indigenous Australians. Over the last thirty years this has been well recognised by governments.

In 1964 Kim Beazley (Snr) said:

*[i]rrespective of who has control over aborigines, only one government is answerable before the forum of international opinion – the Government of the Commonwealth of Australia. In the forum of international opinion – the United Nations – no one will raise Western Australia's policy or Queensland's policy but the delegates of the Government of Australia will have to answer for Australia's attitude.*<sup>129</sup>

<sup>125</sup> For example: "...would give the Commonwealth power to deal with the problem and it would therefore be in a very strong position to ensure that it could implement its policy to the advantage of aboriginal people", Submission to Cabinet by the Attorney-General, the Rt Hon. B. M. Sneddon, 12 August 1966, AA, A5841/2, item 397.

<sup>126</sup> Commonwealth of Australia, "Constitution Alteration (Aboriginals) 1967: Argument in favour of the proposed law" in *Referendum to be held on Saturday 27 May 1967, op. cit.*, pp. 11-12.

<sup>127</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>128</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

<sup>129</sup> House of Representatives, Hansard, 14 May 1964, 1917.

After the 1967 Referendum Prime Minister Holt told Cabinet:

*...we must take into account the place the Aborigine question occupies in Australia's international relationships...*<sup>130</sup>

On taking office in 1972, Prime Minister Whitlam stated:

*Australia's treatment of her Aboriginal people will be the thing on which the rest of the world will judge Australia and Australians – not just now, but in the greater perspective of history.*<sup>131</sup>

In 1997, commenting on the ten point plan and the Howard Government's response to the report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children from their Families – *Bringing them home* – the former Liberal Prime Minister Malcolm Fraser said:

*Australia faces a moral crisis. How we respond to it will effect [sic] our standing in the world. Two things are coming together: the racial bigotry of Pauline Hanson and the "One Nation" Party and the condition of Australian Aboriginals.*

*In international eyes the two issues will merge into one and Australia's response will be critical to our standing in the world and to our own self respect*<sup>132</sup>

A letter to *The Australian* published the day before the Referendum now takes on a chilling significance. The author admonishes the Commonwealth for not putting any case for a 'No' vote. He goes on to say:

*[the amendment] opens the door to discriminatory legislation of the South African kind...while there is no doubt that the present Government will apply it in a benevolent manner, there is no guarantee that all future governments will have the same attitude.*<sup>133</sup>

There was no campaign for a 'No' vote because in 1967 no one believed that any government, then or in the future, would use an amended race power to discriminate against Indigenous peoples. Australians thought that our sense of fair play, concern for the disadvantaged and integrity would always be sufficient guarantee. They believed that this nation was emerging from its history of adverse discrimination and moving forward into the last part of the twentieth century as a just society. In the years following the Referendum many Australians have also acknowledged that recognising our distinct rights is an integral part of achieving equality for Indigenous peoples.

Are we now travelling in the opposite direction?

## **Politics and Indigenous Australia**

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Indigenous political activism, which has been a feature of the Australian landscape since 1788, was consolidated during the 1950s and 1960s when Aboriginal people formed organisations to agitate for civil and land rights and to protest against Australia's discriminatory laws, practices and policies.<sup>134</sup>

<sup>130</sup> Cabinet Submission, no. 432, 14 August 1967, AA, CRS A5425.

<sup>131</sup> Statement by the Prime Minister, E.G. Whitlam, to the Aboriginal Affairs Council, Adelaide, 6 April 1973, quoted in Lippman, *op. cit.*, p. 57.

<sup>132</sup> Fraser, M., *ABC Enterprises CD-Rom Launch*, Sydney 7 July 1997, p. 9.

<sup>133</sup> "The case should have been put!", *The Australian*, Letter to the Editor, 26 May 1967, reproduced in Attwood et al, *op. cit.*, p. 117.

<sup>134</sup> Lippman, L., *Generations of Resistance*, Longman Cheshire, 1991, p. 31.

Activism in the sixties was fuelled by national and international social and political change:<sup>135</sup> “...[t]his activity – nation wide – created an environment which, along with other pressures, forced the federal government to reconsider its involvement in Aboriginal affairs”.<sup>136</sup> At an international level it was the era of decolonisation and the civil rights, anti-racism, women’s liberation and anti-establishment movements.

In the early 1970s Aboriginal people were influenced by the Black Panther movement in the United States, by civil unrest and by race riots throughout the world. It was the decade which witnessed the growth of organised militant political activity by Aboriginal people in their own affairs.<sup>137</sup> The significant shifts in federal Aboriginal affairs policy were largely due to the intense conflicts between Aboriginal people and non-Indigenous authorities during the seventies.

During this period Aboriginal activists tried to gain world attention through several international delegations, including one to China. Indigenous peoples were supported by advocates in human rights and labour organisations throughout the world – notably the Anti-Slavery Society in London which provided office facilities to Aboriginal activists.

*... the emergence of the Aboriginal interest from the wings of the political theatre has been one of the most important developments. From a position where few whites paid any heed to their political demands, by the 1980s it could be said that even those politicians who disagreed with Aborigines could no longer ignore them... The heightened profile of Aboriginal politics could be measured by the inclusion of certain words into our political lexicon: Freedom Rides, land rights, Aboriginal Embassy, Aurukun, self-determination, Noonkanbah.*<sup>138</sup>

Land rights and native title represent the most public and controversial area of Aboriginal activism. In the following selection of some of the major examples of Indigenous activism we can see the roots of the modern Indigenous rights movement.

**1938** The Day of Mourning is held on Australia Day to protest the 150th anniversary of the arrival of the First Fleet. The meeting calls for Aboriginal control of our own affairs and demands secure ownership of adequate land.<sup>139</sup>

**1939** In late 1938 the Cumeragunja community, living on the New South Wales side of the Murray River opposite Barmah, Victoria, petitions the NSW Government to dismiss the station manager because of his arrogant, abusive and offensive behaviour and demands an urgent inquiry into the conditions and management of Cumeragunja. The petition details complaints about the paucity of rations and the denial of family endowment payments.<sup>140</sup> Conditions worsen on the station and petition signatories are increasingly victimised by the station manager.

In February 1939, 200 of Cumeragunja’s 300 residents walk off the station and set up camp across the river in Barmah. The strike lasts nine months. The people call for a Royal

<sup>135</sup> O’Donoghue, L., “The May 1967 Referendum: 30 years down the track”, (1997) 4 *Indigenous Law Bulletin* 4.

<sup>136</sup> Perkins, C., “Aboriginal Australia and Public Administration” (1992) 51 *Australian Journal of Public Administration*, p. 224.

<sup>137</sup> *Ibid.*

<sup>138</sup> Bennett, S., *Aborigines and Political Power*, Allen & Unwin, 1989, p. vii.

<sup>139</sup> Goodall, H., *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*, Allen and Unwin, 1996, pp. 235, 236.

<sup>140</sup> *Ibid.*, p. 249.

Commission to remove the station manager; return farm blocks to the Cumeragunja owners; support agricultural development plans for the whole reserve; abolish all boards of control; and grant full citizen's rights.<sup>141</sup>

The strike is broken in October 1939 when the NSW Protection Board convinces the Victorian Government to withhold food relief to the strikers. Many do not return to the station but choose instead to move to surrounding areas in Victoria and NSW. The strike is not, however, a failure – the station manager is sacked by the APB and the enormous symbolic significance of the strike cannot be overstated.<sup>142</sup>

**1958** The Federal Council for Aboriginal Advancement (FCAA) develops from a meeting in Adelaide of affiliated organisations including churches, trade unions, student bodies, labour councils and various committees and councils for Aboriginal rights. The meeting determines a series of goals relating to Indigenous citizenship, living standards, education and land ownership. Members are either organisations formed primarily to be of special benefit to Aborigines or organisations which support the Council's objectives. The Council's major achievement is its vigorous campaign for the 1967 Referendum.

**1964** Charles Perkins and a number of white students undertake the 'Freedom Rides', a well publicised bus ride through north-western NSW towns to draw attention to petty discrimination such as segregated cinemas and whites-only municipal swimming pools. The resulting adverse publicity and open hostility of town residents forces some change in the towns concerned.<sup>143</sup>

**1966** *For 85 years our people have accepted these conditions and worse, but on August 22, 1966, the Gurindji tribe decided to cease to live like dogs.*

The Gurindji people walk off Wave Hill Station in protest against appalling living conditions and inadequate wages. They set up camp at Daguragu (Wattie Creek) an area to which they have traditional rights. National and international attention focuses on Indigenous land issues.

*...the issue on which we are protesting is neither purely economic nor political but moral. We address you as fellow citizens, but our citizenship has not brought us the opportunity to live a decent life ...*<sup>144</sup>

**1966** *Aboriginal Lands Trust Act* (SA) vests Aboriginal reserves in a Lands Trust which could administer the land. Country held under the Land Trusts Act is vested in local communities by 99 year leases.

**1968** The *Mining (Gove Peninsula Nabalco Agreement) Ordinance* (NT) grants a 42 year lease with a right to renew for a further 42 years to Nabalco to develop the bauxite deposits on Gove Peninsula. (See case study, p. 29.)

**1969** Plans are revealed to resume land for tourist development on the Fingal Peninsula on the Southern Head of the Tweed River. The Peninsula, on Bandjalang lands, is the site of an Aboriginal reserve. Members of the community own blocks of land on the beachfront, lease

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<sup>141</sup> *Ibid.*, p. 252.

<sup>142</sup> For further discussion of the Cumeragunja strike see Goodall, *op. cit.*, pp. 247-258.

<sup>143</sup> Bennett, *op. cit.*, p. 8.

<sup>144</sup> A message from Vincent Lingiari to the people of Australia objecting to the term 'Wave hill strikers' and making the point that the issue was wider than an industrial one, published by journalist Christopher Forsyth in *The Australian*, 18 October 1966. Quoted in Rowley, C. D., 1979: *The Remote Aborigines: Aboriginal Policy and Practice Volume III*, Australian National University Press, p. 16.



or hold land by permissive occupancy or live on the reserve. Attempts by members of the community to have their occupancies and leaseholds converted to freehold, a practice widely successful pre-1969, are unsuccessful. A deputation travels from the community to Sydney and Canberra to put the community's position. The deputation receives very positive media coverage. The NSW Minister for Lands agrees that the long-term Indigenous residents of Fingal can convert their tenures into freehold.

- 1970** During an alternative ceremony to the official re-enactment of Cook's landing, wreaths are laid, each carrying the name of a language no longer spoken.
- 1970** The Gibb Committee is set up to investigate conditions on pastoral properties in the Northern Territory. The major recommendation of the Committee, that a legal right to the reservation protecting Aboriginal interests be granted, is ignored and only minor concessions are made. Excision or sub-lease by Aboriginal communities for limited village economic or recreational purposes is to be allowed in 'appropriate' areas.<sup>145</sup>
- 1970** The Yolgnu people including Gumatj elders Milirrpum and others of Yirrkala take legal action against Nabalco Pty Ltd and the Commonwealth of Australia. (See case study p. 29.)
- 1970** *Aboriginal Lands Act* (Vic) grants freehold title to reserves at Lake Tyers and Framlingham to trusts made up of Aboriginal residents
- 1970** A statewide conference of Aboriginal people is held in Sydney and a Land and Rights Council is established.
- 1971** The Aboriginal flag is 'born' as a symbol of Indigenous protest.
- 1971** In *Milirrpum v Nabalco Pty Ltd (the Gove Land Rights Case)*<sup>146</sup> the court decides that Indigenous land laws are incapable of recognition by the Australian common law, that native title does not form and has never formed part of the law of any part of Australia. It states that even if native title did exist then native title rights would have been extinguished. Justice Blackburn further states that even if native title did exist, the Yolgnu could not prove the elements he considers necessary to establish native title. This decision by a single judge of the Supreme Court of the Northern Territory is significant because it is thought to represent the law on native title for 22 years until corrected by the High Court of Australia in *Mabo*.<sup>147</sup> (See case study p. 29.)
- 1971** The Walmatjarri and Nyikina people walk off Noonkanbah station in protest against ill-treatment.
- 1971** The Larrakia people 'sit in' on Bagot Road, Darwin, to protest the theft of land. Bagot Reserve was established as a segregated Aboriginal settlement in 1938, its size was increased in the 1950s. After tight controls on such settlements were eased in the 1960s the Bagot Road residents continued to live on the land. In 1965 a large portion of the reserve was resumed for urban expansion. The sustained political action of the residents succeeds in the retention of the remaining reserve lands which are now managed by an Aboriginal Community Council in whom title was vested in 1974.
- 1971** The Office of Aboriginal Affairs conducts an inter-departmental study to advise the Federal Government. The report is generally supportive of the Yirrkala people's right to claim

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<sup>145</sup> Lippman, *op. cit.*, p. 51.

<sup>146</sup> (1971) 17 FLR 141

<sup>147</sup> *Mabo and Others v. the State of Queensland [No. 2]*, (1992) 175 CLR 1.

royalties from Nabalco, favours leasehold ownership of reserves in all States and advocates the “*provision of funds to buy land outside the reserves in the States and the Northern Territory*”.<sup>148</sup> McMahon rejects the advice.

- 1971** The NSW Aboriginal Lands Board is established. This body, together with the Land and Rights Council, brings together Aboriginal campaigners committed to the goal of land justice from all over NSW.
- 1972** On 25 January, McMahon announces that the Yirrkala people will receive royalties from the bauxite mining on their country, but at a trivial rate. He also announces that the Government will allow a weak form of Aboriginal leasehold over some reserve areas in the Northern Territory. He stresses that traditional ownership is not the reason for the renewed tenure of any reserves and that these actions are not to be construed as the recognition of land rights. Very little money is available for land purchase and no reference is made to either land acquisition outside ‘traditional’ areas or to any compensation for dispossession. Mining companies can continue to mine unimpeded on Aboriginal reserves.<sup>149</sup>
- 1972** Aboriginal people set up the Tent Embassy outside Parliament House in Canberra in the early hours of Australia Day (26 January) in response to McMahon’s announcement, as a protest against the denial of land rights and to demand that the statement of the previous day be retracted.
- 1972** Whitlam commits the federal Labor Party to land rights when he visits the Tent Embassy.<sup>150</sup>
- 1972** On 2 June, the McMahon Government announces it will acquire land at Daguragu (Wattie Creek) as part of a general policy to obtain land for Aboriginal development from pastoral leases in the Northern Territory. It again stresses that this cannot be construed as a recognition of land rights.

On 14 July, National Aborigines Day, the Black Caucus of the Black Moratorium organises marches in support of land rights around Australia.

On 20 July, the police forcibly remove the Tent Embassy and eight people, black and white, are arrested.

On 23 July, two hundred Aborigines and supporters set up the tents again. Violent clashes ensue between police and members of the Embassy, many are arrested and some hospitalised.

On 30 July, two thousand Aboriginal and non-Aboriginal supporters, mobilised by the network of organisations set up by the Black Caucus of the Black Moratorium, again erect the tents without incident although tensions run high.

- 1972** Recognising land rights becomes a major thrust of Commonwealth Government policy after the Labor Government is elected. Whitlam’s election policy speech includes a specific legislative programme to cover, among other things, land rights.<sup>151</sup>

All applications for mining and exploration leases on Northern Territory Aboriginal reserves are frozen and the Woodward Land Rights Commission is established by the Whitlam Government to advise on how land rights should be granted.

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<sup>148</sup> Goodall, H., *op. cit.*, p. 338.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*, p. 351; see also Lippman, *op. cit.*, p. 41 for a summary of the ALP’s policy on land rights.

<sup>151</sup> Lippman, *op. cit.*, p. 58.

## Treaty

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The call for a treaty between Indigenous Australians and the Australian state has been a feature of Indigenous affairs for several decades. In recent years the issue of a treaty has become entangled with the contemporaneous matter of constitutional reform in the lead up to the Centenary of Federation "[b]ut discussion of specific constitutional reforms eventually leads to the vexed question of whether there should be a treaty or some other document establishing on a new footing the entire relationship between the Indigenous people and the Australian state".<sup>152</sup>

A long tradition of treaty making with Indigenous peoples exists in New Zealand, Canada and the USA. Opponents of such a document argue that only nation states have international standing and are capable of entering into treaties while those who support the negotiation of a treaty argue that the international community will take a close interest in such a development in Australia.<sup>153</sup>

1972 The Larrakia people around Darwin demand a treaty.

1979 In April the National Aboriginal Conference puts forward a treaty proposal. In August the Aboriginal Treaty Committee, a prominent group of non-Indigenous people chaired by H.C. (Nugget) Coombs, launches the idea of a treaty in a full page advertisement in *The National Times*. The signatories call for a negotiated "treaty, Covenant or Convention".<sup>154</sup> In September 1979, Fraser agrees to discuss the treaty proposal. The Treaty Committee operates until 1983

1983 The Senate Standing Committee on Constitutional and Legal Affairs Report *Two Hundred Years Later – a report on the feasibility of a compact or 'Makaratta' between the Commonwealth and Aboriginal people* is released. It rejects the idea of a treaty because of its connotations of an agreement between sovereign states. The Committee concludes that sovereignty is not vested in Aboriginal peoples other than that which they share in the Commonwealth. The Committee is in favour of a compact to eventually be inserted into the Constitution by referendum.

1987 In September, Hawke proposes a treaty for the following year.

On 21 June the Barunga Festival is held. The Barunga Statement is presented to Hawke. The statement calls for Aboriginal self-determination and self-management, control of ancestral lands, compensation for dispossession, a national system of land rights and a treaty.

1988 In response Hawke commits to a series of proposals.<sup>155</sup>

1989 In February, Hawke admits that a treaty may not be concluded during the current Parliament.

1990 In February, Hawke attends the Waitangi Treaty anniversary celebrations in New Zealand and announces that preparations for treaty talks in Australia will be accelerated.

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<sup>152</sup> Reynolds, H., *Aboriginal Sovereignty: Three Nations, One Australia*, Allen & Unwin 1996, p. 151.

<sup>153</sup> Nettheim, G. & Simpson, T., "Aboriginal Peoples and Treaties", (1989) 65 *Current Affairs Bulletin* 23 quoted in Reynolds, *op. cit.*, p. 153. See also Martinez, M.A., *Study on treaties, agreements and other constructive arrangements between States and indigenous populations: Second progress report*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1995/27, 31 July 1997.

<sup>154</sup> The content of the proposed treaty is outlined in detail on pp. 151-152 of Reynolds *op. cit.*

<sup>155</sup> *The Sydney Morning Herald*, 13 June 1988 quoted in Reynolds, *op. cit.* p. 153.

- 1990 The Council for Aboriginal Reconciliation (CAR) is established. The Council is charged with the task of determining whether any document of reconciliation would benefit the Australian community as a whole.<sup>156</sup> Hawke ceases to speak of a treaty.
- 1997 CAR's preliminary analysis of responses from questionnaires and meeting records collected prior to the Australian Reconciliation Convention reveal almost universal support for developing some form of national document or documents to underpin reconciliation. During consultations the word 'treaty', amongst others, is used to describe this document although the surveys and meetings also reveal differences in people's understanding of what such a document should entail.<sup>157</sup>
- 1997 The formulation "*of a national treaty or agreement between Indigenous and non-Indigenous people*" is outlined in the handbook for the Australian Reconciliation Convention as a relevant outcome of CAR's regional, sectoral and community meetings prior to the Convention.<sup>158</sup>

The Council for Aboriginal Reconciliation's Seminar Handbook for the Australian Reconciliation Convention includes several propositions about a national document of reconciliation.<sup>159</sup> At the Convention several propositions are accepted by the participants in the seminar on a national document of reconciliation including:

*This Convention believes that a national document of reconciliation is a desirable outcome of the work of the Council for Aboriginal Reconciliation and recommends that a national agreement be negotiated between Indigenous and non-Indigenous peoples first and then the Commonwealth Parliament and put into legislation.*<sup>160</sup>

- 1974** The Reports of the Woodward Aboriginal Land Rights Commission are completed. These reports propose several justifications for land rights:
- to ensure simple restorative justice because land was taken without consent or compensation;
  - to promote social harmony and stability by removing a cause of grievance;
  - to provide opportunities for economic development to a depressed group;
  - to preserve Indigenous people's spiritual link to land; and
  - to maintain and perhaps improve Australia's international standing.<sup>161</sup>

Despite these findings all subsequent land rights legislation in all jurisdictions disclaims any legal obligation to restore land to Indigenous Australians despite all governments readily admitting the injustice of dispossession.<sup>162</sup>

- 1975** In May the Aboriginal Land Fund Commission is established by the Commonwealth Government to purchase land for Aboriginal communities as a direct result of Aboriginal

<sup>156</sup> Council for Aboriginal Reconciliation, *Addressing the Key Issues for Reconciliation*, AGPS, 1993, p. 50. The negotiation of a treaty is also ATSIC policy.

<sup>157</sup> Council for Aboriginal Reconciliation, *The Path to Reconciliation - the people's responses*, 1997, p. 36.

<sup>158</sup> *Ibid.*

<sup>159</sup> Council of Aboriginal Reconciliation, *Renewal of the Nation: Seminar Handbook*, 1997, p. 51.

<sup>160</sup> Council of Aboriginal Reconciliation, *Interim Report: Seminar Outcomes, Australian Reconciliation Convention, 24 July 1997*, publication pending, p. 25.

<sup>161</sup> McRae, H., Nettheim, G. and Beacroft, L., *Indigenous Legal Issues*, LBC Information Services, 1997, p. 205.

<sup>162</sup> *Ibid.*, p. 169.

demands for land rights.

- 1975** In August, Whitlam hands the Wave Hill Station lease to Vincent Lingiari of the Gurindji people at a ceremony at Daguragu.
- 1975** The Liberal-National Country Party Coalition takes office. Aboriginal policy is again changed but land rights policies are retained.<sup>163</sup>
- 1975** The passage of the *Racial Discrimination Act (Cth)* which confers rights to equality before the law and binds the Commonwealth and the states to the *International Convention on the Elimination of all Forms of Racial Discrimination*.
- 1976** The *Aboriginal Land Rights (NT) Act (Cth)* is enacted by the Fraser Government based on the Woodward Reports. The Act remains, for many, a model for national land rights in Australia. The legislation recognises Aboriginal land ownership for about 11 000 Aboriginal people.<sup>164</sup> Significant amounts of land are secured for Aboriginal people under this legislation.
- 1976** The *Aboriginal Councils and Associations Act (Cth)* is enacted and provides for the establishing of Indigenous councils and for incorporating Indigenous associations.
- 1978** Conflict arises between the Commonwealth and the Queensland Government over Aurukun and Mornington Island Aboriginal reserves. In response to the Queensland Government's position that the Commonwealth should have no power over Indigenous reserves, the people of Aurukun occupy the airstrip entrance and various buildings on Aurukun. (See case study p. 34.)
- 1978** At Noonkanbah Station, bought by the Aboriginal Land Fund Commission in 1976, the people of the Yangngara community demonstrate against bulldozing a road through a sacred site. The Yangngara subsequently instruct the Aboriginal Legal Service to take action to prevent further exploration on their land. Although the action is unsuccessful, the court finds that action can be taken to protect sacred sites under the *Heritage Protection Act 1972 (WA)*.
- In the meantime CRA Ltd plan to explore for oil on Yangngara land. The Museum of Western Australia investigates and reports that the proposed drilling site is near a sacred site complex. The community petition the Western Australian Parliament to stop the exploration and the museum seeks to have the site listed as a sacred site under heritage legislation.
- 1978** South Australian Premier, Dunstan commissions the Report of the Pitjantjatjara Land Rights Working Party of South Australia.
- 1979** The Western Australian Government ultimately allows mining on Yangngara land. On 15 May the miners attempt to enter Noonkanbah and are met by a Yangngara protest.
- 1980** In March, CRA enters Noonkanbah under police protection and commences work. In August a convoy of trucks under police escort is sent from Perth.
- 1980** In September a delegation from the National Aboriginal Conference (NAC) presents a statement to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the United Nations which gives delegates a "*brief and eloquent Aboriginal*

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<sup>163</sup> Lippman, *op. cit.*, p. 61.

<sup>164</sup> AIATSIS, *The Little Red, Yellow and Black (and green and blue and white) Book*, 1994, p. 49.

*perspective on the history of Aboriginal settlement, the Noonkanbah affair, and the Federal Government's failure to act... ”*.<sup>165</sup>

*The Australian Federal Government has chosen to remain merely an observer to this gross injustice being perpetrated on an innocent people, and to ignore its responsibilities under the various international Human Rights Covenants to which it is party.*<sup>166</sup>

In Geneva and Australia the Commonwealth Government presents the Noonkanbah situation as “*the exception to the rule*” and claims that it is doing “*its utmost to put in place systems which will ensure that there are no more such aberrations*”.<sup>167</sup> The Sub-Commission specifically recognises the submission of the NAC in its resolution at the end of sittings.

- 1981** Despite the diplomatic success of the NAC delegation to Geneva, drilling begins on 30 August the following year. No oil is found at Noonkanbah.
- 1981** The *Cobourg Peninsula Aboriginal Land and Sanctuary Act* (NT) hands back Gurig National Park (Cobourg Peninsula) to its Indigenous owners. The park is owned by the local Aboriginal people and jointly managed by the Parks and Wildlife Commission of the Northern Territory and the Cobourg Peninsula Sanctuary and Marine Park Board. There is Aboriginal majority representation on the park's board of management and the Northern Territory Parks and Wildlife Commission fulfils its functions according to the decisions of the park's Aboriginal owners.
- 1981** The Report of the Pitjantjatjara Land Rights Working Party of South Australia leads to the enactment of the *Pitjantjatjara Land Rights Act* (SA). This legislation vests freehold title to all former reserve lands on Pitjantjatjara country, as well as some land purchased by the South Australian Government, in a corporate body comprising all the traditional owners.
- 1982** Aboriginal people use the Commonwealth Games to gain international publicity for Queensland's record on land rights. The Bjelke-Petersen Government passes the *Commonwealth Games Act* (1982) (Qld) which restricts individual freedoms, while giving the police wide powers to prevent disturbances. The media coverage of the public controversy is extensive.
- 1983** The Hawke Government comes to power with a strong commitment to land rights. Five principles are proposed which will set the minimum standards for the enactment of land rights legislation in each state and territory. (See case study p. 35.)
- 1983** The *Aboriginal Land Rights Act* (NSW) gives freehold title over existing reserves to the Aboriginal residents. The only non-reserve land that can be claimed is Crown land which is not being used and which has no future use. Recognising that because of colonisation and dispossession few New South Wales Indigenous groups can prove traditional ownership of land, the legislation provides flexible criteria for making land claims. It also facilitates the purchase of land on the open market requiring that the equivalent of 7.5 per cent of general land tax revenue for a 15 year period must be placed in a fund for this purpose.
- 1983** The Western Australian Burke Government establishes the Seaman Aboriginal Land Inquiry. The report focuses on Aboriginal wishes for the land, the land available for their use, the land in pastoral leases, the land titles system, the land granting system, Aboriginal sites, Aboriginal

<sup>165</sup> Hawke, S. & Gallagher, M., *Noonkanbah: Whose Land, Whose Law*, Fremantle Arts Centre Press, 1989, p. 308.

<sup>166</sup> Hagan, J., *Address to the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Geneva, 3 September 1980, quoted in Hawke & Gallagher, *op. cit.*

<sup>167</sup> Hawke & Gallagher, *op. cit.*, p. 309.

disputes over land, mineral and petroleum mining, water resources, access to the sea and environmental protection.

- 1984** The *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) is passed and provides for the protection and preservation of objects and sites of religious, historic and cultural significance to Indigenous peoples.
- 1984** The Seaman Report recommends the transfer of reserve and mission land to Aboriginal ownership, pastoral excisions, a scheme for acquiring and returning pastoral leases to local Aboriginal communities and a land claims process. The report also recommends that Aboriginal groups should have strong powers to veto mining on their land.
- 1984** The Tasmanian Aboriginal (Palawa) community re-occupy their land at Oyster Cove. The 46 Aboriginal people who survived the Wybalenna Aboriginal Settlement were moved to Oyster Cove probation station in 1847. Several years earlier, the station had been abandoned as unfit for convict habitation. By 1855 half the people were dead and by 1871 only Truganini remained there. She moved from the station in 1873. In 1909 Dr. Crowther dug up the graves at Oyster Cove and removed the skeletons.
- 1984** Prime Minister Hawke reneges on an ALP promise that the Northern Territory Aborigines' right to veto minerals exploration and extraction would be extended to all states.
- 1984** *Maralinga Tjarutja Land Rights Act* (SA) grants the Maralinga lands to the Yalata people. This Act also vests former reserve lands and some land purchased by the South Australian Government in an Aboriginal corporate body. This statute and the Pitjantatjara Land Rights Act 1981 (SA) vest freehold title land comprising 18% of the state of South Australia in Aboriginal people.
- 1984** *Land Act (Aboriginal and Islander Land Grants) Amendment Act* (Qld) lays the basis, with subsequent legislation, for the vesting of freehold title under "*deeds of grant in trust*" (DOGIT).
- 1985** The Western Australian Government introduces a Bill in response to the Seaman report including provisions to: establish corporations to hold special freehold title; declare certain Crown land, reserves and missions claimable by Aboriginal people; excise residential areas within pastoral leases; and, assess claims by a supreme court judge sitting as an Aboriginal land tribunal. The Legislative Council rejects the Bill.

The mining industry responds to the findings of the Seaman Report and the Burke Government's proposal for land rights legislation with a "*vitriolic attack against State and federal land rights*"<sup>168</sup> including an extensive print and electronic media campaign against land rights. This mining industry campaign is criticised for its use of statistical misinformation and inaccurate representations of survey results, law and economic theory.<sup>169</sup>

The mining industry's campaign, which coincides with the lead up to the 1986 Western Australian State elections, is highly successful. The Burke Government is returned to office on the strict understanding that land rights, as an issue, is dead and buried.<sup>170</sup>

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<sup>168</sup> *Ibid.*, p. 198

<sup>169</sup> See for example, Coombs, H.C., *Aborigines made Visible: From Humbug to Politics - Kenneth Myer Lecture II*, Friends of the National Library of Australia, Canberra, 1991, pp. 7- 12 for a general discussion of the mining industry's response to the recognition of land rights.

<sup>170</sup> Lippman, *op. cit.*, p. 48

- 1985** The Tasmanian Aboriginal community manages to regain the bones of the people buried at Oyster Cove and attend a traditional cremation at the site to set free the spirits of their ancestors disturbed by Crowther's actions.
- 1985** The Chief Minister for the Northern Territory announces the living area guidelines which make provision for excisions for Aboriginal people on pastoral leases.
- 1986** The policy of national land rights is abandoned. Hawke, under pressure from the mining and pastoral industries and the Western Australian ALP cites a less compassionate public as justification for his decision.<sup>171</sup> Land rights are shifted from the Commonwealth agenda back to the states. (See Chapter 2, pp. 35 – 64.)
- 1986** Title to land at Daguragu (formerly Wattie Creek) is handed to the Daguragu Aboriginal Land Trust. This country is Gurindji traditional land. The hand back is regarded by many as especially significant as this area is often claimed as the birthplace of the modern land rights movement in Australia because of the walk off at Wave Hill by Aboriginal pastoral workers and their subsequent camp at Wattie Creek.<sup>172</sup> (See 1966, p. 56.)
- 1986** The Deed of Grant to Uluru National Park is delivered to the Uluru-Katatjuta Aboriginal Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); it is leased to the Australian National Parks and Wildlife Service for 99 years, its board of management is majority Aboriginal.
- 1986** A struggle begins between the Jawoyn people and BHP, which wants to establish a large gold, platinum and palladium mine at Guratba (Coronation Hill) part of the southern area of Kakadu National Park. Guratba is environmentally sensitive area and forms part of a large area of country known as the 'Sickness Country'. The Jawoyn say that the land was created by their ancestor Bula. They oppose the mine claiming that a disturbance on this country would cause terrible destruction to the whole world.<sup>173</sup>
- The dispute is highly controversial, the Jawoyn are accused of jeopardising the Australian economy and of inventing sacred sites for commercial gain.<sup>174</sup> They are placed under enormous pressure by the Commonwealth and Northern Territory Governments, the mining industry and the media.<sup>175</sup>
- 1986** A grant of land (405 ha) at Wreck Bay is made under the *Aboriginal Land Grant (Jervis Bay Territory) Act* (Cth).
- 1986** The Australian Law Reform Commission's Report on Aboriginal Customary Law is released. The recommendations are not implemented.<sup>176</sup>
- 1987** Amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) introduce a sunset clause ensuring that no land claims can be lodged after June 1997. Further

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<sup>171</sup> A critique of the findings of the Australian National Opinion Poll taken in 1984 regarding land rights and used by Hawke to justify his retreat from national land rights can be found in Goot, M. & Rowse, T., "The 'backlash' hypothesis and the land rights option" (1991) 1 *Australian Aboriginal Studies*, pp. 5-6.

<sup>172</sup> Perkins, C., "Governments and Aboriginal Communities" (1989) 48 *Australian Journal of Public Administration* 2, p. 23.

<sup>173</sup> Ah Kit, J., *Indigenous customs and the evolution of law in the South Pacific*, speech delivered at the French University of the Pacific, Noumea, 12 July 1994, p. 5.

<sup>174</sup> Ah Kit, J., *Development and Sacred Sites*, Global Diversity Conference, April 1995, p. 7

<sup>175</sup> Ah Kit, J., (1994) *op. cit.* p. 6.

<sup>176</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, AGPS, 1986.



amendments, first proposed in 1986, to diminish the rights of land councils over mining are vigorously opposed by the Federation of Land Councils and long-term trade union and church allies. International support for Aboriginal people on this issue is also strong.<sup>177</sup>

A compromise deal on the mining veto is made in June – the land councils agree to amendments which distinguish between mining exploration and mining production. Exploration on land can be banned for five years. Once exploration occurs land owners will only be paid for damage and disruption and have no veto over production. These ‘conjunctive’ agreements mean, in effect, that Aboriginal people who agree to exploration on their lands will have no power to veto mining.<sup>178</sup>

- 1987** The Victorian Government asks the Commonwealth to legislate on Victorian land rights when a land claims bill fails to pass after significant opposition from the Legislative Council. The Commonwealth passes the *Aboriginal Land (Lake Condah and Framlingham Forest) Act* (Cth). The Act vests ownership in an Aboriginal Corporation for each area with significant powers of control over mining and powers of community government. The amount of land involved is minuscule. The Victorian legislation does not provide for ongoing claims. Other legislation is also passed in Victoria vesting small areas of land in Aboriginal ownership.<sup>179</sup>
- 1988** A year long campaign to protest the Australian bicentennial celebrations begins. On Australia Day tens of thousands of Aboriginal and Torres Strait Islander peoples march through the streets of Sydney to celebrate 200 years of survival.
- 1989** Further amendments are made to the Northern Territory legislation which prevents, as of March 1990, Aboriginal claims to stock routes and stock reserves and removes the rights of traditional owners to claim Crown land previously taken over by the pastoral industry. Specified stock routes and reserves are added to Schedule 1 of the Act and Aboriginal claims to other stock routes are withdrawn. In return the Northern Territory Government provides for the excision of ‘living areas’ from pastoral leases. The procedure for processing living area applications is now contained in the *Pastoral Land Act 1992* (NT). Aboriginal people in the Northern Territory now regard this procedure a failure.<sup>180</sup>
- 1989** The *Nitmiluk (Katherine Gorge) National Park Act* (NT) makes similar arrangements for Nitmiluk (Katherine Gorge) to those in place for Cobourg Peninsula.
- 1990** The Aboriginal and Torres Strait Islander Commission (ATSIC) is established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth.).
- 1990** The Federal Resource Assessment Commission (RAC) begins an intensive inquiry into mining at Guratba (Coronation Hill).
- 1991** The RAC finds that mining at Guratba and elsewhere in the ‘Sickness Country’ will damage Jawoyn society and culture. The Commonwealth Cabinet resolves to prohibit mining at Guratba. The Commonwealth also adopts RAC recommendations which will halt mineral exploration in the region and protect the ‘Sickness Country’.
- 1991** The *Council for Aboriginal Reconciliation Act* (Cth) establishes the Council for Aboriginal

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<sup>177</sup> Lippman, *op. cit.*, p. 49.

<sup>178</sup> McRae et al, *op. cit.*, p.173.

<sup>179</sup> See McRae et al, *op. cit.*, p. 196.

<sup>180</sup> McRae et al, *op. cit.*, p. 190. See also Lippman, *op. cit.* p. 52 for a discussion of the living area guidelines and their failure from an Indigenous perspective.

Reconciliation as the agency superintending the process of reconciliation between the Indigenous and other peoples of Australia.

**1991** *Aboriginal Land Act (Qld) and Torres Strait Islander Land Act (Qld)* provides for transfer into Indigenous ownership all previous reserve land, land under DOGIT titles and the Aurukun and Mornington Island Shire leaseholds. The legislation also sets up a Land Tribunal to hear claims to certain areas of Crown land gazetted as available for claim. A grant of freehold title will result if traditional affiliation or historical association can be proved. Claims based on 'economic or cultural viability' result in leasehold title being granted. The Act allows some claims processes.

**1991** The Report of the Royal Commission into Aboriginal Deaths in Custody, which was established by letters patent in October 1987 is released.<sup>181</sup> It investigated the deaths of 99 people between January 1980 and the end of 1990. The report makes 339 wide-ranging recommendations to governments designed to reduce the number of black deaths in custody. The report is greeted with enormous hope by the Indigenous community as a blueprint for change. All governments failed to adequately implement its recommendations.

*Aboriginal people are heavily overrepresented in all forms of custody and this has not dropped since the Royal Commission was established, nor since the Royal Commission's final National Report was tabled in Federal Parliament...*

*During 1991, Aboriginal people were 19 times more likely to die in custody than non-Aboriginal people.*<sup>182</sup>

**1992** Keating's Redfern speech for the Australian Launch of the International Year for the World's Indigenous People recognises the contribution of non-Indigenous Australia to the current disadvantage of Indigenous peoples and honestly considers the history of the relationship between Indigenous and non-Indigenous Australians.

*It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.*

*With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask how would I feel if this were done to me? As a consequence, we failed to see that what we were doing degraded all of us.*<sup>183</sup>

**1992** The High Court decision in *Mabo*<sup>184</sup> recognises the pre-existing native title rights of Indigenous Australians. The legal myth of *terra nullius* is rejected by the court. Native title continues in cases where Indigenous people have an on-going connection with their traditional lands as determined by their own laws and customs, and an act of the Crown has not extinguished these rights.

**1993** The first national meeting of Aboriginal and Torres Strait Islander peoples is held at Eva Valley, Northern Territory, to formulate a response to the High Court decision in *Mabo*. The

<sup>181</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991.

<sup>182</sup> *Ibid.*

<sup>183</sup> The Hon., the Prime Minister, P. J. Keating, M.P., *Australian Launch of the International Year for the World's Indigenous People*, Redfern, 10 December, 1992.

<sup>184</sup> *Mabo & Others v The State of Queensland [No.2]*, (1992) 175 CLR 1.

meeting agrees on a statement to be presented to the Prime Minister which rejects the Commonwealth Government position on native title, calls for national standards for native title recognition and sets out five principles to guide Commonwealth actions on native title.<sup>185</sup>

- 1993** A meeting of approximately 500 Indigenous delegates from around the country is held at Boomanalla Oval in Canberra to determine a united Indigenous response to the Commonwealth Government's proposed native title legislation. Although a united position is not achieved a core group, consisting mainly of land councils and legal services, decides to negotiate with the Government about the bill.
- 1993** The *Native Title Act* (Cth) sets up a land management regime to deal with the native title rights and interests of Indigenous Australians as recognised by the common law in the *Mabo* decision.<sup>186</sup> Negotiations between Indigenous stakeholders, pastoralists, the mining lobby and governments about the legislation take place in the latter part of 1993. The Indigenous representatives place considerable pressure on the other stakeholders to deal fairly with the native title rights of Indigenous peoples.
- 1994** The National Native Title Tribunal is established to receive, register and accept native title claims under the *Native Title Act* 1993 (Cth); notify the public; identify parties whose interest may be affected; conduct mediation sessions to try to resolve the claims; and, if agreement is reached, to make a determination and register it in the Federal Court.<sup>187</sup>
- 1995** The *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* (Cth) sets up the Indigenous Land Corporation (ILC) and the Aboriginal and Torres Strait Islander Land Fund. The ILC's role is to assist Indigenous Australians to acquire and manage land in a sustainable way to obtain economic, environmental, social and cultural benefits. Funds for such activities are made available through the Aboriginal and Torres Strait Islander Land Fund.
- 1995** The Western Australian Government challenges the *Native Title Act* 1993 (Cth) arguing that it is inconsistent with the *Racial Discrimination Act* 1975 (Cth) because it discriminates against non-Indigenous title holders who cannot enjoy native title rights. In *Western Australia v the Commonwealth*,<sup>188</sup> Western Australia loses the case and the High Court states that the *Native Title Act* can be regarded "*either as a special measure... or as a law which, though it makes racial distinctions, is not racially discriminatory*".<sup>189</sup>
- 1995** The *Aboriginal Land Act* (Tas) establishes an Aboriginal Land Council to use and sustainably manage Aboriginal land and its natural resources for the benefit of all Aboriginal persons. Twelve areas of significance to Aboriginal people are vested in the council including Oyster Cove which is now a historic site with Aboriginal custodians. (See p. 66.)

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<sup>185</sup> *The Eva Valley Statement* is reproduced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, AGPS, 1995, p. 221.

<sup>186</sup> Related legislation has been passed in the states/territories: *Native Title (New South Wales) Act* 1994 (NSW); *Land Titles Validation Act* 1994 (Vic); *Native Title (Queensland) Act* 1993 (Qld); *Titles Validation Act* 1995 (WA); *Native Title (South Australia) Act* 1994 (SA); *Native Title (South Australia) Regulations Act* 1995 (SA); *Environment, Resources and Development Court (Native Title) Rules* 1995 (SA); *Environment, Resources and Development Court (Native Title) Regulations* 1995 (SA); *Native Title (Tasmania) Act* 1993 (Tas); *Confirmation of Titles to Land (Request) Act* 1993 (NT); *Validation of Titles and Actions Act* 1994 (NT); *Native Title Act* 1994 (ACT).

<sup>187</sup> National Native Title Tribunal, *Annual Report 1995/96*, AGPS, 1996, p. iii.

<sup>188</sup> (1995) 128 ALR 1.

<sup>189</sup> (1995) 128 ALR 1, p. 62.

- 1995** 17 Aboriginal people die in custody, the highest number ever recorded.<sup>190</sup>
- 1995** The Social Justice Package, the third stage of the Keating Government's response to the High Court's *Mabo*<sup>191</sup> decision agreed during negotiations between the Commonwealth Government and representatives of Aboriginal and Torres Strait Islander organisations, is to provide measures directed towards structural reform and encompassing a broad range of social, economic and cultural factors. The Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation (CAR) and the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner provide the Commonwealth with ideas on possible social justice initiatives.<sup>192</sup> The process does not progress from that point.
- 1996** When the *Racial Hatred Act 1995* (Cth) is finally passed, following significant debate, criminal sanctions for acts of racial hatred are not included in the legislation. While complaints may be made about publicly offensive or abusive behaviour based on racial hatred, only civil remedies are available to the complainant. Although the 1991 *Report of the National Inquiry into Racist Violence in Australia* also recommended that the *Federal Crimes Act 1914* be amended to include "a new criminal offence of racist violence and intimidation", as well as "a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence" these recommendations are not implemented.<sup>193</sup> The *Racial Hatred Act* also falls short of the implementation requirements of the *Convention of the Elimination of All Forms of Racial Discrimination* to which Australia is a signatory.
- 1996** On 31 January, title to traditional lands including Guratba (Coronation Hill) is handed to the Jawoyn people by Tickner, the Minister for Aboriginal and Torres Strait Islander Affairs. The area, known as Gunlom and Gimbat, is held by the Gunlom Aboriginal Land Trust, and is leased to the Australian nation as part of Kakadu National Park. (See 1986, p. 67 and 1991, p. 69.)
- 1996** Significant amendments are proposed to the *Native Title Act 1993* (Cth) by the Howard Government to allegedly improve the 'workability' of the legislation. Proposals include removing the right to negotiate and alterations to the threshold test for native title claims. Many Indigenous peoples protest the racially discriminatory nature of these amendments through the media and official channels, such as parliamentary inquiries on the amendments.<sup>194</sup> Indigenous opposition to the amendments is also expressed in international forums.<sup>195</sup>
- 1996** The first resolution of a native title claim for mainland Australia by the Dunghutti people of Crescent Head, NSW. The Dunghutti people agree to allow development of 12.4ha of their

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<sup>190</sup> Dalton, V., *Australian Deaths in Custody & Custody-related Police Operations 1996*, Australian Institute of Criminology, 1997, p. viii.

<sup>191</sup> *Mabo & Others v The State of Queensland [No.2]*, (1992) 175 CLR 1.

<sup>192</sup> ATSIC, *Recognition, Rights and Reforms: Report to Government on Native Title Social Justice Measures*, ATSIC, 1995; CAR, *Going Forward: Social Justice for the First Australians*, AGPS, 1996; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice Strategies and Recommendations*, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995.

<sup>193</sup> Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia*, AGPS, 1991, p. 389.

<sup>194</sup> See for example Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1995/96*, AGPS, 1996.

<sup>195</sup> See for example Aboriginal and Torres Strait Islander Social Justice Commissioner, *Review of Developments Pertaining to the Protection of the Human Rights and Fundamental Freedoms of Indigenous People: Native Title*, Intervention to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, Fourteenth Session, Geneva, August 1996.

land in return for compensation for the Government's sale of the land without first establishing whether native title existed.<sup>196</sup>

- 1996** The High Court decision in *Wik Peoples v State of Queensland & Others; Thayorre People v State of Queensland & Others*<sup>197</sup> finds that pastoral leases do not give exclusive possession to pastoralists and that native title rights are not necessarily extinguished by the grant of a pastoral lease. Native title rights can therefore continue at the same time that land is subject to a pastoral lease. But where there is a conflict between the exercise of rights granted under a pastoral lease and the exercise of native title rights, the rights of the pastoralist will prevail.
- 1996** A report is tabled in the Western Australian Parliament recommending that all lands held in the Aboriginal Lands Trust be vested in Aboriginal ownership. Aboriginal reserves are vested in and managed by an Aboriginal Affairs Planning Authority, a non-Aboriginal body set up under the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. The Authority has the power to transfer land to the Aboriginal Lands Trust, an all Aboriginal body, which has the power to grant 99 year leases to local communities.
- 1997** The Howard Government introduces a ten point plan to address the *Wik* decision.<sup>198</sup> It is widely rejected by Indigenous peoples. For many Aboriginal and Torres Strait Islander peoples the plan represents an attempt by the Government to extinguish native title on pastoral leases. The plan is rejected at a national level and a working group is established to formulate an Indigenous response to the proposals.
- 1997** The First Australian Reconciliation Convention calls for a people's movement, similar to that which spearheaded the 1967 Referendum, to achieve reconciliation between Indigenous and non-Indigenous Australians.
- 1997** The group Australians for Native Title and Reconciliation, a coalition of non-government organisations and concerned citizens, begins a campaign of protests against the Commonwealth Government's response to the *Wik* decision.
- 1997** Members of the National Indigenous Working Group present the Indigenous position on native title and *Wik* and the Government's response in meetings in Europe. Support is expressed for the Indigenous position:

*I have to say that it seems from all these thousands of miles away that Mr Howard and his colleagues have handled their response to the Wik case in, putting it mildly, a bloody unsympathetic way.*<sup>199</sup>

The Commonwealth Government announces a six-month review of the *Aboriginal Land Rights (Northern Territory) Act 1976 (NT)*. The review will examine the overall effectiveness of the legislation; the operation of its exploration, mining and royalties provisions; the operation of the Aboriginal Benefits Trust Account; and the future role and structure of the land councils. It is expected to commence in August 1997.<sup>200</sup>

- 1997** The Howard Government fails to adequately respond to the recommendations of the Evatt

<sup>196</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Native Title Newsletter*, 6/96, p. 1.

<sup>197</sup> (1996) 187 CLR 1; see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1994*, pp. 95-98.

<sup>198</sup> *Wik Peoples v State of Queensland & Others* (1996) 187 CLR 1.

<sup>199</sup> Media Monitors, *Broadcast Transcript of Dr Norman Goodman, British Labour MP, member of the British Labour Parliamentary Human Rights Committee*, ABC Radio, 23 August 1997.

<sup>200</sup> Ryan, C., "Aboriginal land rights facing review", *The Age*, 17 July 1997, p. 8.

*Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).*<sup>201</sup> The report calls for the adoption of a national policy covering all aspects of Aboriginal culture and heritage. The controversy surrounding Kumurangk (Hindmarsh Island) at both State and Commonwealth levels, and the Commonwealth's continued failure to act on the application lodged by the Gamileroi people over a sacred site at Boobera Lagoon reflect the failure of all governments to adequately protect the culture and heritage of Indigenous peoples.

**1997** *Bringing them home*, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families is tabled in parliament. The Inquiry was established by the Federal Attorney-General in 1995 to consider past and current policies and practices of removing Indigenous children from their families. The report makes 55 recommendations to governments. The Commonwealth Government fails to apologise on behalf of the nation to Aboriginal and Islander people forcibly removed from their families as children. The Howard Government's response to the recommendations is expected in late 1997.

An official apology is made to the stolen children by the governments of South Australia, Western Australia, Tasmania, the Australian Capital Territory and New South Wales. Various local governments and churches across the country also make official apologies.

**1997** The South Australian Minister for Aboriginal Affairs announces the South Australian Government's intention to return land at Emu to the traditional owners once a clean up of the area is completed. The land was used by the British for nuclear tests in the 1950s. The land will be added to the freehold lands handed back under the *Maralinga Tjarutja Land Rights Act* in 1984.

## Chapter 3: The New Stolen Generation

### Introduction

The various responses to *Bringing them home*, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families have largely concentrated on the effects of past policies and practices on the removal of Indigenous children. The critical, cotemporary implications of the Inquiry's fourth term of reference have been almost entirely overlooked:

Examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

The devastating impact of the operation of the juvenile justice system on the lives of Aboriginal and Torres Strait Islander children has become a thematic element of my last two reports:

In 1995:

*We despair watching the impact of incarceration on our young people. Fourteen year olds come home street-wise sullen men. The current system damages our children, while doing nothing to protect our communities and protect the wider community in any lasting way.*<sup>202</sup>

<sup>201</sup> Evatt, E., *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996.

<sup>202</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, Third Report 1995, AGPS, 1996. p.23.

In 1996:

*These are our kids. Without denying their responsibility for their behaviour, our kids are most frequently offended against before they offend against others. Before society has any moral claim to exact punishment, our responsibilities to them must be met. This is so for all kids.*<sup>203</sup>

I have consistently drawn attention, not only to the damage to the lives of Indigenous children and their families, but also to the broader social problems which the operation of the criminal justice system is relentlessly building for the future of this country.

It is clearly necessary to present the realities again: to provide another opportunity to consider the relevant findings of the National Inquiry. Perhaps, in isolation they will receive the attention they deserve. Accordingly, I asked eminent criminologist, Mr. Chris Cunneen, to draw out the salient points. They are necessarily broad brush and to some degree abstract. What cannot be forgotten is that behind the statistics and statements of general principles are the lives of young children whose futures are now being shaped by their experience in police stations, courts and detention centres. What is happening day in, day out, beyond the view of the rest of the community, has direct relevance for the entire Australian community.

There has been profound and understandable reluctance for people to contemplate that past laws, policies and practices could be caught within the term 'genocide'. It has been said that the past is the past, that the evaluation of the past should not be made in terms of contemporary values. Leave those arguments to one side. The separation of Aboriginal and Torres Strait Islander children from their families continues. It is not done by reference to race, it is not done for the purposes of assimilation, but consider contemporary separation from the most practical perspective possible: what are the effects of the current laws, policies and practices of the Australian juvenile justice system? They result in the massively disproportionate arrest and incarceration of Indigenous youth. If the statistics were presented without explanation the disproportions alone would identify the issue involved.

The dividing line is one of race. Systemic discrimination removes Aboriginal and Torres Strait Islander children from their families and the rates of separation are in many places accelerating. Whatever the rationale of removal, Indigenous children are taken away from their families and deprived of what the Prime Minister most values:

*I believe that Australian families not only provide the greatest source of emotional and spiritual comfort to Australian individuals but beyond that a functioning united coherent family is the most effective social welfare system that any nation has ever seen.*

*And the widening gap between rich and poor, much of the social disintegration of this country and much of the unemployment of this country can be traced to the disintegration of family life. A Government that believes very strongly in the robust independence of individualism in Australia and Government that recognises and respects and seeks to enhance the cohering and stabilising role of the family unit within Australian society. They are our principles, that is our credo and faithful adherence to those principles and that credo will, I believe, deliver excellent Government for future Australians.*<sup>204</sup>

<sup>203</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, Fourth Report 1996, AGPS, p. 21.

<sup>204</sup> The Prime Minister, the Hon. J. Howard, MP, 'Address to the 61st Annual State Conference of the National Party', Queensland, 20 July 1996.

I share this belief in the importance, the centrality of family life and its high potential to shape the lives of future Australians. Yet Aboriginal and Torres Strait Islander children continue to be arrested, incarcerated and removed from their families at culpably distorted rates when compared with other Australian children.

These are not welfare removals. They do not reflect inherent ‘criminality’. The regional variations show how rates of Indigenous arrest and detention are reflective and responsive to the laws and practices applied by the criminal justice system. Poverty, lack of education, health and housing are objective factors which drive systemic discrimination, overt racism can catalyse its operation. Overall there is the human reality of our people, our families and our communities, whose knowledge of past treatment is reinforced by current experience. The notion of a country which gives everybody a ‘fair go’ becomes a bitter mockery. Its bitterness will be shared by all Australians unless we act, sharing responsibility, to place the life prospects of Indigenous and non-Indigenous children within the same field of equality.

*We don't want our kids taken away. Out here in Broken Hill if our kids go to juvenile justice they can't be kept here because it's not adequate enough for them. They [DOCS] say: 'Oh well, we only get a few kids here now and again', but that's a few kids' lives that have been destroyed.*

*My own grandson has been taken down to Wagga to the Riverina juvenile justice. We was only able to visit him once because of the distance, the miles, and the money we just haven't got to go down there. And they're locked away from us, we got no access to them. If you haven't got the money – which most people haven't got out this way because we're very isolated – it doesn't give us a chance to get down and see our kids. So you lay down every night wondering what's happening to them, if they're all right ... If they wasn't being treated properly, they'd be too frightened to say, because they'd know that they'd be locked away there again with them people and they'd get it worse.*

*Our Aboriginal kids – we should be looking after them ourselves. We should be properly resourced to do it, because those kids are torn between worlds and they're very disadvantaged out here. They don't get the same work as every other young person gets – you know, you've got big shopping centres here and lots of businesses, but you don't see any of our people employed in them. The only jobs you get out this way are government-funded jobs, and soon as the funds run out there's no more work. And our kids are disadvantaged in a lot of ways because they've got nothing to do and they get into trouble. And then straight away they're taken away from us again.*

*There's going to be a lot more problems over the years because we're not funded enough. What are they going to do? Just keep on taking our kids and locking them away, and taking our people and locking them away? There's got to be a better solution than what they're doing now.*

*The children – they're so scared when they've got to go to court. Even when they've got to go to court for a little thing, they think they're going to get sent away and they're not coming back. The court is some place where they think they're going to be taken away from their people.*

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Confidential evidence 771, New South Wales.*



## The continuum in forced removals

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (the Inquiry) found that the high levels of criminalisation and subsequent incarceration of Indigenous young people in Australia effectively amounts to a new practice of forced separation of Aboriginal and Torres Strait Islander children and young people from their families. The failure to reform juvenile justice law and practice, the failure to remedy the social justice issues facing Indigenous youth, and the failure to respect the right of self-determination of Indigenous people means that in practice the human rights of Indigenous young people and their families are being abused.

Aboriginal child care agencies and Aboriginal legal services throughout Australia consistently drew attention during the 1980s to the problems associated with the high levels of criminalisation of Indigenous youth.<sup>205</sup> Some academic commentators argued that the over-representation of Indigenous young people in juvenile corrections represented a continuation of earlier assimilationist removal policies by way of a process of criminalisation rather than by way of welfare.<sup>206</sup> Aboriginal organisations in their submissions to the Inquiry also argued strongly that there was a continuum between earlier forced removals and current levels of criminalisation and detention. The Inquiry supports this interpretation.

Empirical evidence supporting this argument can be found in a raft of research covering most Australian jurisdictions which indicate that, not only are Indigenous young people over-represented in the juvenile justice system, they are most over-represented at the most punitive end of the system, in detention centres.<sup>207</sup>

## We know the problem

The Inquiry found that the issues facing Indigenous young people have been identified and demonstrated time and time again. It is not surprising that Indigenous organisations and commentators draw attention to the historical continuity in the removal of Indigenous children and young people when the key issues in relation to juvenile justice have already been identified for some time. Yet the problem of over-representation appears to be deepening.

We know that 40% of all young people held in police custody are Indigenous.<sup>208</sup> This figure demonstrates a staggering use of police custody for Indigenous children and young people given that they comprise only 2.6% of the national youth population. In fact, the rate of custody per 100,000 of Indigenous young people is 1,333 compared to a rate of 52 for non-Indigenous youth.

<sup>205</sup> D'Souza, N., 'Aboriginal Children and the Juvenile Justice Systems', *Aboriginal Law Bulletin*, Volume 2, Number 44, 1990.

<sup>206</sup> See, Cunneen, C., *A Study of Aboriginal Juveniles and Police Violence*, Human Rights and Equal Opportunity Commission, 1990; Cunneen, C., 'Enforcing Genocide? Aboriginal Young People and the Police', in White, R. and C. Alder (eds) *Police and Young People in Australia*, Cambridge University Press, 1994; O'Connor, I., 'The New Removals: Aboriginal Youth in the Queensland Juvenile Justice System', *International Social Work*, Volume 37, 1994, pp. 197-212.

<sup>207</sup> Gale, F., Bailey-Harris, R., and Wundersitz, J., *Aboriginal Youth and the Criminal Justice System*, Cambridge University Press, 1990; Luke, G. and Cunneen, C., *Aboriginal Over-Representation and Discretionary Decisions in the New South Wales Juvenile Justice System*, Juvenile Justice Advisory Council of New South Wales, 1995; Criminal Justice Commission, 'Children, Crime and Justice in Queensland', Research Paper Series, Vol 2, No 2, September 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner, (1995) and (1996) op. cit.

<sup>208</sup> National Police Custody Survey, August 1995, Human Rights and Equal Opportunity Commission, *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS, 1997, p. 492. ['Bringing them home']

We know that nationally some 36% of youth in juvenile correctional institutions are Indigenous. The rate of incarceration is 540 per 100,000 for Indigenous young people compared to a non-Indigenous rate of 25 per 100,000. We know that the situation is getting worse. The most recent figures show that there were 26% more Indigenous young people in detention at the end of June 1996 than there were at the end of September 1993. The rate per 100,000 of the Indigenous youth population incarcerated had also increased by 24% from 408 to 540. During the same period, the number of non-Indigenous young people in detention centres increased by 5%.

We know that Indigenous children and young people are separated by long distances from their families and communities. Most detention centres in Australia are potentially hundreds, if not thousands of kilometres away from many Aboriginal communities they service. The distance makes it extraordinarily difficult for parents and relatives to visit incarcerated young people and therefore exacerbates the extent of removal. It is an issue that particularly affects Indigenous children and young people because they are more likely to come from a non-urban, rural or remote, background.<sup>209</sup> They are far from home often without any regular contact with their families.

## **Policing issues**

The Stolen Generations report dealt extensively with issues relating to policing Indigenous young people. These related to both general matters such as Aboriginal/police relations, as well as specific concerns about police powers, the utilisation of police discretion and the regulation of police behaviour. Poor Aboriginal/police relations, racism and over-policing were seen to be an issue in many parts of Australia.

The Inquiry found that arrests for public order offences still constitute a significant reason for the involvement of Indigenous young people in the juvenile justice system and that arrests of Indigenous young people were increasing.

Various types of legislation, including welfare, local government and parental responsibility developed to regulate the behaviour of Indigenous young people in public places contribute to over-policing.

All the available research evidence shows overwhelmingly that Indigenous young people do not receive the benefits of police cautioning schemes to the same extent as non-Indigenous young people.

The use of Indigenous elders (rather than police officers) to issue cautions to kids is not widely used. Cautioning by Aboriginal and Torres Strait Islander elders instead of police, can only be done on the request of an authorised police officer.

The decision as to who cautions an Indigenous young person should reside with Indigenous communities and organisations. Current measures show no change in decision-making power and are tokenistic.

Indigenous young people are more likely than are non-Indigenous young people to be proceeded against by way of arrest rather than by summons.

There is widespread and disproportionate use of police custody for Indigenous juveniles.

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<sup>209</sup> Luke and Cunneen (1995), *op. cit.*

## Issues of diversion

The Inquiry found that one of the most critical issues in relation to the development of diversionary schemes has been the lack of Indigenous consultation, negotiation and control over those schemes. In particular the Inquiry considered the use of family group conferencing, and found that the available theoretical, observational and empirical evidence strongly suggests that family group conferencing, far from being a panacea for offending by Indigenous young people, is likely to lead to harsher outcomes for Indigenous children and young people.

Family Group Conferencing is a model that, by and large, has been imposed on Indigenous communities without consideration of Indigenous cultural values, and without consideration of how communities might wish to develop their own Indigenous approaches to the issue.

Police control over the referral process in many jurisdictions is not likely to benefit Indigenous access to conferencing.

There is no provision for Indigenous organisations and communities to make decisions about whether their children would be best served by attending a conference.

The best that is included in conferencing models is that when conferences are held which involve Indigenous youth, then an elder or other representative of the young person's community must be invited. Such an approach is tokenistic.

## Sentencing and legislative issues

The Inquiry found that throughout Australia Aboriginal and Torres Strait Islander young people generally receive harsher outcomes in the Children's Court than non-Aboriginal young people, particularly at the point of being sentenced to detention.<sup>210</sup>

Greater likelihood of incarceration was caused by a number of factors including:

- Greater likelihood that an Indigenous young person comes from a rural background and appears before a non-specialist Children's Court (or Justice of the Peace). Geographic isolation also raises issues of inadequate legal representation, fewer non-custodial sentencing options and harsher sentencing attitudes by non-specialist magistrates.
- Greater likelihood that an Indigenous young person has been institutionalised previously, was less likely to have received a diversionary alternative to court, and was more likely to have a greater number of prior convictions. Each of these factors increases the likelihood of a custodial order.
- Formal intervention occurs at a younger age with Indigenous children, they accumulate a criminal record at a much earlier age than non-Indigenous children.
- Earlier discrimination in the system results in Indigenous young people being less likely to receive diversionary options and being more likely to receive the most punitive of discretionary options. These factors compound as the young person moves through the system. Apparently equitable treatment at the point of sentencing may simply mask earlier systemic biases.

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<sup>210</sup> Gale et al, *op. cit.*; Crime Research Centre, *op. cit.*; Luke and Cunneen, *op. cit.*; Criminal Justice Commission, *op. cit.*.

- Mandatory and repeat offender sentencing legislation will have the greatest negative impact on Indigenous young people. They are precisely the group who, because of the reasons discussed above, are more likely to have longer criminal histories.
- There is inadequate legislative recognition of the importance of the cultural background of the young person just as there are no legislative obligations to negotiate with Aboriginal and Torres Strait Islander communities.

Recommendation 62 of the Royal Commission into Aboriginal Deaths in Custody called for negotiation in developing diversionary alternatives to custody, and links self-determination with an assumption of responsibility, where it says:

*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.*<sup>211</sup>

## **The underlying issues**

The Inquiry considered the poor socio-economic conditions which make Indigenous young people more susceptible to criminalisation and removal, as well as the ongoing effects on later generations of earlier removals under assimilationist policies.

There are numerous social, economic and cultural factors which contribute to the likelihood of increased intervention by juvenile justice agencies in the lives of Indigenous children and young people. Some of the factors arise from cultural difference. Others are the outcome of dispossession and marginalisation which today manifest themselves in high levels of poverty, ill-health and homelessness.<sup>212</sup> All of which, independent of specific racial and cultural factors, are predicative of high level of contact with the criminal justice system.

The Inquiry noted that cultural difference, particularly different familial structures and child-rearing practice can lead to adverse decisions by juvenile justice, welfare and other agencies, particularly where cultural difference is not understood or does not inform policy development and implementation. Other issues related to issues considered by the Inquiry included the incidence of domestic violence, alcohol and other substance abuse, poor health and mental illness. Drawing on other research the Inquiry noted that substance abuse is a major problem for Indigenous young people in some communities and can spark intervention by welfare or juvenile justice authorities. Other health factors which were considered included problems with mental health, environmental health, hearing loss and poor nutrition – all of which can be associated with juvenile justice intervention.

The Inquiry found that Indigenous young people were severely disadvantaged in areas of education, housing, employment and income. For example the unemployment rate of Indigenous young people was more than twice that of all Australian youth (50% compared to 22% for 15 to 19 year olds; 46% compared to 13% for 20 to 24 year olds). ABS data showed that one in five Indigenous young people report no income at all is a disturbing feature and one likely to increase the probability of criminalisation.

The Inquiry also considered the effect which the removal of Indigenous children under the previous

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<sup>211</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report, Overview and Recommendations*, AGPS, 1991, p. 45.

<sup>212</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, (1995), *op. cit.*, p.26.

assimilationist policies has had on later generations – the inter-generational transmission of problems. The Inquiry found that removal and institutionalisation had a number of effects including the severing of cultural knowledge, the severing of knowledge about being a parent and a sense of unresolved psychological trauma.

All of these factors negatively effect children and increase their likelihood of institutionalisation. There is little doubt that there is a direct association between removal and the likelihood of criminalisation and further instances of removal. It is yet another example of the continuum of forced separations.

Both the solutions and the issues have been identified. The issues raised above have been stated time and time again.

Problems in relation to policing and the courts have been well documented since Eggleston's (1976) pioneering work. Problems with Aboriginal/police relations across most of Australia were well documented in the early 1980s<sup>213</sup> and repeated in national inquiries and regional studies in the late 1980s and early 1990s.<sup>214</sup> The failure of Indigenous young people to receive fair treatment in diversionary options such as police cautioning or less intrusive methods such as summons and court attendance notices was demonstrated from the mid-1980s onwards,<sup>215</sup> and the failure of other diversionary schemes such as panels to meet the needs of Indigenous youth from the end of the 1980s.<sup>216</sup> Failure to comply with police instructions regarding the presence of a parent or adult, failure to notify Aboriginal Legal Services and the inadequacy of police guidelines in regulating police behaviour have been commented upon periodically for a decade and a half.<sup>217</sup>

All of the above issues were addressed comprehensively in the findings and the recommendations of the Royal Commission into Aboriginal Deaths in Custody. They have also been addressed in various international conventions to which Australia is a party. A key recommendation of the Royal Commission into Aboriginal Deaths in Custody in relation to Indigenous children and young people in police custody said that, only in exceptional circumstances, should juveniles be detained in police lock-ups.<sup>218</sup>

The *Convention on the Rights of the Child* also requires that arrest and detention following arrest should be measures of last resort.<sup>219</sup> Alternatives should be utilised unless the circumstances are

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<sup>213</sup> Anti-Discrimination Board, *A Study of Street Offences by Aborigines*, NSW Anti-Discrimination Board, 1982; Roberts, L., Chadbourne, R. and Murray, R., *Aboriginal/Police Relations in the Pilbara*, Special Cabinet Committee on Aboriginal/Police and Community Relations, 1986.

<sup>214</sup> International Commission of Jurists, *Report of the Aborigines and the Law Mission*, Australian Section, 1990; Royal Commission into Aboriginal Deaths in Custody, *op. cit.*, Human Rights and Equal Opportunity Commission, *Racist Violence. Report of the National Inquiry into Racist Violence*, AGPS, 1991.

<sup>215</sup> Cunneen, C., and Robb, T., *Criminal Justice in North West New South Wales*, New South Wales Bureau of Crime Statistics and Research, 1987; Broadhurst, R., Ferrante, A. and Susilo, N., *Crime and Justice Statistics for Western Australia: 1990*, Crime Research Centre, University of Western Australia, 1991; and Wilkie, M., *Aboriginal Justice Programs in Western Australia*, Research Report No 5, Crime Research Centre, 1991.

<sup>216</sup> Gale et al, *op. cit.*; Broadhurst et al, *op. cit.*; Wilkie, *op. cit.*

<sup>217</sup> for example, Rees, N., 'Police Interrogation of Aborigines', in Basten, J., et al (eds) *The Criminal Injustice System*, Australian Legal Workers Group and Legal Service Bulletin, 1982; Cunneen (1990), *op. cit.*; Warner, K., 'The Legal Framework of Juvenile Justice', in White, R., and Alder, C., (eds) *The Police and Young People in Australia*, Cambridge University Press, 1994.

<sup>218</sup> Recommendation 242.

<sup>219</sup> Article 37(b).

exceptional. An evaluation of State and Territory responses to Recommendation 242 found that it has not been adequately implemented.<sup>220</sup>

Addressing the issue of over-policing and the establishment of protocols were also major recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>221</sup> Other research has shown that these recommendations have been poorly implemented.<sup>222</sup> The need for protocols to regulate the interaction between police and Aboriginal communities was reiterated by the Inquiry.

The Royal Commission into Aboriginal Deaths in Custody recommended that legislation and instructions be reviewed to ensure that young people are not proceeded against by way of arrest unless such an action is necessary. The test should be more stringent than with respect to the arrest of adults.<sup>223</sup> The recommendation is consistent with the *Convention on the Rights of the Child (CROC)* which demands that arrest should be used only as a last resort. The Inquiry found that this recommendation has not been properly implemented.

Article 37(c) of *CROC* requires the separation of juveniles from adults when young people are deprived of their liberty.<sup>224</sup> Article 37(c) also requires that every child is to be treated in a manner which takes into account the needs of persons of his or her age. The Commonwealth Government submitted a reservation on the relevant sections of both Conventions, arguing that geography makes total segregation difficult to achieve and that responsible authorities should have the discretion to determine whether it is beneficial for a child or juvenile to be imprisoned with adults.<sup>225</sup> The available empirical evidence strongly suggests that the discretion unfavourably affects Indigenous young people. As noted above, Article 37(b) of *CROC* requires that arrest and detention following arrest should be measures of last resort.

The routine use of police custody shows that exceptional circumstances and last resort are very broadly interpreted when it comes to Indigenous youth. Indeed, they are interpreted so broadly that Indigenous youth are 26 times more likely to be held in police custody than other young people in Australia.

Article 37(b) of *CROC* states that no child shall be deprived of his or 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. Other international instruments which ensure that imprisonment is a sanction of last resort for juveniles include Rule 1 of the UN Rules for the Protection of Juveniles Deprived of Their Liberty and Rules 17.1(b) and 19.1 of the UN Standard Minimum Rules for the Administration of Juvenile Justice. The Inquiry considered various changes to sentencing law in relation to mandatory imprisonment for certain offences and repeat offenders.<sup>226</sup> Such legislation was found to breach *CROC*, the Beijing Rules, the *International Covenant on Civil and Political Rights (ICCPR)* and the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The best interests of the child are made secondary to the protection of the community when sentencing; rehabilitation is no longer seen as an important or dominant consideration in sentencing; and imprisonment is no longer a last resort or used for the minimum necessary period.

<sup>220</sup> Cunneen, C, and McDonald, D., *Keeping Aboriginal and Torres Strait Islander People Out of Custody, An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, ATSIC, 1997, pp. 182-184.

<sup>221</sup> Recommendations 88, 214, 215 and 223.

<sup>222</sup> Cunneen and McDonald, *op. cit.*, pp. 94-97 and 100-102.

<sup>223</sup> Recommendation 239.

<sup>224</sup> see also *ICCPR* article 10(2)(b).

<sup>225</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner (1996), *op. cit.*, p. 205.

<sup>226</sup> *Bringing them home, op. cit.*, p. 527.

Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* requires States to prohibit and eliminate racial discrimination. Article 2 of the Convention requires state parties to implement policies to eliminate racial discrimination. These policies include reviewing government legislation and practices which have the effect of creating or perpetuating racial discrimination. The Inquiry found that State and Territory policy and practice does not comply with the prohibition on racial discrimination. In particular, policies and practices continue to be affected by indirect discrimination. The evidence presented to the Inquiry indicated that Indigenous children and young people do not receive equal treatment before the law.

The *Convention on the Rights of the Child* requires that 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.*<sup>227</sup> Several recommendations (111-114, 236) from the Royal Commission into Aboriginal Deaths in Custody were designed to increase the availability and use of non-custodial sentencing options as well as Indigenous input and control over the nature of community-based orders. Recommendation 236 in particular noted that governments should recognise that local community based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding. Recommendation 235 states that:

*Policies of government and the practices of agencies which have involvement with Aboriginal juveniles in the welfare and criminal justice systems should recognise and be committed to ensuring, through legislative enactment, that the primary sources of advice about the interests and welfare of Aboriginal juveniles should be the families and community groups of the juveniles and specialist Aboriginal organisations, including Aboriginal Child Care Agencies.*

The Inquiry found that nowhere in Australia is this recommendation adequately implemented.

## **Current approaches are failing**

New legislation has done little to face the issues which affect Indigenous young people or reduce the levels of police and detention centre custody. Some of the legislative changes such as the repeat offender sentencing regimes are unashamedly punitive in their intent. Others, such as the introduction of new diversionary schemes, have been perceived as more enlightened. Whole legal systems regulating juvenile justice have changed in some States like South Australia, Western Australia and Queensland in the last few years. Yet a recent review and evaluation of the new South Australian system could be applied to most of Australia:

*These figures clearly suggest that, in overall terms, the position of Aboriginal youths within the new juvenile justice system does not seem to be any better than under the old system. They are still being apprehended at disproportionate rates and once in the system, are still receiving the harsher options available.*<sup>228</sup>

Why have new regimes failed? The evidence before the Inquiry suggests several reasons. Many of the more progressive changes have been restricted in form, content and applicability. They are designed and implemented as non-Indigenous systems with the expectation of finding solutions to the problems facing Indigenous people. In addition, tokenism pervades some of the changes, particularly in relation to police cautioning and family conferencing schemes. Finally, there has been the failure to address the underlying issues which contribute so substantially to Indigenous offending levels.<sup>229</sup>

<sup>227</sup> Article 40(4)

<sup>228</sup> Wundersitz, . J., *The South Australian Juvenile Justice System. A Review of its Operation*, Office of Crime Statistics, 1996, p. 205.

<sup>229</sup> *Bringing them home, op. cit.*, pp. 539-540.

Recommendation 42 of the Inquiry calls on Australian Governments to develop and implement a social justice package and to also implement the recommendations from the Royal Commission into Aboriginal Deaths in Custody which addressed underlying issues.

The outcome of the recent national Ministerial Summit on Indigenous Deaths in Custody gives absolutely no reason to believe that the Royal Commission recommendations will be any more effectively implemented in the future than they have been in the five years following the presentation of the Royal Commission's five volume report.

### **The need for a new framework**

The Inquiry found that existing systems have failed miserably to solve the issues relating to juvenile justice and welfare matters and no where is this failure more profoundly reflected than in the inability of States to reduce the number of Indigenous children placed in care, held in police cells and sentenced to detention centres. This failure is apparent even in States that have recently altered their legislation with a view to reducing Aboriginal juvenile over-representation. The Inquiry argues for a new framework which respects the right to self-determination for Indigenous peoples and complies with other international obligations for the treatment of children and young people.

The objective of the Inquiry is to eliminate unjustified and unnecessary separations of Aboriginal and Torres Strait Islander children from their families and communities. Such a goal is consistent with Article 6 of the draft *Declaration on the Rights of Indigenous Peoples* which states that Indigenous people have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of Indigenous children from their families and communities under any pretext. The *Convention on the Rights of the Child* envisages that the best interests of the child will normally be served by being brought up with his or her birth family and by both parents, and to inherit and participate in the culture(s) into which he or she was born. Similarly Australia agreed, under Article 27 of the *International Covenant on Civil and Political Rights*, to protect the rights of minorities to enjoy their own culture, to profess and practice their own religion and to use their own language.

The Inquiry considered in detail the draft *Declaration on the Rights of Indigenous Peoples* as containing emerging human rights norms which reflect the aspirations of Indigenous peoples. Further the draft Declaration identifies the cultural rights of Indigenous peoples as necessary to ensure the survival of Indigenous peoples as distinct 'peoples'. However existing Australian law and policy for the protection and promotion of Indigenous cultural rights are poorly conceived and developed. What is needed is recognition of such rights as the basis of policy development in all areas, be that health, education, housing or resource development.<sup>230</sup>

The draft *Declaration* contains a number of basic principles, including self-determination, which directly impact on the exercise of control over matters affecting Indigenous children and young people, particularly in regard to child welfare, custody and juvenile justice issues. These principles are mirrored in Articles of the *ICCPR* and *ICESCR*. In the context of juvenile justice issues, the United Nations Guidelines for the Prevention of Juvenile Delinquency, states:

*Community-based services should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should be utilised only as a last resort.*<sup>231</sup>

<sup>230</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner (1995), *op.cit.*, p. 59.

<sup>231</sup> United Nations 'Guidelines for the Prevention of Juvenile Delinquency' in *Crime Prevention: Seeking Security and Justice for All*, 1996, p. 91.



Further the draft *Declaration* affirms the right of Indigenous people to control matters affecting them including the right of self-determination.<sup>232</sup> For example, community-driven ‘Community Justice Groups’ at Palm Island and Kowanyama, successfully divert young Indigenous people from the formal agencies of control. The need for “*greater community involvement in the management of criminal justice*” necessarily involves a devolution of power by formal agencies as part of the move towards “*depenalisation, decriminalisation, [and] the principle of minimum intervention.*”<sup>233</sup>

Article 3 of the draft *Declaration* describes the right of self-determination as involving the free choice of political status and the freedom to pursue economic, social and cultural development (It is established in the same terms as Article 1 of the *ICCPR*). Article 4 provides that:

*Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they choose, in the political, economic, social and cultural life of the State.*

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy, or self-government, in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions, as set out in Article 31.

Part II of the draft *Declaration* is concerned with the rights to life and existence. Of particular relevance is the right to existence as a collective right of Indigenous peoples to maintain and develop their distinct identities and characteristics. It has been recognised that a major theme of the draft *Declaration* is the protection of the unique character and attributes of Indigenous peoples, including culture, religion and social institutions.<sup>234</sup> Articles 6 and 7 of the draft *Declaration* deal with genocide, ethnocide and cultural genocide. They are significant because they deal with specific problems affecting many Indigenous peoples.<sup>235</sup> Article 6 of the draft *Declaration* protects Indigenous peoples from genocide through the separation of children from their families under any pretext. This Article is of clear relevance to the removal of children and young people through both child welfare and juvenile justice mechanisms.

The draft *Declaration* expands international human rights through the development of provisions on ethnocide and cultural genocide (Article 7). According to Burger and Hunt (1994) these provisions represent a logical extension of existing legal provisions. Article 7 (d) prohibits any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures. Such a provision also has implications for child welfare and juvenile justice laws which may seek either directly or indirectly to impose the standards and cultural and social mores of the dominant group on Indigenous children, young people and families.

The Inquiry noted the widespread desire of Indigenous peoples in Australia to exercise far greater control over matters affecting their young people. The Inquiry also noted that self-determination could take many forms from self-government to regional authorities, regional agreements or community constitutions. Some communities or regions may see the transfer of jurisdiction over juvenile justice matters as essential to the exercise of self-determination. Other communities may

<sup>232</sup> Coulter, R., ‘The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?’, *Netherlands Quarterly of Human Rights*, Volume 13, No 2, 1995, pp. 123-138.

<sup>233</sup> United Nations ‘Standard Minimum Rules for Non-custodial Measures’ in *Crime Prevention: Seeking Security and Justice for All*, 1996, p. 90.

<sup>234</sup> Coulter, *op. cit.*, p. 127.

<sup>235</sup> *Ibid.*, p. 133

wish to work with an existing modified structure which provides greater control in decision-making for Indigenous organisations. The level of responsibility to be exercised by Indigenous communities must be negotiated with the communities themselves.<sup>236</sup>

The example of self-determination experienced by Indigenous peoples can be demonstrated with the establishment of Community Justice Groups in Queensland, and the Koori Justice Worker Programme in Victoria. Each has a place on the spectrum of possibilities which self-determination provides.

Community Justice Groups were an initiative of Indigenous communities at Palm Island and Kowanyama after communities were confronting overwhelming difficulties with maintaining local law and order. The Justice Groups were made up of Aboriginal people elected by community members, community-based development officers who provide on-going support to the group, members of the community and other relevant organisations. Each community recognises that success cannot however be achieved by working in a vacuum so they strive to improve communication with the judiciary, local police, Shire and Aboriginal councils and schools.

Another illustration of self-determination is the Koori Justice Worker Programme, owned by communities who actively participate in developing and facilitating programme activities established for Indigenous young people 'at risk' in six regions of Victoria, for example, surf board making, site restoration, family camps.

The recommendations from the Inquiry stress the importance of self-determination, as well as greater controls over decision-making in the juvenile justice system, and matters relating to welfare. Recommendation 43 is the key recommendation pertaining to self-determination. It requires that national legislation be negotiated and adopted between Australian Governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination. The national framework legislation should adopt principles which bind Australian Governments to the Act; that allow Indigenous communities to formulate and negotiate an agreement on measures best suited to their needs in respect of their children and young people; that adequate funding and resources be available to support the measures adopted by the community; and that the human rights of Indigenous children are ensured. Part (c) of recommendation 43 authorises negotiations to include either the complete transfer of juvenile justice and/or welfare jurisdictions, the transfer of policing, judicial and/or departmental functions or the development of shared jurisdiction where this is the desire of the community.<sup>237</sup>

Recommendation 44 is concerned with the development of national legislation which establishes minimum standards for the treatment of all Indigenous children and young people, irrespective of whether those children are dealt with by Government or Indigenous organisations.<sup>238</sup> Recommendation 45 requires a framework for the accreditation of Indigenous organisations who perform functions prescribed by the standards.<sup>239</sup>

The Inquiry sets out a number of minimum standards which provide the benchmark for future developments. Standards 1-3 consider principles relating to the best interest of the child. Standard 4 sets out the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person. In juvenile justice matters this includes decisions about pre-trial diversion, bail and other matters. Standard 5 requires

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<sup>236</sup> *Bringing them home, op. cit.*, pp. 575-576.

<sup>237</sup> *Ibid.*, p. 580.

<sup>238</sup> *Ibid.*, p. 582.

<sup>239</sup> *Ibid.*, p. 583.

that in any judicial matter the child be separately represented by a representative of the child's choosing or appropriate accredited Indigenous organisation where the child is incapable of choosing.

Standard 8 of the recommendations deals specifically with matters relating to juvenile justice. There are 15 rules established within the standard. Rules 1 and 2 seek to minimise the use of arrest and maximise the use of summons and attendance notices. Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained. Rule 4 requires consultation with the accredited organisation before any further decisions are made. Rules 5 to 8 provide protection during the interrogation process. Rules 9-12 ensure that Indigenous young people are not denied bail and that detention in police cells is eliminated except in truly exceptional circumstances. Rule 13 prioritises the use of Indigenous-run community-based sanctions. Rule 14 establishes the sentencing factors which need to be considered. Rule 15 requires that custodial sentences be for the shortest possible period, and that reasons must be stated in writing.

Many submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families drew attention to the fact that the contemporary juvenile justice system was replicating the old policies of removal. The previous assimilationist policies have been characterised as genocide and Australian Governments must now bear the responsibility of these previous policies. However, the evidence also shows that the hugely disproportionate rate at which Aboriginal and Torres Strait Islander children and young people are being incarcerated today is reflective of a systemic denial of Indigenous rights. These abuses include the failure to remedy the appalling levels of social and economic disadvantage which prevent the enjoyment of citizenship; they include the failure to ensure that the lives of Indigenous children and young people are free from direct and indirect racial discrimination; and they include the failure to provide the conditions where Indigenous people might enjoy the right of self-determination particularly in relation to decisions which affect their children and young people. *Bringing them home*, the report of the Inquiry provides a framework for progressive change which respects the rights of Indigenous Australians.

## Chapter 4: National Community Education Project

*A wise education cannot be something that is done to people, it is something that people must learn to do for themselves. This involves the whole community and starts with a collective vision of the future.*<sup>240</sup>

We have travelled extensively throughout Australia to turn our concept of community education about human rights and equality into a collective one. We have listened to many different people tell their stories, share their dreams and explore their capabilities in order to develop strategies to live fuller, safer and more dignified lives. Our concept has been fleshed out and taken new forms. It has grown beyond a product of set content and knowledge into a process which facilitates a journey towards people becoming active participants better able to protect and assert their rights. It is a journey that takes people from seeing rights as static theory towards a vision of rights as concrete mechanisms and tools for action.

The National Aboriginal and Torres Strait Islander Community Education Project (NCEP) is about finding solutions to the discrimination that happens in our daily lives. It is not about all-purpose 'quick fix' solutions. It offers practical choices when our human rights and our dignity as human beings are denied. The product is dynamic and responsive. It identifies ways in which the resolution of a problem can be designed around the specific situation of the community in which that problem has arisen. As stated in my second report, communities not institutions are the starting point for the source of knowledge:

<sup>240</sup> Nunavik Education Task Force, *Silatunirmut: The Pathway to Wisdom*, Makivik Corporation, Quebec, 1992, p.20.

*It is through communities developing their own processes that self-determination is realised... Information that is relevant for a community is a fluid, living creature which can provide bridges between the non-Indigenous system and Indigenous communities.*<sup>241</sup>

In the words of Donna Atkins, a young Aboriginal songwriter and singer, ‘*you and me can make a difference*’. Together, through community action, we can find durable resolutions to problems. This is the ultimate aim of the NCEP.

The Community Action Plan is central to the NCEP strategy. It is a model for constructive action. Like a map, it helps sort things out, to see the lay of the land clearly and set directions when confronted with discrimination. Various tracks as options to protect rights are considered. Using the Community Action Plan will result in different outcomes in the hands of different individuals and different communities responding to different problems. That is the objective. To provide a means to craft a specific, local solution. To facilitate people finding their own solutions.

The process of developing a plan is an interactive exercise with a trained community worker stimulating discussion, drawing out responses and ideas. NCEP video, audio and written resources have been designed for use in this process.

### **Community Action Plan – Steps**

#### ***What is the problem or complaint?***

Identify all of the bits or parts of the issue, like peeling layers of an onion.

#### ***What do you want to happen?***

Do you want an apology, the behaviour corrected and prevented from happening again, monetary compensation from the person or organisation, reinstatement, training, to have the unfair treatment stopped?

#### ***What has been done so far?***

What strategies or solutions are there? Who has been contacted?

#### ***What tools do you have to solve the problem?***

Tools are the things you use to solve a problem.

The law is a tool, so is evidence.

What evidence do you have: letters, receipts, statements of witnesses, etc?

What information or knowledge do you have?

Can I solve the problem myself? Can I put up with the consequences of taking action – what I might have to go through to get my complaint sorted out?

#### ***What tracks can you go down to sort it out?***

Tracks are types of strategies. We describe personal/individual tracks (handling it yourself), community tracks (using the media, boycotting the offending business) and legal tracks (accessing rights under general law as well as human rights and anti-discrimination law).

The tracks that emerge will be local. They will evolve from the experiences of people, drawing collectively on individual strengths. They may be creative. They may be bland. There is no sure way of deciding the best approach in advance. You might have to try a number of different tracks before you get the result you are looking for. The best track is the one that works for you.

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<sup>241</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, AGPS, 1995, p.181.

**Individual tracks:**

This involves going back to speak to the person you have an issue with: ring the person up, contact your trade union, go to see the employer or the boss, write a letter of complaint, write to the media, write to your local politician, write to your ATSI Regional Counsellor, go to see the Regional Manager of an organisation or company, contact an Ombudsman if appropriate, write to the Minister, contact one of the review and appeals bodies if appropriate.

*The personal approach can work but you must know your rights and what you want from the person... If it works it will make you feel stronger 'cause you worked it out one to one.*

Tracking Your Rights Video

**Community tracks:**

Community tracks may involve some of the same activities as individual tracks but are undertaken with the support of the whole community: the power of people working together, for example, boycott the store/business, which is the source of the problem.

*Community action is a good track for making changes ... if you work as one mob these fellas pretty soon work out they have to do the right thing.*

Tracking Your Rights Video

**Legal tracks:**

This involves using the law to resolve a conflict. People may use the law by referring the problem directly to the authorities to take action. You may use anti-discrimination laws, consumer protection law or other general laws. There are state, territory, commonwealth, local government and international laws.

**Laws Available to People**

*The law is a really powerful tool especially if you can make it work ... use the system!*

Tracking Your Rights Video

Legal tracks may involve 'class' or 'representative' action on behalf of a group of people experiencing the same problem. However, legal tracks often deal only with the symptoms of the problem/issue and not the causes. The same problem/issue may crop up again in the future. Legal tracks can also take a long time, may be complex, confusing and can take a heavy emotional and financial toll.

It may be useful to apply the Community Action Plan steps to a significant issue which was consistently raised in community consultations in South Australia and the Northern Territory – racism in sport.

People told us stories about racial vilification on the field, Aboriginal teams being refused entry into particular leagues, umpires making unfair decisions, clubs discriminating in their choice of members, treating Aboriginal sports people differently, discriminatory sponsorship, stereotyping Aboriginal people and a lack of consistency in implementing rules.

*Two football teams have played off in the Grand final every year for 10 years. One team is an Aboriginal team and the other is a non-Aboriginal team. The Aboriginal team has traditionally won the Grand final most of these years. During the finals games in the last few years it has become a common practice of the police to walk onto the playing field and issue warrants – warrants that they have had for many months – to some of the key Aboriginal players, taking them off in the middle of the game.*

South Australia

*I was awarded the best and fairest player that day but in the same game I got suspended because I gave in to the racist abuse, goading and brutality by standing up for myself and my race. I have been suspended for life and the players that abused me are still playing, and received no punishment. I am a good player and could have made the league, football was all I cared about. I felt good about myself when I played football.* South Australia

Colin Tatz has written extensively about the fact that “*Aboriginal sport has a centrality that rarely occurs in other societies ... it is a means of survival...*”<sup>242</sup> It is clear from the stories we were told that this is a reality. Consultations, particularly in South Australia, have shown us what the reality is for young Aboriginal players; how important football is to their self-esteem, their lifestyle and to their communities. As Professor Tatz states:

*... sport provides, however temporarily, some purpose and meaning in life ... enables a few moments of total empowerment and sovereignty.*<sup>243</sup>

Standing up for your rights is not easy, as Aboriginal sports heroes over the years in all aspects of sport have known:

*He'd much prefer senior players like Michael Long and Michael McLean to carry the torch, but at 22 Cockatoo-Collins says its time for him to stand up for their rights ...*<sup>244</sup>

*There's young kids out there in the AFL who don't know their rights and are still being taunted.* Che Cockatoo-Collins<sup>245</sup>

This issue is faced not only in local football leagues but in netball, basketball and other sports. It is a reality that Aboriginal Australian Football League players are confronting at a national level.

Aboriginal footballers, the Australian Rules Football League and a number of journalists are working to find solutions to this kind of racial discrimination and vilification, because in the words of Michael Long:

*The difference is it [racism] gets to your heart and soul.*<sup>246</sup>

and Jeff Farmer:

*I have to cope with racism every day ... I do not expect to have to do so on the football field.*<sup>247</sup>

These players have instigated a model for constructive action. They are standing up for their rights in response to discrimination and vilification. They have tried a number of different tracks so far, some are working more effectively than others, but essentially this ‘action’ is a real life response to vilification.

<sup>242</sup> Tatz, C., *Obstacle Race, Aborigines in Sport*, University of New South Wales Press, 1995, p. 297.

<sup>243</sup> *Ibid.*, p. 318.

<sup>244</sup> Che Cockatoo-Collins, reported in ‘Bomber star speaks out’, *The West Australian*, 23 April 1997, p. 146.

<sup>245</sup> Che Cockatoo-Collins, reported in *The Age*, Wednesday 23 April 1997, p. B16.

<sup>246</sup> Michael Long, reported by Wilson, C., in ‘The heart of the matter’, *The Age*, 1 May 1997, p. 22.

<sup>247</sup> Jeff Farmer, reported by Gullan, S., ‘Kolyniuk apologies for abuse’, *The Age*, 23 April 1997, p. B16.

## What has been their Community Action Plan?

### *What is the problem or complaint?*

Racism on the playing field is unacceptable.

*Racism denies people the fundamental human right to be judged by their character, by what is inside. This is why it's not easy to experience a lifetime of racial abuse, be constantly reminded of it and yet be expected simply to ignore it.* Michael Long<sup>248</sup>

*An AFL football ground should be the most even of playing fields where players are judged by their skill and determination, not by their race or the colour of their skin.*

Jeff Farmer<sup>249</sup>

*Former champion footballer Maurice Rioli ... has said ... there is no place in football, or any other sport, for the person who constantly uses racist tactics ... They are bringing the game into disrepute.*<sup>250</sup>

### *What do you want to happen?*

An apology?

*It is not good enough to say sorry anymore.* Che Cockatoo-Collins<sup>251</sup>

A change of attitude? Education?

*A club has a heavy responsibility to educate its players on this issue.*<sup>252</sup>

*... you got the impression that the Melbourne captain once wondered what all the fuss was about but had learnt from Aboriginal team mates just how hurtful racial abuse could be.*<sup>253</sup>

*Michael Long and Che Cockatoo-Collins are brave and stylish leaders of the movement, the force, demanding more education and action on the blight of racism on the football field.*<sup>254</sup>

Harsher penalties for players who vilify their opponents:

*... public identification of offenders ... then widespread condemnation, public condemnation ...*<sup>255</sup>

*They should be delisted – deregistered ...*<sup>256</sup>

Naming offenders of racial abuse:

*Players named will have to defend themselves publicly*<sup>257</sup>

<sup>248</sup> Long, M., 'Despite racial setbacks, I still have my dream', *The Age*, 23 April 1997, p. B16.

<sup>249</sup> Jeff Farmer reported in *The Canberra Times*, Wednesday 23 April 1997, p. 18.

<sup>250</sup> Maurice Rioli, reported by McGrath J., in 'Delist repeat racists: Rioli' *The West Australian*, 1 May 1997, p. 74.

<sup>251</sup> Che Cockatoo-Collins reported in 'AFL claims six to blame for taunts', *The West Australian*, 23 April 1997, p. 146.

<sup>252</sup> Long, M., 'Despite racial setbacks, I still have my dream', *op. cit.*

<sup>253</sup> Wilson, C., 'The heart of the matter', *op. cit.*

<sup>254</sup> Sheahan, M., 'Deeper issue in latest race blight', *Herald Sun*, 23 April 1997, p.77.

<sup>255</sup> Long, M. 'Despite racial setbacks, I still have my dream', *op. cit.*

<sup>256</sup> Maurice Rioli, reported by McGrath J. in 'Delist repeat racists: Rioli', *op. cit.*

Racism on the footy field stopped:

*League Chief, Wayne Jackson ... said ... From the AFL viewpoint, if there is one case of racial abuse, or discrimination against a minority, it's unacceptable and one too many.*<sup>258</sup>

### **What has been done so far?**

Strategies or Solutions:

1. In 1993 Nicky Winmar, an Australian Rules footballer for St Kilda, made one of the most eloquent and effective stands against racial vilification in the history of Australian Rules football. At the end of a match between St. Kilda and Collingwood, having been subjected to racist taunts from Collingwood fans, he lifted his football guernsey and pointed to his skin.
2. In 1995 Michael Long, an Essendon player, made further complaints to the Australian Football League (AFL) about racial vilification on the football field during a match against Collingwood. As a direct result of his complaint, and an acknowledgment by the football community that racism was a serious issue, the AFL introduced a racial and religious vilification code. The code involves a player, umpire or club lodging a complaint, which then goes either to conciliation or directly to a Tribunal.

### **What Tools do you have to solve the problem?**

*Racial Discrimination Act 1975 (Cth)*  
*(Racial Hatred Amendment Act 1995)*  
 Racial and Religious Vilification Code

Evidence: statements of players, umpires, League officials, journalists.

Information or knowledge: books such as *Obstacle Race, Aborigines in Sport* by Colin Tatz.<sup>259</sup>

Can I solve the problem myself? Can I put up with the consequences of taking action – what I might have to go through to get my complaint sorted out?

*Unfortunately, the process in place has led to a situation where a lot of taunts are now spat at younger players in the league, players who, because of their youth and uncertainty in a new sporting world, feel uncomfortable about coming forward.* Michael Long<sup>260</sup>

*When I came from Darwin as a 16 year old and got to Melbourne you had to prove yourself as an elite footballer and on top of that you had to prove yourself as a person. It just doesn't add up.*<sup>261</sup>

*Talk-back radio yesterday morning clearly exposed the prejudice. Melbourne's Jeff Farmer was told he was a wimp, that he should take it on the chin, for it is character building. One even suggested it was very suspicious that he was the common denominator in both cases. Of course, he was, Farmer's sin is that he was born black. Others suggested that he should go out and play twice as well. Does this mean it is fine to racially vilify people unless they are champions? You are a coon unless you can play a blinder and dob eight goals?*

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<sup>257</sup> Capel, A. & M. Naley, 'Footy racism revolt', *The Sunday Mail*, Adelaide, 4 May 1997, p.1.

<sup>258</sup> Wayne Jackson reported in 'AFL claims six to blame for taunts', *op. cit.*

<sup>259</sup> Tatz, C., *op. cit.*

<sup>260</sup> Long, M. 'Despite racial setbacks, I still have my dream', *op. cit.*

<sup>261</sup> Michael McLean reported by Timms, D. in 'Mediation won't work', *The Herald Sun*, 24 April 1997, p. 85.



*No, the biggest weapon in the fight against racism – firstly in football and then in the community is the football players themselves...*<sup>262</sup>

### **What tracks have been taken to sort it out?**

**Personal/individual tracks:** the media, Nicky Winmar's action in 1993, players' meetings.

**Community tracks:** the media.

**Legal tracks:** conciliation/mediation through the nominee of the President, Human Rights and Equal Opportunity Commission, the AFL Tribunal.

In seeing the way people have handled a situation, others in communities may see the lay of the land more clearly, be able to set their directions when confronted with discrimination and find a means to craft a specific, local solution.

Knowledge of our rights is the beginning. The process of dealing with racism demands creative and local strategies. The strategies may or may not work at first, but at least people should know that they have choices and they can find their own solutions.

Michael Long best states the total impact:

*Like the great Martin Luther King, I have a dream.*

*It is to see my child grow up in Australia and be judged by the content of his character, not the colour of his skin. Events of the last few weeks have caused me to wonder whether I will ever see the day ... the AFL's attempts to rid football of racism have been strong and well-intentioned, but the fact is it remains a serious problem...*

*The reasons still elude me and probably always will. Why should the colour of someone's skin matter? No one cares about the colour of another person's dog, car or clothes, so why should the colour of a person's skin be important.*

*Racism denies people the fundamental human right to be judged by their character, by what is inside. This is why it's not easy to experience a lifetime of racial abuse, be constantly reminded of it and yet be expected simply to ignore it.*<sup>263</sup>

We can only hope that Michael Long never has to let go of his dream; that none of us have to let go of what must become a shared dream and collective vision.

Our community consultations have only reinforced this contention. In all facets of our lives, not just in delivery of basic, essential services but in aspects of our lives such as sport and recreation that should enunciate the ethos 'a fair go for all'.

In last year's report we recounted some of the stories people shared with us during our consultations in Western Australia. This year we present some of the issues raised in the course of speaking with people in south eastern Australia.

<sup>262</sup> Smith, P., 'Coaches must come out against taunts', *The Age*, 23 April 1997, p. B16.

<sup>263</sup> Long, M., 'Despite racial setbacks, I still have my dream', *op. cit.*

## Consumer Rights

Supermarket cashier: "...and I'd like to check your bag." Aboriginal woman: "Fine, and I'm sure the rest of the queue will be more than happy for you to search theirs too!!"

## Schooling

Kids are threatening to punch teachers. Kids are getting near windows and threatening to commit suicide. Teachers are taking stress leave at an alarming rate. New South Wales

One participant told about her Aboriginal daughter in kindergarten. She was told to go somewhere else when they were taking the class photo. She was the only Aboriginal child in the class and the only one who was not in the photo. The mother complained to the school. New South Wales

## Employment

One person said she was working night shift at a bakery, when one of the workers came in with a shot gun and said "they reckoned they shot all the abos, but it looks as though they missed one." He then pointed the gun and dry fired. Tasmania

## Rights

A lot of Kooris are brought up with a mentality to accept things, not to stand up for their rights. Victoria

Repercussions, reprisals and retributions. To stand up and be counted is a wonderful sort of decision to make but you actually have to do that, but you have to pay the price. To use the legislation you have to stand out in the pack. I'm not sure if I was 13 that I would want to do that. After the action – what actually happens? Tasmania

## Disability

In 1981 a survey was carried out with people with disabilities. Blacks weren't included. When they were included, later in other surveys, it was found that the major causes of disability for Aboriginal people were: diabetes, glaucoma, trachoma, leprosy, head injuries and amputations and domestic violence. Victoria

## Youth

A particular shopping centre watches the koori kids when they go in. If one kid is caught shoplifting or there is a fight, all of the koori kids get banned from the whole shopping centre. Victoria

## Police

Aboriginal boy: "I'm just minding my own business...". Police officer: "That's what you all say!"

## NCEP in Review

### 1. Consultations

Extensive consultations have taken place in all states and territories. As stated in previous reports, an ongoing consultative process is essential to community education. Consequently, we have visited most communities more than twice, distributed periodic newsletters, been in contact by phone and

fax where possible and corresponded regularly with people participating in our consultations. We have had very good feedback about this process. We would like to acknowledge the generosity of spirit shown by people as they went over their ideas, thoughts and experiences for us, as they shared their lives and vision and trusted us with knowledge that we have been able to translate into something useful to give back to them.

The places visited and the issues raised can be seen on the map opposite.

## **2. National Coordination**

There are currently a multitude of agencies peddling their wares to Aboriginal and Torres Strait Islander communities. During consultations people spoke continuously about duplication, the waste of resources, the resulting confusion and the need for national co-ordination.

We established a National Reference Committee to guide the project. This Committee gave members a forum to offer ideas, perspectives and experiences for developing the project. The Committee comprised representatives from government and non-government organisations/agencies including: ATSIC; Department of Employment, Education, Training and Youth Affairs; Council for Aboriginal Reconciliation; Northern Territory Anti-Discrimination Commission; Victorian Equal Opportunity Commission; South Australian Equal Opportunity Commission; New South Wales Anti-Discrimination Board; Western Australia Aboriginal Legal Service; Secretariat National Aboriginal and Islander Child Care; National Aboriginal and Islander Legal Services Secretariat; Tranby College; Native Title Unit Victoria; HREOC, Tasmania, Northern Territory and Sydney; South Australian Legal Rights Movement; Northern Australian Aboriginal Legal Aid Service; Central Australian Aboriginal Legal Aid Service; Katherine Regional Aboriginal Legal Service; Aboriginal Justice Advisory Committee, South Australia; National Federation of Aboriginal Education Consultative Groups; Aboriginal Disability Association; and community representatives.

The Reference Committee met three times (August 1995, April and December 1996) and members have had ongoing contact with the National Co-ordinator and consultants and assisted with distributing information, contacting communities and organising meetings.

Commonwealth, State and Territory Human Rights and Anti-discrimination agencies all have a mandate to develop education products about human rights and anti-discrimination mechanisms. National co-ordination has been imperative to draw on the experience, expertise and contacts of staff working in these agencies and thereby avoid duplication. We have been fortunate to have staff accompany consultants and assist with organising consultations, particularly in Victoria, South Australia and Western Australia.

Staff from a number of these agencies are willing to implement the NCEP as a part of their overall education strategy. We commend these individuals for the commitment, energy and effort they have given to assisting our efforts to develop a quality product. However, some agencies feel that they are unable to implement the NCEP within the confines of their agendas.

It is of grave concern that our systems of justice, our minders of anti-discrimination and equal opportunity laws interpret their jurisdiction so guardedly, so meticulously that they forget the clearly stated needs of the very clients they serve.

## **3. Tracking Your Rights – Resource:**

- Queensland 1992 (Commonwealth Community Relations Strategy)
- Western Australia April 1996
- South East December 1997

	Queensland	Western Australia	NSW, ACT, Vic and Tas	Northern Territory
<b>Recruitment &amp; Selection</b>	1992	March - December 94	March - December 94	March - December 94
<b>Contracts</b>	1992	January - March 95	January - March 95 January 96 **	January - April 96
<b>Consultations: Rounds 1 &amp; 2</b>	1992	June - August 95 September - November 95	June - July 95 February - May, July - August 96	January - November 96 June - July 97
<b>Drafting Resource</b>	1992	January - April 96	November 96 - April 97	July - September 97
<b>SJU Editing</b>		April 96 - February 97	May 97 - September 97	September - October 97
<b>Consultations: Trialing Round 3</b>	1994*	February - March 96	July - September 97	October 97
<b>Redrafting</b>		March - April 96	October 97	November 97
<b>SJU Editing</b>		April 96 - February 97	November 97	November 97
<b>Production</b>	1992*	January - March 96	November - December 97	November - December 97
<b>Distribution</b>	not yet determined	not yet determined	not yet determined	not yet determined
<b>Implementation</b>	not yet determined	not yet determined	not yet determined	not yet determined

\* Tracking Your Rights - Queensland was produced in 1992 under the Community Relations Strategy and the design and development was a prototype for the NCEP.

\*\* Two groups of consultants.

#### 4. Tracking Your Rights – Video

##### **Tender & Selection**

Project Manager November 94 – January 95

Production Company October 95 – January 96

**Treatment** August – October 95

**SJU Editing** October – December 95

**Script** January – March 96

**Casting** March 96

**Filming** April 96

**Editing** May 96

**Final Production** May 96

#### 5. Tracking Your Rights – Training Manuals

	<b>Video</b>	<b>Resource</b>
Drafting	May – June 96	March – August 97
SJU Editing	July 96 – June 97	September 97
Trialing	May 97	not applicable
Production	June – August 97	September 97

## 6. Tracking Your Rights – Audio

### *‘Working It Out Locally – Aboriginal Community Justice and Mediation’*

Consultations	March 95 – June 96
Script Writing	February – July 96
Production	July – October 96

## 7. Information Dissemination:

It has been fundamentally important to keep people informed of the progress and continuing development of the NCEP, especially those people in communities who freely gave their time to participate in meetings and willingly shared their thoughts, experiences and knowledge with us. During the course of the project we have undertaken or distributed:

- ***Information Packages***  
‘Background Paper – WA Social Justice Community Education Resource’;  
‘NCEP – Consultation Guide’ (Mukina Management Services);  
‘Background to the National Community Education Project’ – Faculty of Aboriginal and Islander Studies, University of South Australia.
- ***Newsletters***  
Two from each of the regional consultant teams; and  
Four from the National Co-ordinator.
- ***Articles***  
National and state magazines, for example, ‘Milli Milli Wungka’, WA.
- ***Reports***  
Consultants’ progress reports;  
Reference Committee reports;  
Annual and internal reports, including Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Commission, and Access and Equity.
- ***Meetings and Workshops***  
Community organisations; government agencies and departments; and unions.

## 8. Sponsorship Proposals:

A great deal of time and effort was expended in developing sponsorship proposals and identifying potential sponsors to ensure a reasonable level of resources to develop the NCEP in each region.

Ansett Airlines, the Law Foundation of New South Wales, the Council for Aboriginal Reconciliation and the Race Discrimination Unit of the Human Rights and Equal Opportunity Commission contributed to the work of the NCEP. We gratefully acknowledge and applaud their commitment to social justice for Indigenous Australians.

## 9. Racial Vilification:

The Race Discrimination Commissioner, Ms Zita Antonios, has worked closely with the NCEP to produce education materials on racial vilification for Aboriginal and Torres Strait Islander peoples. The Tracking Your Rights Video and each of the regional Resource products include a significant component on racial vilification and the Training Manuals feature a detailed case study based on racial vilification.

## 10. Privacy:

The Privacy Commissioner, Ms Moira Scollay, is committed to achieving positive and tangible outcomes through the Aboriginal and Torres Strait Islander Privacy Awareness Project both generally and inclusively with the NCEP.

## 11. Aboriginal Artists and Graphic Designers:

We are indebted to the artists and graphic designers who shared their perceptions of the social justice issues raised by Indigenous communities. They have effectively translated concepts and stories into dynamic and powerful images which are invaluable to the reader.

## 12. Implementation

Implementation is the undisputed key to the long-term success of the NCEP. The community response to the project has been inspiring. Aboriginal educators and administrators from one end of the country to the other have told us that *“this is the most important thing we have ever been asked to implement because it affects us, all of us, in our daily lives”*. People want to use Tracking Your Rights, but we still have no means ‘to get it out there’.

States and Territories have abdicated their responsibilities to implement a constructive, co-ordinated national response to Recommendation 211 of the Royal Commission into Aboriginal Deaths in Custody, which states:

*That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it.*

By narrowly interpreting the recommendation, State and Territory Governments have conveniently side-stepped their inherent joint accountability and generally satisfied the lowest threshold of implementation by producing token gestures such as yet more colourful calenders.

Although, in the six years since the Royal Commission, ensuring *“effective dissemination of information as to the legislation and ways and means of taking advantage of it”* has not figured largely on State and Territory Government agendas, it was an item on the Commonwealth Government’s agenda until recently.

The current Government’s singular dedication to ‘effective’ economic management, through a policy of funding cuts followed by more funding cuts, has cauterised social policy and rendered community-driven projects at the base of their trickle-down economic hierarchy virtually impotent.

Perversely, the NCEP is demonstrably cost-effective. Tracking Your Rights advocates and promotes the strength and authority of individuals and communities to resolve problems created by racist or discriminatory actions – actions which contravene both State and Commonwealth laws – before having to employ lengthy and costly legal mechanisms or court proceedings.

However, the prospective 1997/98 financial year funding cut to HREOC of 43% contained in this year’s Budget has created serious repercussions for the future delivery of the NCEP. The

restructuring of my office compelled by this draconian cut has resulted in the loss of the position previously dedicated to the development and implementation of the NCEP.

This loss is not only profound, it may result in a waste of the time, money, energy and enthusiasm which has gone into developing this educational resource so desperately needed in Australia at this time. If Recommendation 211 had relevance in 1991, it has increased relevance in 1997.

While an 'elite' special policy unit has been established with the Department of Foreign Affairs and Trade to combat negative perceptions of Australian racism, funds are cut from agencies and projects concerned with addressing the reality of discrimination within this country. I am certain this is not one of the images of Australia that the 'Images of Australia' unit will present to Asia.

The delivery of the NCEP resource will be pursued by the Human Rights and Equal Opportunity Commission. The full implementation of Recommendation 211 may be retarded by the lack of government support but it will not be stopped.

Short-term, short-sighted government policies of impairment or effective extinguishment, whether they target common law rights, social justice or access and equity in community education, will not defeat our collective vision of a 'wise education', a vision which we know can eventually create a just Australian society.

## **Chapter 5: National Indigenous Legal Curriculum**

### **Development**

The National Report of the Royal Commission into Aboriginal Deaths in Custody (Royal Commission) recognised the need for the more effective use of anti-discrimination mechanisms which would offer practical protection for the rights of Indigenous peoples. Recommendation 212 specifically identified that strategies to this end should be formulated in consultation with Aboriginal Legal Services. It recommends:

*That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions.*

Early discussions with Aboriginal Legal Services indicated that increasing the level of legal and human rights education and training available to Aboriginal and Torres Strait Islander peoples would be an appropriate means of achieving the objective of the recommendation. A decision was made to focus on curriculum and course development for the education of Aboriginal Legal Field Officers.

### **The Context for Developing Legal Field Officer Training**

Aboriginal Legal Services were set up in the 1970s to address the high rates of incarceration among Indigenous peoples and to bridge the gap between Indigenous peoples and a justice system which is alien and unfamiliar to many of us. A lack of understanding of legal processes, limited access to legal advice and assistance, and linguistic and cultural barriers combine to place Indigenous people in a disadvantaged position in legal proceedings. Aboriginal Legal Services (ALS) and other legal aid organisations seek to overcome these disadvantages so that Indigenous Australians have a fair day in court and are made aware of the various positive mechanisms to protect our rights. Aboriginal Legal Field Officers play an integral role in this process.

All ALS employ Legal Field Officers. Their duties, though wide-ranging and crucial to the operations of the service, are undervalued. Legal Field Officers serve as the entry point for Indigenous people, acting as intermediaries between clients and the ALS' solicitors, who are usually non-Indigenous.

Legal Field Officers' duties include: obtaining instructions and information from clients; preparing statements; advising defendants of options available to them; making arrangements for defendants and their witnesses to see solicitors; notifying relatives; and obtaining interpreters. Field officers also serve an important educational role in their communities. They advise community members of their legal rights and assist them to seek legal protection of those rights. Their cultural knowledge and familiarity with their communities make Field Officers more successful than solicitors in communicating with and obtaining information from Aboriginal clients.

Legal Field Officers' contribution to the work of legal services has, however, been constrained by the lack of culturally appropriate training courses. Their duties have remained ill-defined and the lack of nationally accredited training has meant that the job carries little status and the competency of officers varies greatly between organisations. The end result is that ALS are less effective than they might be.

Almost all professional legal training available in Australia takes place through university courses which are inaccessible to many Indigenous people because: entry to law degrees generally demands formal academic qualifications which few Indigenous people currently attain; university education is expensive; degree courses lack the flexibility required by people living in remote areas and by people in the workforce; the content of legal curricula is inappropriate to the needs and backgrounds of many Indigenous people; and many Indigenous people feel alienated in the university environment.<sup>264</sup> University law programmes offer few Indigenous legal subjects and do not take Indigenous cultural knowledge and differences into account in formulating curricula.

Some universities do offer special access programmes and provide counselling for minority students. However, affirmative action programmes are insufficient to overcome the enormous under-representation of Indigenous students in mainstream legal programmes and full legal degrees do not actually meet the training needs of people working as Legal Field Officers in communities.

To date there has been little training specifically directed to Aboriginal Legal Field Officers. Legal services have on occasion arranged for members of the judiciary, court officials, police officers and representatives of community agencies to deliver lectures to ALS staff.<sup>265</sup> While such seminars may have helped the participants, one-off training sessions are of very limited value particularly where there is a relatively high rate of staff turn-over.

There has long existed a need for well-structured, accessible training courses which lead to formally recognised qualifications.

Some legal services have prepared their own legal handbooks for Field Officers. They tend, however, to be excessive in technical detail and legalese and consequently are limited in their usefulness. Field Officers currently gain most of their skills through on the job experience and may sometimes acquire

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<sup>264</sup> see, 'Statistics', Education, page 219.

<sup>265</sup> For example, in 1976 and 1977, the ALS of Western Australia organised three Field Officer training seminars in conjunction with the extension school of the University of Western Australia Law Faculty. In 1974 and 1977, the ALS arranged week-long training workshops for its Field Officers.



considerable practical legal knowledge through working closely with a solicitor in their legal service.<sup>266</sup>

A number of local initiatives have developed which try to address this training gap. In 1982 Redfern Aboriginal Legal Service in conjunction with the University of New South Wales developed a Field Officer training programme. The South Australian Department of Employment and Technical and Further Education established a Certificate in Legal Training (Aboriginal) in 1992. In Western Australia the ALS had a training officer position which was supported by the Aboriginal Legal Education Committee of the University of Western Australia Law Faculty. Valuable as they are, these programmes have not provided nationally accredited qualifications or opportunities for advancement to tertiary studies and they tend to be short-lived.

The National Indigenous Legal Curriculum is the first nationally accredited legal training course for Aboriginal people and Torres Strait Islanders. The legal curriculum's focus on human rights law ensures that Field Officers will gain expertise, skills and competencies which will allow them to contribute more effectively to protecting the human rights of Indigenous Australians. In developing the curricula and the courses, we have been mindful of the shortfalls of previous endeavours and have attempted to build courses which will be both accessible and appropriate to the specific needs of Legal Field Officers.

## **Developing the NILCD Project**

In 1994, an Indigenous National Co-ordinator was appointed to consult directly with Aboriginal and Torres Strait Islander Legal Services and other relevant Indigenous community organisations about the project. A National Steering Committee was set up to consider planning, curricula and funding parameters. The Committee was made up of representatives of the Attorney-General's Department, the Department of Employment, Education and Training, the Aboriginal and Torres Strait Islander Commission and the Aboriginal and Torres Strait Islander community.

A Curriculum Development Advisory Committee (CDAC) was also established to ensure relevant Indigenous groups had input to the project. It worked to identify the most pressing Indigenous human rights issues and appropriate education strategies. The CDAC included: Aboriginal and Torres Strait Islander Legal Field Officers representing all states and territories, Aboriginal and Torres Strait Islander Legal Services representing all states and territories, the Department of Employment, Education and Training, the Aboriginal and Torres Strait Islander Commission, the Attorney-General's Department, the Human Rights and Equal Opportunity Commission (HREOC), the National Federation of Aboriginal and Torres Strait Islander Education Groups and the Indigenous Higher Education Development Committee.

To streamline the curriculum development, focus groups were set up for the community, vocational education and training sector, and the university sector. The focus groups developed documents and course materials when financial and time constraints prevented the larger CDAC from doing so. Four national CDAC and Steering Committee meetings were held.

In April 1995, a meeting of National Aboriginal and Torres Strait Islander Legal Services was convened in Darwin to discuss the project. The issues raised and the recommendations made by Legal Service representatives on course structure, content and delivery have guided the CDAC and Steering Committee throughout the project. The NILCD curricula and courses address the training needs of Field Officers identified by Aboriginal Legal Services representatives. (See 'The Darwin Report', page 130.)

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<sup>266</sup> Coe, P., in *Lawyers in the Alice*, Fame Federation Press, 1989, p. 18.

## Outcomes of the NILCD Project

The curricula are now complete and I am pleased to report that nationally accredited training courses focussing on the legal and human rights of Aboriginal and Torres Strait Islander people are to be offered at the community, vocational and university levels.

Courses for the vocational sector, developed by the Aboriginal and Torres Strait Islander Curriculum Consortium based at the Queensland Institute of Training and Further Education (TAFE), will be offered through Institutes of TAFE and community-controlled education and training centres such as Tranby Aboriginal College in Sydney.

Three qualifications will be offered to students who enrol in institutions offering the courses:

- i. Certificate III in National Indigenous Legal Studies, which provides students with competency in general office and administrative duties;
- ii. Certificate IV in National Indigenous Legal Studies, which provides students with the skills to work as Legal Field Officers; and,
- iii. Diploma of National Indigenous Legal Studies, which provides students with skills in office administration and detailed knowledge of legal matters necessary to work as senior Field Officers. (See 'Course Structure', page 135.)

The vocational courses were designed for maximum flexibility in delivery and to enable working Field Officers to access training. To accommodate participants from remote communities who are unable to attend a TAFE, modules can be undertaken through community organisations working in co-operation with TAFE Colleges. Students will be able to access courses on or off-campus and on a full-time or part-time basis.

To allow students to pace their own learning, the courses comprise modules which can be completed one at a time. Students will be assessed after completing each module and will attain credit for modules in which they achieve competency. Students who have gained the required skills and competency for particular modules through prior education or training may also be granted credit for those modules.

If communities decide that particular aspects of modules are irrelevant to their needs, they can seek approval from HREOC (through my office) to vary the course delivery. Providing that the content, learning outcomes, cultural, educational and vocational intent of the individual modules remain intact, modules may be accessed independently of the full certificate or diploma courses. They may also be offered individually to meet specific community or industry needs.

The courses are informed by Indigenous perspectives and experiences and use straightforward language and vocabulary. Modules that include culturally-relevant content, such as Customary Law, will be taught by Aboriginal or Torres Strait Islander people approved by the Curriculum Advisory Boards established by the college or institution running the course/s (see below). Counselling will also be provided for students who need support because of the sensitive content of some modules.

## Application Process

### Community Organisations Vocational Sector

Community organisations wishing to run these courses should apply to the Centre for Training Materials.<sup>267</sup>

Before an organisation can offer the courses, it must establish a Community Advisory Board (CAB) to assist with course administration and delivery. The CAB should be comprised of Indigenous Australians and include: a community liaison person; a minimum of two elders recognised by the appropriate community cultural groups; a public sector employer representative; a practising course graduate; and two student representatives. The CAB will have authority to reshape elements from the course thought to be culturally inappropriate for a specific region or area and will ensure that course providers have suitable agreement with the relevant Indigenous community to protect cultural and intellectual property rights.

The Centre for Training Materials will assess all applications and, when satisfied of the organisation's ability to adequately deliver the course, approval will be notified to HREOC and the Queensland TAFE. Approval from these bodies will be notified to the Centre for Training Materials who will advise the applicant organisation and assist the organisation to access the courses. This process is required by copyright considerations and to ensure the maintenance of appropriate education standards in course delivery.

### University Sector

The university level courses were developed by the University of Technology Sydney (UTS), in consultation with the Indigenous community.<sup>268</sup> The tertiary courses are intended to be offered at Indigenous Tertiary Centres and universities around Australia. Students will be able to attain a Bachelor of Laws in Australian Indigenous Laws. Currently, six electives are offered in Indigenous Law at UTS. Students must take four of these to attain the Bachelor of Laws in Indigenous Law. Students may also achieve a combined Bachelor of Arts/Bachelor of Laws by majoring in Aboriginal Studies together with completing basic LLB requirements. These courses are available at UTS on a part-time or full-time basis.

Vocational students completing the Diploma course who wish to continue to university study will be able to transfer up to a year's worth of credits towards a Bachelor degree.

### Course Delivery

The first delivery of the Diploma of National Indigenous Legal Studies is currently taking place at Tranby College, Sydney. At this stage Tranby is the only community-based college offering the Diploma course and it has found a high demand from people wanting to enrol. I applaud Tranby for their initiative and hope that Tranby's example will be followed in other States and Territories.

At this stage, negotiations are taking place around the country for other community colleges and TAFEs to run the courses, with the outcome largely dependent on the availability of funding. Taoundi Aboriginal College in Adelaide and the Institute of Aboriginal Studies in Alice Springs wish to run the course. In the Top End, I have had on-going discussions with Batchelor College who

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<sup>267</sup> Applications should be addressed to the Chairperson, Centre for Training Materials. Address: LMB 527, GPO Brisbane, Qld, 4001. Telephone: (07) 3237 0045.

<sup>268</sup> Consultations and meetings in regards to the university course are detailed in, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1995* and *Fifth Report 1996*.

indicate that they may select some modules from the suite of courses developed with a view to negotiating with other learning institutions to consider jointly offering justice studies.

Murdoch University in Western Australia has also shown a keen interest in offering the Diploma of Indigenous Legal Studies.

Students wishing to undertake the VET sector courses can apply to Tranby College or directly to community-based organisations running the course in their own area (see below). Students wishing to apply for the university sector course should apply to the University of Technology, Sydney.

So we are well on the way. Within the next three years it is possible that a number of sites around the country will be offering accredited legal and human rights education and training developed by Aboriginal and Torres Strait Islander peoples.

However, now that we have developed the courses and gained accreditation, I am seriously concerned that recent government cuts in education will prevent them attaining broad delivery, particularly at the community level. The government has cut back block release programmes – programmes which allow working people to structure their education and employment time to incorporate tertiary studies. Cuts to block release will severely affect access to tertiary education for Indigenous people who rely on flexibility in the delivery of education services to accommodate work and community obligations.

There are also moves to restructure student allowances (Abstudy and Austudy) under a new umbrella scheme to be called Youth Allowance which will make funding more difficult for Indigenous vocational students. Further, Abstudy will not fund tertiary fees for part-time students, which makes accessing university studies impossible for many Indigenous people with full-time jobs, including Field Officers.

There are serious impediments to the effective implementation of Recommendation 212 imposed by a government which not only professes concern for the dismal outcomes of Royal Commission recommendations, but also identifies improved education for Indigenous Australians as one of its prime objectives in Aboriginal and Torres Strait Islander affairs.

### **Indigenous Disability Advocacy Project**

As outlined in my last report, HREOC undertook a number of projects under the auspices of the *Disability Discrimination Act* (DDA) Resource Training Project with funding from Attorney-General's Department, Legal Aid and Family Services.<sup>269</sup> One of the priority projects identified during national consultation with stakeholders was community legal education on the DDA for legal and para-legal workers working with Aboriginal and Torres Strait Islander peoples.

The development of this product underscores the complexity of discrimination. The discrimination that Aboriginal and Torres Strait Islander people suffer is not necessarily one dimensional. An Indigenous person with disability, for example, suffers discrimination which is qualitatively different to that experienced by non-Indigenous people with disability or Indigenous people without disability. Nor is their experience a simple summation of two types of discrimination.

Following consultations with a number of Aboriginal Legal Services, it was agreed that specific disability training within the NILCDP would provide the most effective and lasting resource for addressing the education and training needs of Aboriginal and Torres Strait Islander legal and para-legal workers.

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<sup>269</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, pp. 148-149.

Consequently, a joint project with the DDA Resource and Training Project was undertaken. The objectives were to:

1. ensure that an ongoing resource is available through an accredited formal structure, as distinct from the completion of a one-off training event;
2. allow for the development and trialing of a much more substantial module (or modules) to address issues concerning disability discrimination and the experience of Aboriginal and Torres Strait Islander peoples; and,
3. allow for the production and distribution of the module as a stand-alone training package for use by people outside the original target group in the broader legal, para-legal, health, child-care and community development fields.

The modules developed under the broader NILCDP Curriculum Project are:

NILS417 Disability Discrimination and the *Disability Discrimination Act*; and  
 NILS508 Making a Disability Discrimination Complaint

These modules may form part of the overall NILCDP Certificate 3 and 4 courses, or may be used as stand-alone training modules for advocates, field officers and others seeking to assist and encourage Indigenous people with disability to enjoy their rights. The modules take the form of a training kit *Making Connections* which includes a Facilitator's Guide and a Student Workbook.

I expect to launch the resource with the Disability Discrimination Commissioner in October this year. It will be available from the Human Rights and Equal Opportunity Commission.

## **Conclusion**

I feel that the methodology used to develop the National Indigenous Legal Curriculum has not only satisfied the requirements of Recommendation 212 but has created comprehensive guidelines for the future development of training courses for Indigenous peoples.

The curricula and courses are products of collaborative development. Community service, government and non-government organisations have willingly given their time and contributed ideas to the NILCD Project. Throughout, I have sought to maximise the opportunities for Indigenous educators, legal officers and community members to contribute. In doing so I have been particularly aware of the need to include the people directly affected by the result – the people who are likely to take the course and the people accessing the services of Aboriginal Legal Field Officers.

Consequently, I believe that Indigenous people have a sense of owning the course. In my experience community people and potential participants are rarely involved in programme development. The curricula reflect what people at the grass-roots consider important to respond to the needs of their communities. The product is culturally appropriate and tailored to meet the needs of Aboriginal and Torres Strait Islander people working in their communities.

I predict a growing interest in the courses, particularly at the community and vocational level, and offer my whole-hearted thanks to all those who assisted in developing the NILCD Project. Community members, Field Officers, government officers and those working in non-government

organisations have generously given their time, knowledge and experiences to inform the development of this project. It could not have happened without them.

Both the NILCD and the NCEP represent benchmarks in the development of legal and human rights education in Australia and I would encourage people involved in similar fields of education and training to consider the path we have followed.

## **The Darwin Report**

The Darwin Report is the record of the first meeting of Aboriginal and Torres Strait Islander people concerned with Field Officer training convened by this Office. It documents the ‘concerns’ of the participants: what they as community members and consumers of legal services view as important to the delivery of effective services.

### **Concern 1**

Darwin Conference participants wanted recognition of the importance of the role of Indigenous Field Officers in ALS. Participants were also concerned about the mainstreaming of ALS and its implications for the work of Indigenous Field Officers.

#### **NILC response**

The courses developed provide for recognition of the important role of Field Officers and other para-legal workers by granting nationally accredited certificates, diplomas and degrees to para-legal workers who complete the Indigenous legal studies courses.

### **Concern 2**

There is a need for defined roles for para-legal workers.

#### **NILC response**

The courses help define the role of para-legals by providing national curricula for field and administrative officers (Certificates III and IV in National Indigenous Legal Studies) and senior Field Officers (Diploma of National Indigenous Legal Studies).

### **Concern 3**

Para-legal workers want standards established for para-legal employment and education, and wage bases correlated with these standards.

#### **NILC response**

Dividing the programme into four levels, i.e., Certificate III, Certificate IV, Diploma and Degree, establishes standards in education for various para-legal positions. After fulfilling the required modules for a particular level, students may end their studies and receive the corresponding qualification. At each exit point, students will be assessed according to competency-based assessment strategies. Remuneration should be appropriate for the level of competency and education attained by the para-legal worker. Organisations should negotiate with the relevant funding bodies to obtain funding for positions at the appropriate wage level.

### **Concern 4**

There is a need for recognition of the cultural qualifications which Aboriginal and Torres Strait Islander para-legals bring to their work.

#### **NILC response**

Courses such as Culture and Corrections; Customary Law; Cross-Cultural Communication and the Law; Supportive Communication Skills; Indigenous Women’s Perspectives and the Law; Indigenous Men’s Issues and the Law; Criminal Law and Its Impact on Indigenous Communities; Business Law

and Culture; and Issues of Country and Heritage take into account and build on Indigenous students' cultural knowledge. Students will not have to complete modules in which they can demonstrate that they have attained competency through prior work experience or education. Students' cultural knowledge will be taken into account in determining their competency in modules with cultural content.

#### **Concern 5**

There is a need for culturally appropriate training for Indigenous Field Officers which would allow students who wish to continue their legal studies to apply Vocational Education Sector (VET) credits towards attaining law degrees.

#### **NILC response**

The courses will allow students to study the law from the perspective of Indigenous peoples, our culture and our social context. For modules with culturally relevant content, the instructors must be Aboriginal or Torres Strait Islander people who are recognised and approved by the Aboriginal or Torres Strait Islander communities (through the CAB) as having appropriate knowledge and skills to teach and assess those modules.

The VET courses provide the link for Field Officers to progress to university study. VET students can apply for up to a year's worth of VET credits towards a Bachelor of Arts/Bachelor of Laws in Australian Indigenous Law, which will allow students to graduate with the contextual knowledge unique to Australian Indigenous cultures.

#### **Concern 6**

The lack of Indigenous para-legal workers' access to professional indemnity insurance prohibits them from giving legal advice.

#### **NILC response**

This is not the responsibility of the Commission. However, it is hoped that the legal profession will move towards providing for this in a sensitive and appropriate manner in the near future.

#### **Concern 7**

The curriculum development should take into account previous ad hoc training programmes for Indigenous Field Officers. The developers of the curriculum should negotiate with ALS and tertiary institutions about the relationship of this course to any existing courses.

#### **NILC response**

ALS played an integral role in developing the courses. The curriculum developers were aware of the problems of previous courses and tried to avoid them by creating a programme that would offer nationally recognised qualifications.

#### **Concern 8**

Indigenous peoples should control the course.

#### **NILC response**

HREOC holds the copyright, but will be guided by the Federation of Independent Aboriginal Education Providers and the Aboriginal and Torres Strait Islander Queensland TAFE Consortium.

#### **Concern 9**

The course should be nationally accredited.

**NILC response**

The course is nationally accredited and will be reviewed again for accreditation in three years according to national standards.

**Concern 10**

Who will be able to access the course? Recognition should be given for prior learning.

**NILC response**

Preference is given to Aboriginal and Torres Strait Islander applicants for Certificates III and IV and the Diploma courses. For entrance into the Certificate IV course, applicants must complete Certificate III or its equivalent. If applicants claim to have gained the required skills/competency for Certificate III through work or prior education and can substantiate their claim, they will be granted credit for Certificate III. For entrance into the Diploma course, applicants must complete Certificate IV or show that they have gained the required skills through work or prior education.

**Concern 11**

The presentation and format of the course, including language and vocabulary, should be appropriate for Indigenous students, particularly those already operating as Field Officers.

**NILC response**

The courses follow a competency-based, modular format. This allows delivery of modules in non-TAFE settings as part of co-operative programmes with community organisations. The focus on outcomes and the modular format allows for flexibility of pace, place and timing of programme delivery. Innovative training/learning strategies are encouraged by using the following approaches:

- experiential learning;
- use of the workplace and the community in learning experiences;
- integration across modules;
- a functional approach to language which reinforces the appropriateness of the varieties of language Aboriginal and Torres Strait Islander people use in their everyday lives.

**Concern 12**

Working Indigenous Field Officers need to be able to access on the job training.

**NILC response**

The modular format of the courses allows for flexible delivery including on the job training.

**Concern 13**

Training and qualifications should be portable and transferable to other areas of work and study.

**NILC response**

Given the range of National Modules which are included in this curriculum students can enrol, with credit transfers, in other courses which include these modules.

**Concern 14**

How are the new courses going to be financed?

**NILC response**

The vocational courses will be offered nationally through various TAFEs around Australia which will be guided by the Queensland TAFE in providing the courses. The Federation of Independent Aboriginal Education Providers has also negotiated with HREOC to offer the course through independent providers such as community-controlled education and training centres. The tertiary sector of the course will be offered through the University of Technology, Sydney. However, recent government cuts will probably affect delivery of the course (see chapter).



## CNAIC010 Diploma of National Indigenous Legal Studies

This course provides learners with the skills and competencies in office administration and more detailed legal matters equivalent with the duties required of a Senior Field Officer or Senior Administrative/ Executive Officer in a legal service.

The Diploma has a nominal duration of 350 hours. There are 7 compulsory modules which have a nominal duration of 155 hours. The remaining 195 hours may be selected from the electives.

Module	Pre-requisite	Hours
<b>Core Modules</b>		
NILS501 Supportive Communication Skills	Nil	30
NILS503 Academic Skills	Nil	15
NILS510 Customary Law: ethical & practical issues	NILS416	20
NILS511 Enforcement of International Human Rights	NILS409	30
NILS517 Criminal Law & its impacts on Indigenous Communities	NILS306, NILS406 NILS401, NILS402	20 20
NILS519 Issues of Country & Heritage	Nil	20
NCS016 Writing in Plain English		155
<b>Electives</b>		
NILS507 Mental Health: law, rights & consent	Nil	40
NILS508 Making a Disability Discrimination Complaint	NILS517	30
NILS515 Media Procedures & Issues	Nil	40
NILS504 International Law	Nil	25
NILS505 Impacts of Family Violence	Nil	20
NILS512 Law Reform	Nil	20
NILS506 Family Law & Society	Nil	20
NILS513 Juvenile Justice	NILS414	20
NILS514 Indigenous Women's Perspectives and the Law	Indigenous woman	20
NILS516 Indigenous Men's Perspectives and the Law	Indigenous man	20
NILS502 Managing Finances in a Not for Profit Organisation	Nil	40 20
NILS518 Business Laws & Culture	Nil	30
NILS520 Advocacy		
NOS327 Payroll	NOS135, NOS234	20
NGMS106 Managing Effective Working Relationships	Nil	40
NGMS118 Managing People: Training & Development	Nil	40
NOS135 Payroll – Manual	Nil	10
NOS234 Payroll – Computerised	NOS118 or NOS143	20

## Appendix 1: Imprisonment as a Last Resort Ministerial Summit on Indigenous Deaths in Custody

### Deaths in Custody 1990 - 1996

Rates per 100,000	1990	1991	1992	1993	1994	1995	1996
Indigenous	7.1	7.5	5.1	5.5	7.5	11.6	8.7
non-Indigenous	0.4	0.4	0.4	0.5	0.5	0.5	0.4
Over-representation	17.3	17.9	11.8	10.8	15.8	25.3	19.0

Sources: *Aboriginal and Torres Strait Islander Commission, Indigenous Deaths in Custody 1989 to 1996, Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, AGPS, 1996* and Dalton, V., *Australian Deaths in Custody and Custody-Related Operations 1996, Australian Institute of Criminology, 1996, p.vii.*

See also, Statistics: Population Figures, Deaths in Custody and Juvenile Justice, pp. 188–198.

Convening a Ministerial Summit on Indigenous Deaths in Custody was one of the Coalition Government's election promises. Some fifteen months later, on 4 July 1997, Attorneys-General, representing Commonwealth, State and Territory Governments, together with Ministers with responsibilities affecting the criminal justice system, sat around the table with Indigenous representatives<sup>270</sup> to talk about strategies to reduce deaths in custody and the over-representation of Indigenous people within the criminal justice system.<sup>271</sup>

The Summit was originally scheduled for January 1997. However, with some State and Territory Government representatives unable to commit, the meeting was postponed.<sup>272</sup> Whether this delay was caused by logistical difficulties or a lack of enthusiasm and goodwill on the part of some participants is a matter for speculation. Given that some participants threatened to boycott the Summit altogether, I believe that the latter is more likely. While this is disappointing, given the urgency of the problem of deaths in custody, many government representatives did participate with enthusiasm and goodwill.

In the face of both international and domestic reports calling for immediate, effective action, the path to date has been a meandering one: tangible results have been few. The Summit outcomes unfortunately replicate the vague, generalised approaches of the past which have been marked by refusal to commit to achieving specific measurable outcomes within specific time frames.

### Time-line

The time-line traces the convoluted processes of monitoring the implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody (Royal Commission) since 1989.

<sup>270</sup> National and state Aboriginal Justice Advisory Committee delegates, Aboriginal and Torres Strait Islander Social Justice Commissioner, Tasmanian Aboriginal Centre and Winnunga Nimmityjah Health.

<sup>271</sup> The Ministerial Summit was attended by 99 delegates: 14 Commonwealth, 63 State and Territory, 6 Aboriginal and Torres Strait Islander Commission, and 16 Indigenous representatives.

<sup>272</sup> Originally scheduled for late January 1997, then 1 May, finally 4 May was agreed.

**1989–1991*****Royal Commission into Aboriginal Deaths in Custody***

339 recommendations. 338 accepted by Commonwealth, State and Territory Governments. \$400m allocated for implementation over five years, ending 1996/97 financial year. Some projects like the National Community Education Project were to receive ongoing funding after the five year period.<sup>273</sup> (See chapter 5, pp. 116,117.)

**July 1991*****Joint Forum***

Commonwealth, State and Territory Ministers convened to formulate a ‘whole of government’ approach to combat the high incidence of Indigenous deaths in custody.

**1992 – 1993*****First Annual Report on the Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody***<sup>274</sup>

The report was supposed to provide accountability to the people of Australia, especially Indigenous Australians, but “*fails in this task for a series of reasons that appear from the document itself*”.<sup>275</sup> Most readers will give up reading the report because it is complex, disjointed, and written in repetitive, padded, vague, uninformative language. The level of generality on critical issues is often unacceptable and in some cases it gives an unduly favourable account of what has happened. All too frequently the specific point of a recommendation is missed or ignored.

It is “*essentially an account of bureaucratic activity that rarely reveals what, if anything, has been achieved or anything by which to measure the value of the achievement*.”<sup>276</sup>

*There is no reason why the Commonwealth’s Report should not be a very readable, coherent narrative of the historic, exciting and urgent task to which the Commonwealth has committed itself.*<sup>277</sup>

I reiterate the point made in my 1995 Report that “*One is irresistibly reminded of the likening of bureaucratic activity to the sex life of elephants: much trumpeting, a lot of activity at a high level and no outcome for three years.*”<sup>278</sup>

**1993*****Amnesty International Report***

Amnesty reported that “*despite federal and state commitments to implement the vast majority of recommendations made in 1991 ... 21 Aboriginal people were reported to have died in custody or during police operations – the highest number in any single year since records were first collected in 1980.*”<sup>279</sup>

<sup>273</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991. The Council for Aboriginal Reconciliation internet site includes texts of Royal Commission state and national reports at <http://www.austlii.edu.au/car/>

<sup>274</sup> The Commonwealth has published annual implementation reports. States and territories also publish implementation reports on responses to recommendations for which they are responsible.

<sup>275</sup> Submission of Aboriginal and Torres Strait Islander Social Justice Commissioner, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into the Commonwealth’s Annual Report on the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1994, p. 4.

<sup>276</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, AGPS, p. 77.

<sup>277</sup> *Ibid.*

<sup>278</sup> *op. cit.*, p. 76.

<sup>279</sup> Amnesty International Australian Report, Amnesty International Publications, 1993.

**1993 – 94*****Three Years On: Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody***

The report “*seeks to provide a basis for measuring progress in addressing the underlying causes of indigenous disadvantage. It looks at the evidence of improvement – or lack of it – in the overall quality of life for indigenous Australians, including the impact that the Commonwealth’s response to the Royal Commission’s recommendations is making on that quality.*”<sup>280</sup>

**1994*****‘Justice Under Scrutiny’: Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry Into Commonwealth’s Annual Report on the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody***

The referral of the Commonwealth’s implementation report was part of the process of ensuring the accountability of governments to the adequate implementation of the Royal Commission’s recommendations. The Standing Committee wanted to ensure that the intent of Royal Commission Recommendation 1 was being achieved in the implementation reports and to check whether the recommendation was being followed in the implementation processes of governments.<sup>281</sup>

**1995*****Crime Research Centre, University of Western Australia: Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody***<sup>282</sup>

*...the time may be appropriate to call a national planning and co-ordinating conference at which some agreed prioritisation of implementation strategies may be developed.*<sup>283</sup>

**1995*****Third Report, Aboriginal and Torres Strait Islander Social Justice Commissioner***

In 1995 my report focused on the impact of the criminal justice system upon young Indigenous people and posed the question as to what, on current trends, will be the rate of imprisonment of our children in 2001. The recommendations of the Royal Commission were clearly not being effectively implemented and, in many ways, contradicted by a juvenile justice system akin to a “*crude system of prohibitions and punishments. Beneath the rhetoric of ‘rehabilitation’ carried out in ‘correctional centres’ lies the reality of a system that most often deepens the damage to kids who are already in trouble.*”<sup>284</sup>

**March 1996*****Coalition Government Election Promise***

*“Immediately on coming to Government, the Coalition will organise a special summit meeting on Aboriginal Deaths in Custody and the causes of Aboriginal incarceration rates with the State and Territory Ministers for Aboriginal Affairs, Health, and State and Territory Attorneys-General ... the purpose of the Summit will be to work with the States and Territories in the co-ordinated*

<sup>280</sup> Royal Commission Government Response Monitoring Unit, *Three Years On: Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Aboriginal and Torres Strait Islander Commission, 1995, p. 6.

<sup>281</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny*, AGPS, p. 14.

<sup>282</sup> Harding, R., Broadhurst, R., Ferrante, A. and N. Loh, *Aboriginal Contact with the Criminal Justice System and the Impact of the Royal Commission into Aboriginal Deaths in Custody*, The Hawkins Press, Sydney.

<sup>283</sup> ‘Frazer Guild Imprisonment Rate Too High’ in *Sunday Times*, 26 November 1995.

<sup>284</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report, op. cit.*, p.13.

*implementation of the recommendations of the Royal Commission” and to establish a “co-ordinated strategy with well-defined, achievable goals and measurable outcomes.”*<sup>285</sup>

It was reported on 5 January 1996 in an article entitled, ‘Deaths in Custody Prompt Summit’ that *“the Federal Government has agreed to set up an Aboriginal deaths in custody summit to address the growing number of juvenile deaths in detention centres, particularly in the past few weeks.”*<sup>286</sup>

However, despite an intention to address juvenile deaths in custody, it was not a focal point of the Summit. Instead, many States and Territories, defended the ‘law and order’ policies that have culminated in a wave of unforgiving, punitive legislation which draws more juveniles into custody. The Western Australian Attorney-General, Peter Foss, justifies this approach on the basis that *“it’s too late once Aboriginal people have got into the cycle of offending even if you divert them... You don’t want to have twice as many Aboriginal people being diverted, you do not want them getting into the system in the first place.”*<sup>287</sup> This attitude was reinforced at the Summit when Western Australia called for a ten year period of reform as ‘realistic’ if underlying issues are accepted as the cause of over-representation of young Indigenous people in the criminal justice system.

The issue of health also moved to the periphery despite the Coalition’s promise to include *“State and Territory Ministers for ... Health”*.

While it is self-evident that entrenched, underlying social issues must be addressed over the long-term, there are immediate causes of disproportionate Aboriginal entry to the criminal justice system which lie within the system itself. Sentencing practices, arrest and bail criteria are examples of these. They are immediately responsive to policy shifts. ‘Law and order’ policies demonstrate this fact: with negative rather than positive outcomes.

## **June 1996**

### ***UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions***

The Special Rapporteur on Extrajudicial Summary or Extrajudicial Executions, Mr Bacre Waly Ndiaye, responded to allegations relating to deaths in custody in Australia. A series of questions were put to the Commonwealth Government, pertaining to the substance of the allegations.

At the United Nations Economic and Social Council in December 1996, the Special Rapporteur reported that *“no replies had been received from the [Australian] Government”* and a letter has been sent to Australia *“reminding the Government of Australia”* to respond.

It had been alleged that *“many of [the] deaths could occur because recommendations made by the RCIADIC ... were not implemented to any meaningful degree.”*<sup>288</sup>

Further, the Special Rapporteur requested the Commission on Human Rights appoint a Special Rapporteur on Conditions of Detention and Prison Conditions and to establish a system of periodic visits to places of detention, to which Australia may be subject.

The implementation of the Royal Commission’s recommendations is coming under the UN spotlight. International attention is liable to grow in direct proportion to the length of time since the National Report of the Royal Commission was delivered in 1991 and the lack of any effective response.

<sup>285</sup> *For All Of Us: Policies for a Coalition Government*, Aboriginal and Torres Strait Islander Affairs Policy Discussion Paper, February 1996, p. 3.

<sup>286</sup> McLean, L., ‘Deaths in Custody Prompt Summit’ in *The Australian*, 5 January 1996, p. 3.

<sup>287</sup> MacDonal, J., ‘Plan to End Jail Deaths’ in *The West Australian*, 5 July 1997, p. 26.

<sup>288</sup> Commission on Human Rights, 53rd Session, E/CN.4/1997/60/Add., December 1996, p. 9.

### **September 1996**

#### ***Australian Deaths in Custody and Custody-Related Police Operations 1996, Australian Institute of Criminology***

*While the total number of prison deaths has fallen for the second consecutive year ... and the number of non-Aboriginal people dying in Australian prisons has decreased markedly, deaths of Aboriginal people in prison have continued to increase, reaching the highest figure recorded for the 16 year period from 1980.*<sup>289</sup>

This was attributed to a lack of co-ordination between the Commonwealth and state/territory governments regarding implementation of the Royal Commission recommendations.

In its concluding remarks the report asserts that “*an optimistic future here is dependent upon concerted implementation of key recommendations*”.<sup>290</sup> This is precisely the outcome the National Summit could have achieved.

### **November 1996**

#### ***Fourth Report, Aboriginal and Torres Strait Islander Social Justice Commissioner***

In 1995 I examined the impact of the criminal justice system upon young Indigenous people and said,

*We have to move now to stop our youth haemorrhaging from their homes to far away lock ups. We have to understand the bigger picture, the forces that shape lives and link the ‘offenders’ and the ‘offences’ with their wider generative causes. Any response to juvenile crime which concentrates on the ‘criminality’ of the offender and which fails to address structural inequalities will necessarily have limited impact.*<sup>291</sup>

It is in this context that I called for increased and continuing expenditure on fundamental economic and cultural recommendations of the Royal Commission. If the longer-term approach to underlying issues advocated by the Western Australian Attorney-General is to be ‘realistic’ then such expenditure is essential.

### **December 1996**

#### ***First Senior Officers Meeting***

Senior officers from the Commonwealth, State and Territory Governments gathered in Canberra to discuss plans for the Summit. It was proposed that the meeting would “*focus on the issues of juvenile justice, diversionary practices, policing and prisons... Two additional issues to be considered at the Summit are risk factors for incarceration and legal representation*”, contrary to the Coalition’s election promise! Underlying social issues were seen as important background factors.

The scope of the Summit narrowed in the months following to exclude Ministers for Health. Similarly, juvenile justice ultimately moved to the periphery: it was not a separate agenda item at the Summit nor specifically mentioned in the final Outcomes Document. Yet the gross over-representation of young Indigenous people is a problem that has been “*recognised for over two decades.*”<sup>292</sup>

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<sup>289</sup> Dalton, V., *Australian Deaths in Custody & Custody-related Police Operations 1996*, Australian Institute of Criminology, 1996, p.31.

<sup>290</sup> *Ibid.*

<sup>291</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, AGPS, p. 21.

<sup>292</sup> Einfeld, the Hon. Justice M., ‘The Rights of the Child’, Launch of *The Progress of the Nations 1997*, UNICEF Australia, July 1997.

Clearly, a one day summit could not address all the underlying issues which impact on offending. However, an appropriate approach would have been for Ministers to consider the full range of relevant issues affecting custodial rates and to have brought to the Summit strategies with concrete objectives to be achieved within these areas. Instead, references to underlying issues were used by some as a diversion from making clear commitments to immediate problems in the criminal justice and corrective systems.

### **January 1997**

#### ***Original Date for Ministerial Summit***

*The Summit would be held in late January and would involve State corrective services ministers, Attorneys-general and Ministers for Aboriginal affairs.*<sup>293</sup>

### **February 1997**

#### ***National Indigenous Summit***

More than 100 Indigenous people from around the country attended The National Indigenous Summit to develop strategies and proposals for the Ministerial Summit on Indigenous Deaths in Custody.

The Indigenous Summit resolved that underlying issues cannot be ignored as they are critical to reducing Aboriginal imprisonment rates and deaths in custody. Delegates also called on governments to implement recommendations through legislation and acknowledge that “*effective implementation of the Royal Commission recommendations required further funding... A tripartite agreement on justice would provide the framework for this to happen and would involve the Commonwealth government, State and Territory governments and the NAJAC as signatories.*”<sup>294</sup>

The outcomes of the Indigenous Summit, as summarised by the Attorney-General’s Department in the document *Recommendations From the Indigenous Summit 17-18 February 1997, Recommendations to the Ministerial Summit on Indigenous Deaths in Custody, prepared by the National Aboriginal Justice Advisory Committee* did not, in my view, adequately represent the views expressed at the Indigenous Summit. This document was circulated by the Attorney-General’s Department to State and Territory Governments as representing the final ‘Indigenous position’ on what should go to the Ministerial Summit. It is a position which represented the lowest common denominator.

### **March 1997**

#### ***2nd Senior Officers’ Meeting***

Senior Officers formulate proposals to put to their Chief Executive Officers (CEOs) at the CEO meeting prior to the Summit.

Proposed ‘Outcomes’ of the Ministerial Summit:

An agreement on Aboriginal Justice between the Commonwealth, the States and Territories and the Aboriginal community. The Agreement should focus on priority areas which should be endorsed by Governments prior to the Summit. *The agreement should include a timetable for implementation.* This could take the form of a three year programme with appropriate funding.<sup>295</sup>

<sup>293</sup> McLean, L., ‘Deaths in Custody Prompt Summit’, *op. cit.*, p. 3.

<sup>294</sup> Windsor, G., ‘Blacks Attack Jail Deaths Buck-Pass’ in *The Australian*, 19 February 1997, p. 6.

<sup>295</sup> Attorney-General’s Department, Draft Minutes of the Ministerial Summit on Aboriginal Deaths in Custody, 4 July 1997, p. 3, emphasis added.

**March 1997*****United Nations Commission on Human Rights, Geneva***

Mr Bill Barker, a former Director of the Human Rights Section, Department of Foreign Affairs, addressed CHR on behalf of several leading Aboriginal organisations and said, “*successive Australian governments have failed to observe Australia’s obligations to indigenous people under the [UN] Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights*” and pointed to “*marked inequalities*” in areas of health, education, employment and housing, which he said represented violations of international Conventions on the Rights of the Child and on the Elimination of All Forms of Racial Discrimination.<sup>296</sup>

For the first time in the 50-year history of the United Nations’ Commission on Human Rights (CHR) Australia’s record has come under such criticism.

**May 1997*****Queensland Minister for Police, Corrective Services and Racing presents deaths in custody strategy in the lead up to the Summit.***

I was invited to meet with Mr. Russell Cooper, Minister for Police, Corrective Services and Racing on two occasions in the lead-up to the Summit and on the second occasion a number of strategies were discussed.

The Queensland strategy includes the involvement of Indigenous community groups in handling juvenile offenders and improving family support for offenders. I publicly encouraged States and Territories to ‘take a leaf out of the book of Mr Cooper’.<sup>297</sup>

**May 1997*****Bringing them home: Report of the Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families***

The report concluded:

*“State and Territory policy and practice are often affected by racial discrimination, in particular, by indirect discrimination. The evidence presented to the Inquiry indicates that Indigenous children and young people do not receive equal treatment before the law. The juvenile justice system produces massive levels of criminalisation and incarceration of indigenous youth.”*<sup>298</sup>

**June 1997*****3rd Senior Officers’ Meeting***

After consultation with Indigenous communities and State and Territory Governments, the Aboriginal and Torres Strait Islander Commission and the Commonwealth Attorney-General’s Department, the meeting identified the following as the primary outcome:

*The main objective of the Ministerial Summit is to **agree to outcomes** which will lead to the **reduction in the rates of incarceration** of Indigenous people and thus, **reduce the numbers of Indigenous deaths in custody**” through “*tripartite agreements on justice issues between the Commonwealth, the relevant State or Territory and ATSIC, or the relevant Indigenous organisation on behalf of the Indigenous community.**

<sup>296</sup> Central Land Council, *Australia’s Rights Record Under Fire From Former Diplomat*, Press Release, 1 April 1997.

<sup>297</sup> Kennedy, F., ‘Dodson Praise for Cooper’ in *Weekend Australian*, p. 10.

<sup>298</sup> Human Rights and Equal Opportunity Commission, *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS, 1997, p. 559.



**June 1997*****Amnesty International Australian Report – Deaths in Custody: How Many More?***

Amnesty welcomed the Summit as a “*unique and important opportunity for all parties to initiate effective reforms*”<sup>299</sup> while recognising that:

*...six years after the Australian government initiated a national program to combat a high incidence of Aboriginal deaths in custody, Aborigines are still dying in prison and police custody at high levels, sometimes in circumstances which Amnesty International believes may have amounted to cruel, inhuman or degrading treatment. While some 100 custodial deaths of Aborigines during the 1980s occurred mostly in police custody, the problem has since shifted to the prison system where it reached new record levels during 1995-1996, indicating that Aboriginal inmates are dying at almost twice the rate of other prisoners.*<sup>300</sup>

Amnesty asserts that the Royal Commission recommendations could have resulted in a “*substantial drop in the numbers of custodial deaths*” had they been “*properly implemented*”<sup>301</sup> and that “*for the Summit to have immediate and visible effect... Ministers should adopt a series of measures which can be implemented with a minimum delay.*”<sup>302</sup>

To date, the failure to reverse the escalating rates of Indigenous incarceration and deaths in custody stems from a “*lack of co-ordination between the Commonwealth and the State and Territory Governments regarding the implementation of the recommendations of the Royal Commission.*”<sup>303</sup>

**June 1997*****Queensland Minister for Police and Corrective Services and Racing announces third tier of law and order campaign***

Mr. Russell Cooper presented a discussion paper to the State cabinet with options that would greatly increase police powers – including surveillance, detention and ‘move-on’ rights – arguing they are necessary to fight crime. Other measures include amendment to the *Criminal Code and Penalties and Sentences Act*, to make graffiti a specific offence with a maximum punishment of five years.

For a juvenile this would mean a maximum of two and a half years in detention if sentenced by a judge.

The Criminal Justice Commission has warned the ‘move-on power’, demanded by police, could be used to target young Indigenous people. The Commission also doubts whether such a power would make a significant contribution to crime prevention or maintaining law and order.<sup>304</sup>

Whilst recognising Minister Cooper has released a discussion document, I believe punitive law and order policies such as these have direct and damaging implications for rates of custody, with correspondingly disproportionate implications for Indigenous custodial rates. They travel in a direction diametrically opposed to the strategies the same Minister announced only one month prior.<sup>305</sup> I understand the politics of the hard line law and order approach, however, with the Criminal Justice Commission, it is my view that they do not serve the general community well in

<sup>299</sup> Amnesty International Australian Report, *Deaths in Custody: How Many More?*, June 1997, p. 1.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*, p.2.

<sup>302</sup> *Ibid.*, p. 1

<sup>303</sup> *Ibid.*, p. 2.

<sup>304</sup> Emerson, S., ‘Cooper Seeks Move-on Powers for Police’ in *The Australian*, 25 June 1997, p. 5.

<sup>305</sup> Minister Cooper told me at the Summit when I questioned him about the proposed amendments to the *Criminal Code and Penalties and Sentences Act* that it was merely out for discussion and was not a Government policy position.

terms of crime prevention: the ‘collateral damage’ of such policies is immediate and generates future problems for everyone.

*Doing it harder, longer and stronger to ‘criminals’ is in the long-term counterproductive to the very objects that I believe the Australian community most desires: greater safety in a more cohesive, civilised society.*<sup>306</sup>

## **July 1997**

### ***National Aboriginal Justice Advisory Committee Preparatory Meeting***

Commonwealth Attorney-General’s Department. Indigenous representatives were advised of Ministerial Summit protocol and discussed the approach to the Ministerial Summit.

## **July 1997, Ministerial Summit on Indigenous Deaths in Custody**

The Summit opened with statements by the Summit’s co-convenors – the Minister for Aboriginal and Torres Strait Islander Affairs, the Hon. John Herron, and the Attorney-General, the Hon. Daryl Williams. This was quickly followed by the statements of Indigenous representatives, collectively allocated 40 minutes to put their concerns to the floor: NAJAC Chair, Tauto Sainsbury; Victorian AJAC, Alf Bamblett; ATSIC Commissioner, Col Dillon; and, myself.

Indigenous delegates expressed concern that the draft outcomes statement (the ‘Communique’) did not adequately represent the Indigenous position. The document represented “*the lowest common denominator position*”,<sup>307</sup> rather than a wider representation of our views.

The Communique was co-ordinated by the Commonwealth Attorney-General’s Department, which also facilitated the Ministerial Summit, with the intention of achieving agreed outcomes between Indigenous peoples, and States and Territories. It was hoped Ministers would sign the Communique at the end of the day as an expression of support and commitment.

Following statements from Indigenous delegates, the Chair called for statements from State and Territory Governments, each allocated 10 minutes to address the Summit. Collectively they represented the divergence of opinion underpinning reform of the criminal justice system: some reports were encouraging and optimistic, while others were defensive and closed.

For example, the Northern Territory Attorney-General, Denis Burke, defended the criminal justice system within his jurisdiction, referring to the Summit as a ‘talk-fest’ both at the Summit and during preliminary planning. He justified the grossly disproportionate numbers of Indigenous people in custody on the simplistic basis of our proportion of the Northern Territory population and maintained that if persons break the law and are sentenced to jail, as a mandatory minimum term, race is irrelevant.

On a more positive note, the Northern Territory Attorney-General also recognised the “*importance of promoting customary law to eliminate crime in Aboriginal society in a way that the rest of Australia can recognise and in a way that human rights are also recognised.*”<sup>308</sup>

Despite the broad spectrum of opinion expressed, two common themes ran through State and Territory responses.

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<sup>306</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report, op. cit.*, p. 20.

<sup>307</sup> Attorney-General’s Department, Draft Minutes of the Ministerial Summit on Aboriginal Deaths in Custody, *op. cit.*, p. 3.

<sup>308</sup> *Ibid.*, p. 10.

The first was the reference to underlying social issues as a second tier to the problem of over-representation and subsequent deaths in custody. What differentiated State and Territory positions was the emphasis placed on addressing underlying issues and the consequent time frame for change.

Western Australia, for example, argued that underlying issues are the primary cause of over-representation in the criminal justice system and that once people enter the system rehabilitation is too late. People are prevented from entering the system in the first place, not through diversion at the point of custody or institutional intervention, but through improving the socio-economic status of those groups at risk. The proposed ten year target reform period resting on this presumption is an inadequate response to what is an increasingly urgent problem which is also responsive to more immediate issues associated with the laws, policies and practices of State and Territory criminal justice systems. Addressing these long-term issues is part of the resolution. It cannot justify the failure to address more immediate problems within the criminal justice and corrective systems.

Similarly the Northern Territory emphasised underlying issues and said “*we should concentrate on preventing people breaking the law in the first place*” and encourage “*Aboriginal and Torres Strait Islander families to be responsible for youth and their own problems and issues*” which governments “*can’t fix*” for example, paint sniffing. The Northern Territory Attorney-General suggested sport as a “*big plus*” in helping the situation.<sup>309</sup> Meanwhile ATSIC monies for sport have been handed over to the Australian Sports Commission.

This red herring thrown in by the Northern Territory Government is patronising and offensive. It reeks of ‘pulling yourself up by your own bootstraps’. It denies the reality of how much concern and effort is already put into addressing these problems within Aboriginal communities. However, despite the best efforts of Aboriginal families and communities, the issues requiring urgent attention are not within our power to shift alone. They call for concerted government action in co-ordination with Aboriginal people.

By contrast, the New South Wales and Tasmanian Governments, acknowledge that immediate measures are required to prevent deaths and steep increases in our over-representation in custody. In Victoria, the Minister for Community Services reported a decrease in the over-representation of Indigenous young people in custody as a result of several community-based diversionary initiatives.<sup>310</sup>

The second theme was the contentious issue of expenditure on Royal Commission initiatives and the withdrawal of funding by the Commonwealth Government. State and Territories argued that responsibility should be shared by all governments in consultation with Indigenous people. The Victorian Minister for Community Services said that Victoria’s initial reaction to the Summit was as an opportunity to address the lack of Commonwealth, State and Territory co-ordination in the context of the closure of several programmes, which has had a “*devastating effect*.”<sup>311</sup>

The Commonwealth insists that service delivery within the criminal justice system is not its direct concern and hence not a matter it should directly fund. Both the Commonwealth Attorney-General and the Minister for Aboriginal Affairs took a firm backseat in the development and delivery of initiatives arising from the Royal Commission recommendations.

*On the particular issues relating to criminal justice ... the Commonwealth does not have a specific role.*<sup>312</sup>

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<sup>309</sup> *Ibid.*, p.11.

<sup>310</sup> *Ibid.*, p. 6.

<sup>311</sup> *Ibid.*, p.6.

*While the Commonwealth, along with States and Territories, are working towards significantly improved outcomes in the key areas of health, housing, education and employment, it is the States and Territories which have the responsibility for administering the criminal justice system.*<sup>313</sup>

Inter-governmental conflict was at the fore before any attempt to facilitate agreed outcomes between governments and Indigenous representatives through the draft Communique.

I criticised the Commonwealth Government's self-defined role as a facilitator and not as a leader. Indigenous people have had years of discussion with State and Territory Governments and do not require the Commonwealth to assist by facilitating discussion. What is needed is a government that is prepared to lead. Aboriginal deaths in custody are a national problem and a national responsibility.

My criticisms were echoed in documents piled on a table at the back of the room, including a report prepared by Amnesty International calling for "*both federal and state authorities in Australia bear a collective responsibility ... to take action in accordance with international standards and with principles of human rights treaties to which Australia has committed itself.*"<sup>314</sup> Amnesty shares the concern of States and Territories that "*there is no intention to continue [funding] as indicated by the 1996/97 budget projections ... if funding ends on 30 June 1997 it will be at a time when reports indicate an upward trend in tragic deaths amplified by increasing levels of juvenile incarceration.*"

After the State and Territory reports were delivered it was agreed that the draft outcomes document should be re-drafted by an ad hoc team including both government and Indigenous representatives. Meanwhile the afternoon session of the Summit proceeded according to the original agenda with a more general but hurried discussion of underlying issues, over-representation and custodial care. At approximately 3pm an amended draft outcomes document re-entered the forum for discussion and debate until finalised for signature.

## **Outcomes Statement**

The Outcomes Statement, a three page document,<sup>315</sup> was signed by:

Aboriginal Justice Advisory Committee representatives, and  
Commonwealth, State and Territory government representatives.

The Northern Territory Government, ATSIC and the Tasmanian Aboriginal Centre declined to sign the statement. I also declined to sign the statement. The reasons for not adopting the document differed markedly between government and Indigenous representatives.

It was strongly felt by Indigenous representatives that while the document resolved to develop 'strategic plans' "*for the co-ordination of Commonwealth/State funding and service delivery for Indigenous programs and services, including working towards developing multi-lateral agreements,*" there was no commitment to a time frame. Even the word 'promptly', suggested by Attorney-General, the Hon. Daryl Williams, was too binding for some governments for whom signing an open-ended document was commitment enough.

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<sup>312</sup> Senator the Hon. J. Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Statement to the Ministerial Summit on Indigenous Deaths in Custody, p. 5.

<sup>313</sup> *Ibid.*, p. 2

<sup>314</sup> Amnesty International Australian Report (1997) *op. cit.*, p. 6.

<sup>315</sup> One page appendix of best practice examples.

If it takes 15 months to organise a one-day national meeting of key stakeholders and sit everyone at the table to talk about the problem, how long will it take to develop comprehensive, effective strategies targeted to solid outcomes with known deadlines? In the meantime over-representation, particularly among young Indigenous people, will spiral toward the worst case scenario predicted in my 1996 Report:

*With the current rates of imprisonment rates of Indigenous youth ... by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention ... by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention.*

These projections related to current rates of Indigenous juvenile detention which were already massively disproportionate when compared to non-Indigenous juveniles.<sup>316</sup> They have become worse. These figures are simply horrific in their predictable implications for the lives of young Aboriginal and Torres Strait Islander children who will be drawn into the criminal justice system.

Since the election promise to convene the Summit two Indigenous people have died in custody. Yet signatories to the Outcomes statement walked away without a commitment to meet again and without a time frame for accountability.

It is a blunt fact that the culminating resolution of the Summit does nothing more than reiterate nebulous commitments to the obvious: the governments charged with responsibility to act decisively to address a major issue of social justice in this country have essentially agreed that ‘something ought to be done’. Without the resolve to achieve measurable reductions in Indigenous over-representation over specific time frames there is little prospect of any urgency being brought to bear. There are no precisely defined goals. How can any meaningful accountability attend government action or inaction without fixed points of measurement?

It gives me no joy whatsoever to be so negative about the ‘outcomes’ of the Summit. Unfortunately the words I wrote in 1995 remain as apt today as they did then:

*This is a crisis. It is on us already. It will simply become more acute in the future, as our kids, who are now babies, move with the relentlessness of mathematics into what has become their birthright as the Indigenous children of this country.*<sup>317</sup>

## **Outcomes Statement for the Ministerial Summit on Indigenous Deaths in Custody**

### ***Preamble***

Commonwealth, State and Territory Ministers with responsibility for justice, policing, correctional services, and Indigenous affairs, together with representatives of indigenous communities, met on 4 July 1997 to examine issues relating to the implementation of the Royal Commission into Aboriginal Deaths in Custody.

In coming to this Ministerial Summit on Indigenous Deaths in Custody, Ministers:

- (a) **agree** that the primary issues of concern are the significant over-representation of Indigenous people at all stages of the criminal justice system and the increase in the rate of Indigenous deaths in custody in some States since the release of the Royal Commission’s Final Report;

<sup>316</sup> “Proportionately we have about double the number of young people in our population than does non-Indigenous society.” Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report, op. cit.*, p.15.

<sup>317</sup> *Ibid.*, p.17.

- (b) **acknowledge** the efforts of all Governments, Indigenous peoples and organisations to prevent contact between Indigenous peoples and the criminal justice system;
- (c) **acknowledge** that addressing the underlying issues is fundamental to the achievement of any real, long term solutions to the issue of Indigenous incarceration and deaths in custody; and
- (d) **recognise** that it will take the combined effort of Commonwealth, State and Territory Governments and Indigenous peoples and the wider community to effectively address Indigenous over-representation.

### ***Resolution***

To address the over-representation of Indigenous peoples in the criminal justice system Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, State and Territory funding and service delivery for Indigenous programs and services, including working towards the development of multi-lateral agreements between Commonwealth, State and Territory Governments and Indigenous peoples and organisations to further develop and deliver programs.

The focus for these plans will address:

- underlying social, economic and cultural issues
- justice issues
- customary law
- law reform
- funding levels

and will include:

- jurisdictional targets for reducing the rate of over-representation of indigenous people in the criminal justice system
- planning mechanisms
- methods of service delivery
- monitoring and evaluation

This work would take account of issues and best practices raised at this summit by representatives of the National Aboriginal Justice Advisory Committee and all jurisdictions.

## **Appendix 2: Frequently Asked Questions about the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families**

Following the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families and the release of the report *Bringing them home* several questions have been frequently asked and statements made about the Inquiry's findings and recommendations. Most of these have focussed on issues such as why Australians should acknowledge and apologise for past removals of Aboriginal and Torres Strait Islander children from their families; why those children were removed and why it was genocide; why do the "Stolen Generations" deserve compensation; and why do Indigenous people still talk about their children being separated today.

**Why is so much of the report focused on the past? What we need to do is look at the present and the future, not dwell on the past.**

The National Inquiry's first term of reference, as outlined by the Attorney-General in May 1995, required the Human Rights and Equal Opportunity Commission to:

*trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies.*

Comprehensively tracing the past laws, practices and policies affecting the lives of Indigenous peoples is crucial to Australia's understanding of its history.

*Society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring.<sup>318</sup>*

People mistakenly believe that the taking of Indigenous babies and children from their mothers only happened in the distant past. But the policies and practices of removal were in effect throughout this century until the early 1970s. There are many Indigenous people, now in their late twenties and early thirties, who were removed from their families under these policies.

Although the official policies and practices of removal have been abandoned, the report reveals that the past resonates today in Indigenous individuals, families and communities.

**It never goes away. Just 'cause we're not walking around on crutches or with bandages or plasters on our legs and arms doesn't mean we're not hurting. ...I suspect I'll carry these sorts of wounds 'til the day I die. I'd just like it to be not quite as intense, that's all.**

*Bringing them home, p. 178.*

The negative consequences of removing children cannot be underestimated. The effects of separation on the lives of Indigenous Australians has been devastating for both those who were removed and their families and communities.

*This process has been tantamount to a continuing cultural and spiritual genocide both as an individual and a community experience and we believe that it has been the single most significant factor in emotional and mental health problems which in turn have impacted on physical health.*

Sydney Aboriginal Mental Health Unit quoted in *Bringing them home*, p. 197.

**Why me, why was I taken?**

**It's like a hole in you heart that can never heal.**

*Bringing them home, p. 177.*

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<sup>318</sup> Zalaquett, J., 'Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations' quoted in Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS, 1997, p. 307, [*Bringing them home*']. The guide to *Bringing them home* is at internet site, <http://www.hreoc.gov.au/>

For the majority of witnesses to the Inquiry, the effects have been life-long and profoundly disabling. But the effects of removal do not stop with the children taken. Generations of Indigenous families continue to bear the brunt of government policies and practices which attempted to wipe out their rights and their culture. The unresolved grief and trauma of being taken from your family as a child is inherited by future generations.

The Inquiry found that a high proportion of people separated from their families as children had their own children removed from their care.

**There's things in my life that I haven't dealt with and I've passed them on to my children. ... I look at my son today who had to be taken away because he was going to commit suicide because he can't handle it; he just can't take any more of the anxiety attacks that he and Karen have. I have passed that on to my kids because I haven't dealt with it. How do you deal with it? How do you sit down and go through all those years of abuse? Somehow I'm passing down negativity to my kids.**

*Bringing them home, p. 222.*

**Is the report saying that Australians should feel guilty about what happened in the past?**

*failure ... to distinguish between the ideas of collective guilt and historical shame. Because guilt for wrongs done is always a matter of individual responsibility, any idea of collective guilt genuinely makes no sense. An individual cannot be charged with the crimes of others. He or she cannot experience remorse on someone else's behalf. ...*

*Talk of sharing in a collective guilt over the dispossession of the Aborigines is one thing; however, talk of sharing in a legacy of historical shame is altogether another.<sup>319</sup>*

The word 'guilt' is only used once in the report in a quote from Sir William Deane, the Governor-General of the Commonwealth of Australia:

*It should, I think, be apparent to all well-meaning people that true reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples. That is not to say that individual Australians who had no part in what was done in the past should feel or acknowledge personal guilt.*

*It is simply to assert our identity as a nation and the basic fact that national shame, as well as national pride, can and should exist in relation to past acts and omissions, at least when done in the name of the community or with the authority of government.<sup>320</sup>*

No Indigenous Australian who gave evidence to the National Inquiry said that they wanted non-Indigenous Australians to feel guilty. Overwhelmingly, those who gave evidence simply wanted people to know the truth. They wanted to be able to tell their stories and have the truth of their experiences acknowledged.

Before the Inquiry, few non-Indigenous Australians were aware of the reality of removal. They were certainly not aware of how many Indigenous people were affected by past assimilation policies or of the levels of abuse that many children suffered.

<sup>319</sup> Manne, R., "Forget the guilt, remember the shame", in *The Australian*, 8 July 1996, p. 11.

<sup>320</sup> Deane, W., *Some Signposts from Daguragu: The Inaugural Lingiari Lecture*, Council for Aboriginal Reconciliation, 1996, p. 19, quoted in *Bringing them home, op. cit.*, p. 3.



Australians who were not directly involved in the practice of removing Indigenous children from their families should not perceive the Inquiry as asking them to feel personally guilty. However, it is the responsibility of all Australians to acknowledge the effects of assimilationist policies and practices, and to respect the needs of Aboriginal and Torres Strait Islander peoples.

As Andrew Lewis wrote to the Editor of the Sydney Morning Herald:

*Is each generation a new society or a continuation of the existing society?*

*I was not personally responsible for any of this. I am a member of a society that wronged a group of people primarily on the basis of their race. That society owes an unqualified apology.*<sup>321</sup>

### **What will saying sorry achieve?**

An apology acknowledges that wrong has been done, and attempts to make amends to those who have suffered. Apologies can be made on a variety of levels – for example, as an individual or collectively, as part of a particular group. Apologies can be made by government representatives on behalf of the people they represent, but also on behalf of previous governments. Governments are ongoing representative bodies, irrespective of the particular individuals who occupy positions of power within them. They inherit the laws and practices of previous governments and so too inherit responsibility for their past actions.

Saying sorry does not undo the past.

However, we expect our governments, and the governments of other countries, to take responsibility and make amends for harm suffered in the past. Many Australians expect Japan to apologise today for acts committed against Australians in the past.

Indigenous people who were separated from their families look to the institutions that devised and implemented the laws and policies which affected them – such as governments and their agencies, churches and welfare organisations – for acknowledgement, apology and reparation. Many institutions have acknowledged and apologised for their role in removing Indigenous children. For example, the Anglican Church Social Responsibilities Commission stated in its submission to the Inquiry:

*[The Commission] simply states that no amount of explanation can detract from the now observable consequences of those misguided policies and practices. A great wrong has been done to the indigenous peoples of Australia. It is for participation in that wrong that this apology is offered.*

*Bringing them home, p. 290.*

However, many institutions have not.

There are precedents for institutional apologies for past wrongs. In May 1997 the President of the United States, Bill Clinton, apologised to African-Americans who were abused in syphilis experiments in the 1930s. More recently, the Prime Minister of Great Britain, Tony Blair, acknowledged and apologised to the Irish people for Britain's role in the potato famine. The Truth and Reconciliation Commission in South Africa believes acknowledging the truth and expressing regret is the best way to heal the nation of the legacy of apartheid.

<sup>321</sup> Lewis, A., letter to the editor, *The Sydney Morning Herald*, 11 June 1997.

Saying sorry is an act of compassion, understanding and healing. Acknowledgement and apology are essential components of reparation and reconciliation.

**Weren't Indigenous children removed for their own good? Being taken away from their Indigenous families gave them a good education and opportunities they would not have had otherwise.**

This assertion is based on the very stereotypes used to justify forcibly removing children. It assumes that non-Indigenous people and institutions know more about looking after Indigenous children than their own families do.

Many people have said that Indigenous children were removed from appalling living conditions. However, nothing was being done by government agencies to improve these conditions for Indigenous families. Children were allegedly removed from their families out of concern for their well-being. But the fact that only some children in Indigenous families were taken negates this assertion. It was generally the children with lighter skin who were removed because children with lighter skin were considered more appealing by prospective non-Indigenous foster and adoptive parents. Children with lighter skins were considered easier to assimilate into white Australia.

*Studies indicate that people separated from their families fared no better than those not separated when assessed on social indicators such as education, employment and income. However, those removed were twice as likely to have been arrested more than once in the last five years, and they suffer more health problems.*

*Bringing them home*, pp. 13-17. (See Statistics, Removal, pp. 199-201)

If some Indigenous people removed from their families are now 'successful members of society', it is largely in spite of their separation from their families, rather than because of it.

The notion that children were removed for their own good is particularly offensive to Indigenous peoples given the state of the institutions to which many children were sent. Far from being saved from neglect or destitution, many were imprisoned in institutions without enough food, without enough clothes, without love.

As witnesses who gave evidence to the Inquiry said:

**Sometimes at night time we'd cry with hunger, no food...We had to scrounge in the town dump, eating old bread, smashing tomato sauce bottles, licking them. Half of the time the food we got was from the rubbish dump.**

*Bringing them home*, p. 159.

**I've seen girls naked, strapped to chairs and whipped. We've all been through the locking up period, locked in dark rooms. I had a problem of fainting when I was growing up and I got belted every time I fainted and this is belted, not just on the hands or nothing. I've seen my sister dragged by the hair into those block rooms and belted because she's trying to protect me... How could this be for my own good? Please tell me.**

*Bringing them home*, p. 161.

Far from being protected, Indigenous children were regularly victims of abuse. Almost a quarter of witnesses to the Inquiry who were fostered or adopted reported being physically abused. One in five

reported being sexually abused. One in six children sent to institutions reported physical abuse and one in ten reported sexual abuse.

Although Indigenous children were supposedly receiving a good education and opportunities for the future, most received just enough of an education to prepare them for menial labour.

**I wanted to be a nurse, only to be told that I was nothing but an immoral black lubra, and I was only fit to work on cattle and sheep properties ... I strived every year from grade 5 up until grade 8 to that perfect 100% mark in my exams at the end of each year, which I did succeed in, only to be knocked back by saying that I wasn't fit to do these things ... Our education was really to train us to be domestics and to take orders.**

*Bringing them home, p.171.*

Many Indigenous children were sent to work for non-Indigenous families, where they were vulnerable to and often experienced, abuse and exploitation. Many Indigenous children did the work of adults, but were rarely paid a minimum wage, if they were paid at all. A large proportion of their wages were officially placed in trust for these children, but many never saw the money they had earned.

The bulk of evidence to the Inquiry detailed the damaging and negative effects of removal. But overwhelmingly even those submissions which acknowledged love and care or a good education said that they wished they had never been removed from their families.

**Even though I had a good education with [adoptive family] and went to college, there was just this feeling that I did not belong there. The best day of my life was when I met my brothers because I felt like I belonged and I finally had a family.**

*Bringing them home, p. 13.*

**Lots of children have been removed from their families – from poor families or from single mothers – not just Indigenous children. Why do Aboriginal children who were removed deserve their own National Inquiry?**

The Inquiry found that the main reason for removal of Aboriginal and Torres Strait Islander children from their families was not concern for a child's well-being. The majority of children were removed because they were Indigenous.

The removal of vast numbers of children on the grounds of their race was the unique experience of Aboriginal and Torres Strait Islander children. No other Australians were subject to discriminatory assimilation policies from the moment they were born. And no other section of the Australian community had their children taken away in such a systematic and insensitive manner.

**I was taken off my mum as soon as I was born, so she never even seen me. What Welfare wanted to do was adopt all these poor little black babies into nice, caring white families, respectable white families, where they'd get a good upbringing. I had a shit upbringing. Me and [adopted brother who was also Aboriginal] were always treated different to the others ... we weren't given the same love, we were always to blame. ... I found my mum when I was eighteen – she was really happy to hear from me, because she didn't adopt me out. Apparently she did sign adoption papers, but she didn't know [what they were]. She said to me that for months she was running away from Welfare [while she was pregnant], and they kept finding her. She remembers being in – it wasn't a hospital –but there were nuns in it, nuns running it. I was born at Crown Street. They did let her out with her brother one day**

**and she run away again. Right from the beginning they didn't want her to have me.**

*Bringing them home, p. 50.*

The Inquiry found that the predominant aim of the forcible removal of Indigenous babies and children was to absorb or assimilate the children into the wider, non-Indigenous community so that their unique cultural values and identities would disappear. There was a clear and explicit intention to eliminate Indigenous peoples.

*[T]his conference believes that the destiny of the natives of aboriginal origin, but not that of full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.<sup>322</sup>*

It was thought that Indigenous peoples of Australia were a 'dying race', and that children of 'mixed descent', particularly those with fairer skin, could be assimilated into the broader community.

Children were not allowed to know anything about their families or their Indigenous heritage. Their names were changed. They were punished for speaking their own language. Many were never told they were Indigenous and were brought up with the racist beliefs of the non-Indigenous people around them.

**We were all rostered to do work and one of the girls was doing Matron's office, and there were all these letters that the girls had written back to the parents and family – the answers were all in the garbage bin. And they were wondering why we didn't write. That was one way they stopped us keeping contact with our families. Then they had the hide to turn around and say. "They don't love you. They don't care about you.**

*Bringing them home, p. 155*

Although different states had separate laws which sanctioned the removal of Indigenous children, government officials throughout Australia had absolute power over Indigenous families and could simply order the removal of an Indigenous child without having to prove to a court that the child was neglected. In some cases laws permitted the removal of Indigenous children on the grounds of race alone.

There is not an Indigenous family in this country that has not been directly affected by children removed under these laws. Families and communities lived in constant fear that their children might be taken away – and constant grief for those already gone.

Indigenous children who were removed did not only lose their families. They lost their languages, their cultures, their rights to land and their identities. Many were taught to hate and fear their people and so were taught to hate themselves.

**We were playing in the schoolyard and this old black man came to the fence. I could hear him singing out to me and my sister. I said to [my sister], Don't go. There's a black man'. And we took off. It was two years ago I found out that was my grandfather. He came looking for us. I don't know when I ever stopped being frightened of Aboriginal people. I don't know when I even realised I was Aboriginal. It's been a long hard fight for me.**

*Bringing them home, p. 211.*

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<sup>322</sup> First Commonwealth-State Native Welfare Conference 1937, quoted in *Bringing them home*, p. 32.

Removal policies did not just affect individuals and their families. Whole communities lost their confidence in bringing up their own children, and have been denied one of their most important and precious roles.

**When you look at a family tree, every person that is within that family tree is born into a spiritual inheritance. And when that person isn't there, there's a void. There's something missing on that tree. And that person has to be slotted back into his rightful position within the extended family. While that person is missing from the extended family, then that family will continue to grieve and continue to have dysfunctions within it. Until the rightful person comes and takes their spiritual inheritance within that family.**

*Bringing them home, p. 215.*

**How can you judge the past from the perspective of the present? At the time people thought they were doing the right thing by the children.**

The Inquiry was careful to evaluate past actions in the light of values and legal standards operating at that time. It has become clear since the release of the Inquiry's report that although many Australians knew that Indigenous children were removed, they did not know of the extent of the laws which made removal possible or the atrocities that those children suffered. There were also many Australians that simply did not know that Indigenous children were systematically removed from their families for decades. The outrage expressed today at the findings of the Inquiry could well have been just as strong in the past if the same information had been publicly available.

Dissenting voices were not absent at the time of these policies and practices, they were simply not listened to. In November 1950 the Government Secretary to the administrator of the Northern Territory, R.S. Leydin, wrote:

*I cannot imagine any practice which is more likely to involve the government in criticism for violation of the present-day [1950] conception of 'human rights'.<sup>323</sup>*

The Australian Aborigines Progress Association in 1928 said:

*...girls of tender age and years are torn away from their parents...and put to service in an environment as near to slavery as it is possible to find.<sup>324</sup>*

Fred Maynard, an Aboriginal activist, wrote to the Premier of NSW in 1927 demanding that:

*...the family life of Aboriginal people shall be held sacred and free from invasion and interference and that the children shall be left in the control of their parents.<sup>325</sup>*

**Why was the forcible removal of Aboriginal and Torres Strait Islander children genocide?**

The crime of genocide does not necessarily mean the immediate physical destruction of a group. The *Convention on the Prevention and Punishment of the Crime of Genocide*, which was adopted by the United Nations in 1948 and ratified by Australia in 1949, defines genocide in Article II as such:

<sup>323</sup> Quoted in *Bringing them home*, p. 142.

<sup>324</sup> Markus, A. *Governing Savages*, Allen & Unwin, 1990, p. 177. Quoted in *Bringing them home*, p. 45.

<sup>325</sup> *Learning from the past*, prepared by Gungil Jindibah Centre for the NSW Department of Community Services, Southern Cross University, 1994, p. 44. Quoted in *Bringing them home*, p. 45.

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm of members of the group;*
- (c) Deliberately inflicting 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 groups*
- (e) Forcibly transferring children of the group to another group.*

The *Convention* recognises that genocide is a crime against humanity and expressed a shared international outrage about genocide and empowered any country to prosecute an offender.

The Inquiry's examination of historical documents found that the clear intent of removal policies was to absorb, merge or assimilate children so that Aboriginal people, as a distinct racial group, would disappear.

Policies and laws are genocidal even if they are not solely motivated by animosity or hatred. The Inquiry found that a principle aim of removing children was to eliminate Indigenous cultures as distinct entities. The fact that people may have believed they were removing Indigenous children for 'their own good' was immaterial. The removal remains genocidal.

The Inquiry found that the forcible removal of Indigenous children was a gross violation of their human rights. It was racially discriminatory and continued after Australia, as a member of the United Nations from 1945, committed itself to abolish racial discrimination.

The Inquiry also concluded that even before international human rights law developed in the 1940s the treatment of Indigenous people breached Australian legal standards.

### **Why do people from the 'stolen generations' deserve compensation?**

The National Inquiry's third term of reference specifically requested that the Human Rights and Equal Opportunity Commission:

*examine the principles relevant to determining the justification for compensation for persons or communities affected by such separation;*

It became apparent at an early stage in the Inquiry proceedings that the issue of compensation was only one aspect of a broad range of desired responses from institutions by the survivors of separation. This is why the Inquiry report addresses compensation as part of a broader concept of reparation.

*'Reparation' is the appropriate response to gross violations of human rights. According to international legal principles, reparation has five parts:*

- 1. acknowledgment of the truth and an apology;*
- 2. guarantees that these human rights won't be breached again;*
- 3. returning what has been lost as much as possible (known as restitution);*
- 4. rehabilitation; and*
- 5. compensation.*

In the words of one woman who gave evidence to the Inquiry:

**The Government has to explain why it happened. What was the intention? I have to know why I was taken. I have to know why I was given the life I was given and why I'm scarred today. Why was my Mum meant to suffer? Why was I made to suffer with no Aboriginality and no identity, no culture? Why did they think that the life they gave me was better than the one my Mum would give me?**

**And an apology is important because I've never been apologised to. My mother's never been apologised to, not once, and I would like to be apologised to.**

**Thirdly, I've been a victim and I've suffered and I'll suffer until the day I die for what I've never had and what I can never have. I just have to get on with my life but compensation would help. It doesn't take the pain away. It doesn't take the suffering away. It doesn't take the memories away. It doesn't bring my mother back. But it has to be recognised.**

**And I shouldn't forget counselling. I've had to counsel myself all my life from a very young age. And in the homes I never showed my tears... I've been told that I need to talk about my childhood. I need to be counselled for me to get back on with my life.**

*Bringing them home, p. 277.*

By way of making reparation the report of the National Inquiry suggested recording testimonies of all those removed; acknowledgment and apology by those institutions involved in removing children; commemoration in the form of a national Sorry Day; public education for all Australians on the 'stolen generations'; prioritising reunion; developing language, culture and history centres; assisting people who were removed to identify as Indigenous; and establishing a National Compensation Fund.

### **Why do Indigenous people say that their children are still being taken?**

It was widely recognised in the Indigenous community that any Inquiry into past removals of children must include an investigation into contemporary practices of separating Indigenous children from their families. This is why a specific term of reference was included in the Inquiry to:

*examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.*

Although laws specifically designed to remove Indigenous children from their families were officially repealed decades ago, as far as Indigenous people are concerned, their children continue to be removed through the child welfare and juvenile justice systems. Due to the entrenched disadvantage and ongoing dispossession of Indigenous Australians, contemporary laws continue to discriminate against Indigenous families where raising children is concerned.

*Aboriginal families continue to be seen as the 'problem', and Aboriginal children continue to be seen as potentially 'saveable' if they can be separated from the 'dysfunctional' or 'culturally deprived' environments of their families and communities. Non-Aboriginals continue to feel that Aboriginal adults are 'hopeless' and cannot be changed, but Aboriginal children 'have a chance'.<sup>326</sup>*

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<sup>326</sup> Link-Up (NSW) submission to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, p. 85, quoted in *Bringing them home*, p. 453.

The Inquiry found that Indigenous children are six times more likely to be removed for welfare reasons and 21 times more likely to be in juvenile detention than non-Indigenous children.<sup>327</sup> There are many reasons for these high rates of removal, including continuing cultural bias against Indigenous modes of parenting, inadequate and inappropriate services for Indigenous families and discriminatory treatment of young Indigenous people before the law.

After countless reports documenting the damaging effects of removing Indigenous children from their families and communities and recommending alternative ways of dealing with the problems, we cannot say today that we do not know that continuing these practices is wrong. (See Chapter 3, The New Stolen Generation.)

Supporting Indigenous families and communities to find their own solutions regarding their children works better than removal. Indigenous children should be placed with Indigenous families wherever possible. Strengthening families and communities is far better than punishing their children.

In July 1996 Australia's Prime Minister, John Howard, had this to say about the value of families:

*I believe that Australian families not only provide the greatest source of emotional and spiritual comfort to Australian individuals but beyond that a functioning united coherent family is the most effective social welfare system that any nation has ever seen.*

*And the widening gap between rich and poor, much of the social disintegration of this country and much of the unemployment of this country can be traced to the disintegration of family life.<sup>328</sup>*

Given the Prime Minister's reluctance to officially apologise to the 'stolen generations', this statement is ambiguous and contradictory. It appears, once again, to be a case of the government dictating one set of values for Indigenous Australians, and another for the rest of the country.

It must be recognised that Indigenous families and communities are entitled to the capacity and the power to do what they were denied in the past. That is, to raise and care for their families without fear of discriminatory institutional intervention. Indigenous peoples have the right to bring up their own children.

## **Appendix 3: International Issues**

### **International conventions and complaint mechanisms relevant to Indigenous peoples ratified by Australia since 1967**

**1975**

#### ***International Convention on the Elimination of all Forms of Racial Discrimination (CERD)***

The **Committee on the Elimination of Racial Discrimination** was established in 1969 to monitor compliance with the Convention. Where states have recognised the competency of the Committee, it may consider communications by a state party which is concerned that another state party is failing to implement provisions of the convention, or from individuals alleging violations by a state. In 1993, the Commonwealth recognised the competency of the *CERD* Committee. This complaint procedure is similar to that of the Human Rights Committee detailed below. In 1975 *CERD* provided the basis for the enactment of the *Racial Discrimination Act* (Cth.).

<sup>327</sup> *Bringing them home*, pp. 492-498. See Statistics, Juvenile Justice, p. 197.

<sup>328</sup> The Prime Minister, the Hon. J. Howard, MP, 'Address to the 61st Annual State Conference of the National Party', Queensland, 20 July 1996.



**1975*****International Covenant on Economic, Cultural and Social Rights (ICESCR)***

The *Committee on Economic, Social and Cultural Rights* was established by the Economic and Social Council (*ECOSOC*) in 1985. The Committee monitors compliance with the *ICESCR* by examining state reports on measures taken to implement the Covenant. The progressive implementation allowed for in the *ICESCR* makes it more difficult to hold states accountable for gross violations of economic, social and cultural rights which are pertinent to Indigenous people. However, in recent years, the Committee has developed rigorous reporting guidelines and has been at the forefront of developing procedures to maximise participation of non-Government Organisations.

**1980*****The International Covenant on Civil and Political Rights***

The *Optional Protocol* to the *ICCPR* was ratified by Australia in 1991. It allows individuals to bring complaints alleging violations of their civil and political rights to the Human Rights Committee against state parties.

The Human Rights (*ICCPR*) Committee was established pursuant to *ICCPR* in 1976. The Committee reviews reports from state parties and receives communications from individuals in states which have ratified the *Optional Protocol*. The Committee considers the complaints and the governments' responses to them and sends its determination on the complaint to the individual and the state. While the Committee's views are not legally binding, they undoubtedly carry significant weight – moral pressure is placed on the state to address the violation especially as the international reputation of the state may be jeopardised by the Committee's findings. The *Optional Protocol* process has several impediments. It is slow, the complaint must be in writing and the individual must have exhausted all available domestic remedies before approaching the Committee. Few Indigenous people are aware of the procedure and those who are often lack legal assistance in preparing a complaint. Nevertheless, in recent years, Indigenous people from a number of countries have used *Optional Protocol* procedures to resolve violations of rights under the Covenant.

**1989*****Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)***

*CAT* obliges all state parties to take effective measures to prevent acts of torture and has been cited in relation to Aboriginal deaths in custody, criminal justice and juvenile justice issues.

The *Committee against Torture* was established in 1987. The Committee examines reports, which states submit every four years. The Committee can consider communications by state parties and communications by individuals. The Committee may also conduct a confidential inquiry into a state party in response to 'well-founded indications' that it is systematically practising torture. Australia recognised the Committee's competency in 1993.

**1989*****Convention on the Rights of the Child***

The *Committee on the Rights of the Child* was established in 1991. The Committee monitors compliance with the Convention by examining periodic reports. The Committee's general guidelines regarding the form and content of initial reports specifically calls for note to be taken of Indigenous children. The Committee is not empowered to receive complaints from individuals alleging violation of rights under the Convention.

## United Nations' charter-based bodies

While Indigenous peoples have organised their own networks and domestic action, the United Nations' human rights machinery has also seen many developments relevant to Indigenous peoples.

**1946**

### *Commission on Human Rights (CHR)*

The Commission was established by the Economic and Social Council (ECOSOC) to: undertake studies; prepare recommendations; draft international human rights instruments; and investigate allegations of human rights violations. Of particular relevance to Indigenous peoples are the CHR's mechanisms to assist it in the promotion and protection of human rights.

These include Communications Procedures 1235 and 1503. The former, established in 1967, gives the CHR the power to thoroughly study situations which show a consistent pattern of human rights violations. After investigation, the CHR can then make recommendations and report to the ECOSOC. The strength of this procedure lies in its public nature and the implications it may have for a country's reputation.

The 1503 procedure was established in 1970 to deal privately with communications indicating a consistent pattern of serious human rights violations. On the basis of communications from individuals, groups or non-Government Organisations (NGOs), the CHR decides which situations to examine. It appoints a group of five people to draw up draft decisions on each situation and then discuss the situation, behind closed doors, with the country concerned. The CHR can decide to: keep the situation under review, and possibly appoint an expert to examine the situation; remove the item from the agenda; or send the situation to the 1235 procedure.

These procedures may be helpful to Indigenous peoples in states with consistently bad human rights records. However, due to time and monetary constraints, the CHR only reviews a few countries a year and tends to focus on violations of civil and political rights, rather than violations of economic, social, and cultural rights. Procedures have generally not been used on modern industrialised nations that consistently deprive Indigenous people of basic human rights. It would appear that the recent inclusion of Indigenous issues as a separate item in the Commission agenda indicates a deeper commitment by the CHR to include Indigenous peoples and to attempt to ensure our human rights.

One further limitation of the CHR, from an Indigenous perspective, is the requirement that only those NGOs with consultative status with the ECOSOC, of which there are few Indigenous organisations, may take part in its sessions.

**1947**

### *Subcommission on Prevention of Discrimination and Protection of Minorities.*

Established by the CHR, the Subcommission assists and reports to the Commission on various issues, including deciding which communications alleging human rights abuses should be referred to the Commission. Between 1972 and 1983, the Subcommission studied the problem of discrimination against Indigenous populations. The resulting 'Cobo' Report, was based on written information provided by Indigenous peoples' organizations and governments and information gathered from visits to Indigenous communities. The conclusions and recommendations are taken into account in current UN discourse and activities. The Subcommission also has two ongoing thematic studies on Indigenous people: the *Study on treaties, agreements, and other constructive arrangements between States and Indigenous populations* and the *Study on the protection of the heritage of Indigenous people*.

**1982**

***Working Group on Indigenous Populations (WGIP)***

Established by the Subcommission, the main tasks of the WGIP are to review developments affecting Indigenous peoples' human rights and to give attention to international standards concerning the rights of Indigenous peoples. Over the last 14 years, much of the WGIP's focus has been on drafting a *Declaration on the Rights of Indigenous Peoples* – a task it has now completed. If adopted by the General Assembly, the *Declaration* will provide an internationally endorsed guideline to Indigenous rights and lead the way for an international convention binding on signatory nations. The draft *Declaration* as prepared by the WGIP is replicated in full in my second report published in 1994.

Before the WGIP, few Indigenous representatives could participate directly in UN human rights work, partly because NGOs need ECOSOC consultative status to participate in CHR meetings, and partly due to financial impediments. The WGIP has encouraged Indigenous peoples to take part in its work and has been highly successful in doing so. Hundreds of Indigenous organisations attend its annual meetings and it received written and oral comments and suggestions from a wide range of Indigenous organizations while preparing the draft *Declaration on the Rights of Indigenous Peoples*. This is largely because the WGIP has dropped the requirement for NGOs to have consultative status with the ECOSOC. The UN General Assembly also established the Voluntary Fund for Indigenous Populations, which provides travel grants and daily allowances to representatives of Indigenous peoples so they can attend the WGIP.

**1995**

***Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples (CHRWG).***<sup>329</sup>

Established by the CHR in March 1995, the CHR Working Group is examining the draft *Declaration on the Rights of Indigenous Peoples*. Once the CHR completes its work on the Declaration, it will be submitted to the General Assembly for final adoption.

Appreciating the importance of a high level of Indigenous participation in the deliberations of UN bodies, Indigenous organisations lobbied for the standard rules of participation to be waived for this working group. As a result, the Working Group is open to Indigenous organisations without consultative status in the ECOSOC, if they are approved by the Council Committee on NGOs. As of September 1996, the NGO Committee had approved 90 Indigenous organisations. This widening of criteria for inclusion is unprecedented at such a high level in the UN system and an important opportunity for Indigenous peoples to participate more directly in UN procedures normally dominated by governments.<sup>330</sup>

***Permanent Forum for Indigenous People***

Indigenous organisations have been lobbying for a permanent forum in the UN system for some time. To date, the forum has been the subject of substantive discussion during recent sessions of the WGIP and the CHR. Such a forum would establish a unique place where Indigenous peoples could voice our concerns in what is otherwise a state-centred system. One workshop has been held on the possible establishment of a permanent forum and a second workshop is being held from 30 June to 2 July 1997, in Chile. The status and the mandate of such a forum is being debated. Indigenous people are seeking to ensure that it is placed at a high level within the UN system and is empowered to consider the full range of issues of concern to us.

<sup>329</sup> In March 1995 the Commission on Human Rights resolved to establish an open-ended, inter-sessional working group to consider the draft Declaration on the Rights of Indigenous Peoples. It is officially known as the Commission on Human Rights: Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995.

<sup>330</sup> A brief report on the second session of the CHRWG is contained at p. 179

## International Issues

### *Working Group on Indigenous Populations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Session 14, 1996*<sup>331</sup>

The Working Group on Indigenous Populations (WGIP) Session 14 was attended by over 700 people, making it one of the largest United Nations gatherings outside the General Assembly. The agenda covered: Standard Setting Activities – the Concept of ‘Indigenous’; Review of Developments – Health; the Decade of the World’s Indigenous Peoples; and the Permanent Forum.

#### *Standard Setting Activities Evolution of Standards Concerning the Rights of Indigenous People*

Under the agenda item *Standard Setting Activities* the WGIP was provided with the opportunity to discuss and clarify the term ‘Indigenous’. The draft *Declaration on the Rights of Indigenous Peoples* is currently before the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples (CHRWG) as it makes its passage towards the General Assembly for adoption by the United Nations. The CHRWG had requested a debate on the definition of ‘Indigenous’ following its deliberations in late 1995.<sup>332</sup> Certain states had declared at the CHRWG that they would be unwilling to adopt the draft *Declaration* unless it included a definition of ‘Indigenous peoples’.

Following is an extract from my intervention on the *Concept of Indigenous* together with ancillary comments on the *Protection of Indigenous Culture and Heritage* made at WGIP 14.

#### **Standard Setting Activities: Evolution of Standards Concerning The Rights of Indigenous People, New Developments and General Discussion Of Future Action**

#### **Aboriginal and Torres Strait Islander Social Justice Commissioner, M. Dodson.**

##### *Concept of Indigenous*

I congratulate the members of the Working Group on the specific inclusion of the issue of the concept of Indigenous peoples as a distinct agenda item. Although this forum has addressed the issue in previous years, and indeed reached a position as articulated in the draft *Declaration on the Rights of Indigenous Peoples* as submitted to the Sub-Commission, it clearly remains contentious and widely disputed.

One of the key manifestations of the denial of our right to self-determination has been the attempt by non-Indigenous Governments and people to control the definition of ‘Indigenous’. Aboriginal and Torres Strait Islander peoples have, since colonisation, been the subject of extensive and varied definitions, designed not for our needs, but to fulfil the colonisers’ convenience.

It is evident that this pattern of ‘control through definition’ has not ceased. Already last year in the first meeting of the Commission on Human Rights Working Group, established to consider a draft *Declaration on the Rights of Indigenous Peoples*, several governments expressed, formally and informally, their objection to the concept of self-definition.

<sup>331</sup> Geneva, 29 July - 2 August, 1996.

<sup>332</sup> Geneva, 20 November - 1 December, 1995.

Some have clearly indicated that they will not be willing to enter into elaboration of a draft without having settled a definition which satisfies their requirements. In many cases, such requirements would deny Indigenous status to peoples who would thus identify and have attended the sessions of this Working Group to press their concerns.

We would emphasise that the right of control over the definition of who is Indigenous does not, and cannot, reside with Governments.

Indigenous peoples, here and elsewhere, have strongly asserted that the right to define who is Indigenous belongs to Indigenous peoples ourselves. This principle is embodied in article 8 of the draft *Declaration* which I would continue to strongly endorse. Any attempt to derogate from the principle of self-definition constitutes a violation of the fundamental right of self-determination which we claim under international law.

Madam Daes, as you have yourself indicated, according to the accepted criteria of who constitutes a 'people' (that is: historical continuity, common histories, languages and cultures, the desire to identify as a people), Indigenous peoples are irrefutably 'peoples'. As such, we are entitled to enjoy the right to self-determination from which flows the right to self-definition.

Where an internationally acceptable elaboration on the basic principle of self-definition is required, we would continue to look to the definition developed by Mr Martinez Cobo in his *Study on the Problem of Discrimination Against Indigenous Populations* as the best available working definition.

The report provided:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*<sup>333</sup>

The working definition in Australia, generally accepted by Aboriginal and Torres Strait Islander peoples and officially endorsed by governments, is a three pronged definition requiring:

- a. descent;
- b. self-identification; and,
- c. recognition by the Aboriginal community.

Despite the official position, Madam Daes, I would draw the Working Group's attention to troubling developments in Australia in recent months. Aboriginal and Torres Strait Islander peoples now find ourselves in a 'no win situation'.

On the one hand, for the purposes of racial discrimination and vilification, we are still singled out as a distinct group. We still consistently form a group which experiences inferior status according to every socio-economic indicator.

On the other, there is increasing resistance to the concept of Indigenous peoples as a distinct group. In the media, and even more disturbingly in the statements of political representatives, there has been

<sup>333</sup> Martinez Cobo, J., Special Rapporteur on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1986/7 and Add.4, paras. 379-382.

a great deal of criticism of the notion that Indigenous peoples as distinct peoples require different treatment. Thus, for example, formal recognition of our rights over our traditional territories or over our cultural and intellectual property is seen as a violation of the principle of equality, and an abuse of the rights of non-Indigenous Australians.

This line of thought is now being manifested in policy proposals which would see distinct policies and programmes (such as health, educational, employment and housing programmes) abandoned, and Indigenous peoples being required to partake in ‘mainstream’ programmes. It would also see the abandonment of the recognition of our distinct property rights and protection of our cultural and intellectual property.

Such trends give rise to the greatest concern among Aboriginal and Torres Strait Islander peoples who see the hard won gains we have begun to achieve disintegrating before our eyes. Such a direction not only marks a return to assimilationist policies, it will ensure that we continue to suffer gross disadvantage in every area of our lives.

Finally, Madam Daes, I would emphasise the fluid nature of culture and identity. No people in the world expects to be frozen in an identity time warp – required to live, literally, in the manner of their ancestors. To impose this requirement on Indigenous peoples is an act of racial discrimination.

One might, at most, say that today, being Indigenous means being situated in a network of kinship and affinity.

However, the manner in which a people or an individual manifest their Indigenous identity cannot be objectively dictated. The danger of any concrete definition which seeks to identify the contents of Indigenous identity, no matter how careful, is that it will fail to adequately reflect the changes which are constantly occurring, or the diversity of Indigenous peoples and our circumstances.

As we repeatedly say, we know who we are. This is not really an issue for us. Perhaps the questioning should be turned back on those who wish to continue the colonial process. Rather than our being asked to justify our status as Indigenous, it is they who should be required to justify their right to ask.

### ***The Protection of Indigenous Culture and Heritage***

In relation to my interventions on the protection of Indigenous Culture and Heritage, it is important to state that at present both national and international laws are grossly inadequate. The final report *Protection of the Heritage of Indigenous People*<sup>334</sup> by Madam Erica-Irene Daes, and the principles and guidelines contained therein, are the most comprehensive articulation of adequate minimum international benchmarks for the protection of the heritage of Indigenous peoples. I would recommend the continued support of this document through the United Nations system.

Recent developments in Australia illustrate the importance of your report for Aboriginal and Torres Strait Islander peoples.

Present legislation in Australia provides inadequate protection for the culture and heritage of Indigenous peoples.

The law in Australia through recent judicial decisions reveals an unwillingness on the part of non-Indigenous Australia to protect and promote the culture and heritage of Aboriginal and Torres Strait Islander peoples.

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<sup>334</sup> Daes, E. I., *Protection of the Heritage of Indigenous People*, E/CN. 4/Sub.2/1995/26.

For example, the findings of the court in the *Broome Crocodile Farm* case means that if Indigenous people seek to rely on Federal culture and heritage legislation they may be forced to violate their own laws by revealing secret/sacred knowledge, not only to the court, but also to other parties who by Indigenous law are not entitled to know. In other words we may be required to violate the very laws for which we are seeking protection.

In another example concerning Kumurangk in South Australia a group of Ngarrindjeri women applied under the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* to stop the construction of a bridge. The women claimed that the bridge would destroy a sacred site if it proceeded. The women based their claims on secret/sacred knowledge, or ‘women’s business’, about the site and its significance.

The women’s application was successful and halted construction of the bridge. Public and media responses to this decision were very hostile. The Ngarrindjeri women were accused of fabricating secrets in order to ban the bridge.

The South Australian Government established a Royal Commission to inquire into the question. The findings of this Royal Commission were particularly damaging for Indigenous people. The conduct of the inquiry revealed a disrespect for and ignorance about Indigenous culture.

The Royal Commission found that the women had “*completely and deliberately fabricated*” the women’s business about Kumurangk.

Several months after the Royal Commission a Federal Court decision found that the ban on construction of the bridge was invalid because the Minister had failed to read the documents containing the secret information. The court made this finding although such an action by the Minister would have breached Aboriginal law.

This decision has broader ramifications for applicants under the *Aboriginal and Torres Strait Islander Heritage Protection Act*. Applicants must now breach their laws if they seek to have the non-Indigenous law protect their religious & cultural beliefs. This makes a nonsense of the legislation which is aimed at the protection of Indigenous culture and heritage.

These cases illustrate the inadequacy of the legislation. The Australian Government must put in place an independent system for the protection of Indigenous culture and heritage which is no longer subject to the discretion of any Minister and the political process.

Such protection must not be subject to unfettered ministerial discretion and the vagaries of the political process. A clear set of binding principles, founded on authentic respect for Indigenous cultural and religious beliefs, must underpin the legislative protection of our human rights.

These principles should guide and constrain ministerial decision making and their application should be subject to judicial review.

We must also endeavour to ensure that previously supportive governments, such as our own, maintain their commitment to the full articulation of our rights. Any changes to this commitment is sure to draw attention from other Nation States. I have noted that the Australian Government is re-assessing its position in relation to the draft *Declaration* and specifically the definition of ‘self-determination’. It is clear that equivocation on such sensitive human rights issues will do nothing to inspire confidence in our Asian neighbours and international trading partners. Any attempt to qualify the right to ‘self-determination’ will meet the combined resistance of all Indigenous participants of the Working Group. I have consistently stated that acknowledgement of our right to self-

determination holds no threat to the integrity of the Australian nation. However, I must frankly admit to pessimism concerning the attitude of current Australian governments.

Indigenous peoples around the world are becoming sophisticated international political lobbyists. No longer will we be content to take a back seat in our own affairs. The Australian Government can expect a different and more resourceful approach to the pursuit of our human rights than they have encountered in the past. This is not a passing phase.

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In her report on WGIP 14 Madam Daes, Chairperson-Rapporteur of the Working Group found:

No single definition could capture the diversity of indigenous peoples worldwide, and all past attempts to achieve both clarity and restrictiveness in the same definition had resulted in greater ambiguity. Furthermore, it was not desirable or possible to arrive at a universal definition.

The only immediate solution, based on the experience of the Working Group, was a procedural one. In certain cases the working definition proposed by Special Rapporteur Martinez Cobo should be used:

*Many indigenous representatives made statements in which they reiterated and endorsed the consensus statement, and said that it was neither desirable nor necessary to arrive at a universal definition of indigenous peoples. Furthermore, many indigenous representatives pointed out that there was no definition of the terms “minorities” and “peoples” in international law, and that indigenous rights therefore also could be implemented without a definition of “indigenous peoples”.*<sup>335</sup>

### **The Commission on Human Rights Working Group on the draft *Declaration on the Rights of Indigenous Peoples* 1996**<sup>336</sup>

This forum commenced with a walkout by Indigenous delegates over moves by nation states to amend the text of the draft *Declaration on the Rights of Indigenous Peoples*. The draft *Declaration* is regarded as a minimum standards document.

A separate Indigenous caucus was convened to discuss further action. On the third day of the walkout an Indigenous delegation returned to the Working Group where I made an intervention strongly opposing any change to the text of the draft *Declaration*. I was joined by my Indigenous brothers and sisters from around the world as we reiterated our commitment to the integrity of the draft *Declaration*. We were successful in preserving the content of the draft previously agreed on at WGIP.

As a result of the actions of Indigenous delegates, the CHRWG agreed to be more flexible in allowing the participation of Indigenous representatives who do not hold formal membership status at the Commission. This enabled more Indigenous voices than ever before to be heard at this level of the United Nations.

### **Working Group on Indigenous Populations, Session 15, 1997**<sup>337</sup>

‘Land and environment’ was the theme of the 1997 Working Group on Indigenous Populations. I was, unfortunately, unable to attend this session due to a lack of resources.

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<sup>335</sup> Daes, E.I., *Report of the Working Group on Indigenous Populations on its fourteenth session* (Geneva, 29 July - 2 August 1996). E/CN.4/Sub.2/1996/21, paras 28, 29 and 32.

<sup>336</sup> Geneva, 21 October - 1 November, 1996.

<sup>337</sup> Geneva, 28 July - 1 August 1997.



The recognition of Indigenous rights to land is amongst the most controversial issues in Australia today. The Howard Government's response to the Wik decision and to native title in general has already drawn worldwide attention.<sup>338</sup>

The rights of Indigenous peoples to their traditional lands and waters have been recognised by many other governments. Despite the assertions of the Commonwealth that such issues are of domestic concern, and that international bodies should not intervene, there is no doubt that Australia will be judged by the world for its violation of our rights to country.

### **Habitat II and the Right to Housing, 1996<sup>339</sup>**

The Australian preparatory meeting of Indigenous representatives for Habitat II, the United Nations' World Conference on Human Settlements were held in April 1996. The meeting was held in Istanbul, Turkey, in June 1996. The 'right to housing' was extensively discussed at the meeting. Despite falling outside the reporting period for 1995-96, this issue is given detailed consideration in my *Fourth Report 1996*.<sup>340</sup>

### **The Indigenous Peoples of the Pacific Workshop, 1996<sup>341</sup>**

In September, 1996, the Indigenous Peoples of the Pacific Workshop met for the first time in Suva, Fiji, under the stewardship of Prime Minister Sitiveni Rambuka. The workshop was convened to consider the draft *Declaration on the Rights of Indigenous Peoples*. At the forum, under the patronage of the Chairperson of the WGIP, Madame Daes, regional positions were lobbied and agreed upon, to assist with the passage of the draft *Declaration*, unamended, through the Commission on Human Rights.

There were many political agendas as this diverse group of Indigenous peoples from the Pacific sought to develop a unified position on the draft *Declaration*. Many delegations expressed concern that peace and regional security would be unobtainable while human rights violations in areas such as Bougainville, East Timor and Hawaii remain unaddressed. Of particular concern was culture and heritage protection. Once again, unanimous support was forthcoming for the final report on the *Protection of the Heritage of Indigenous People*<sup>342</sup> by Daes. It was affirmed by the Workshop as the most comprehensive articulation of adequate minimum international benchmarks for the protection of the heritage of Indigenous peoples.

### **United Nations Conference on Biological Diversity, 1996<sup>343</sup>**

In October, 1996, the United Nations Conference on Biological Diversity was held in Buenos Aires, Argentina. Indigenous Australians were represented by Henrietta Fourmile and Geoff Atkins.<sup>344</sup>

Environment Australia is the Australian Government Department with responsibility for the domestic implementation of the *Convention on Biological Diversity*. Environment Australia convenes an

<sup>338</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report, July 1996 - June 1997*; and, *Politics and Indigenous Australia*, pages 54 - 75.

<sup>339</sup> Istanbul, 3 - 14 June, 1996.

<sup>340</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, AGPS, 1996. See in particular pp. 83-88 and pp. 158-159.

<sup>341</sup> Suva, 2 - 16 September, 1996.

<sup>342</sup> Daes, (1995) *op. cit.*

<sup>343</sup> Buenos Aires, 14 - 15 November, 1996.

<sup>344</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, pp. 161-170.

Interdepartmental Committee (IDC). ATSIC is a member of this committee, however, resource restrictions and funding cutbacks have made it impossible for them to adequately represent the interests of Indigenous people. Regrettably, I must report that much the same can be said of my own office. At present, Environment Australia's Biodiversity Convention and Strategy Section through the International Environment Issues Sub-Committee on Biodiversity, endeavours to keep me informed and invites me to meetings, which I do not have the staff or funding to attend. Because of this situation, discussions involving the domestic implementation of the *Convention on Biological Diversity* have not, in my opinion, had adequate input by Indigenous people and certainly to date, few outcomes for Indigenous Australians.

I am pleased to report that Henrietta Fourmile was appointed in June 1997 as Programs Officer in Indigenous Knowledge with the Secretariat for the Convention on Biological Diversity for the United Nations, based in Montreal, Canada.

### **Canadian Royal Commission on Aboriginal Peoples**

The *Report of the Royal Commission on Aboriginal Peoples* was released in November 1996.

*The time has come to put the relationship between Aboriginal and non-Aboriginal people on a more secure foundation of mutual recognition and respect and to plan together a better future for our children and our children's children.*<sup>345</sup>

*What we propose is fundamental, sweeping, and perhaps disturbing – but also exciting, liberating and ripe with possibilities.*<sup>346</sup>

The Royal Commission on Aboriginal Peoples was established in 1991. Five years of public inquiries, more than 350 research studies, published reports and round table discussions have been used to formulate the Report of the findings and the recommendations of the Commission.<sup>347</sup>

A response from the Canadian Government to the Royal Commission is not expected before September 1997. Indigenous Canadians remain cautiously optimistic about the outcomes of the Royal Commission. It has created great interest among Indigenous Australians and in Indigenous communities around the world. It is a report that proposes innovative and exciting concepts and strategies to deal with the complex issues of Indigenous disadvantage.

Indigenous peoples everywhere will watch with interest.

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<sup>345</sup> Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Minister of Supply and Services, 1996, Vol. 2, back cover.

<sup>346</sup> Canada. Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples*, Minister of Supply and Services, 1996.

<sup>347</sup> *Report of the Royal Commission on Aboriginal Peoples* is available on the Indian and Northern Affairs Canada internet site [<http://www.inac.gc.ca/rcap/>] and the Institute of Indigenous Government site [<http://www.indigenous.bc.ca>].

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## About these statistics

This appendix is a collection of statistics and surveys chosen for their relevance in highlighting disparities between Indigenous and non-Indigenous Australians. Reducing people and their experiences to percentages is problematic, however, statistics are useful as indicators of disparities and inequalities, and of similarities, between Indigenous and non-Indigenous Australians. This appendix should be viewed as a selection of statistics, representative (but by no means comprehensive) of recent research and findings by key indicators such as health, education, employment, housing and welfare. Weight has been given to the most recent data published in these areas. While the focus is on gaining a national impression of statistics relating particularly to Aboriginal and Torres Strait Islander peoples through Australian Bureau of Statistics' publications, often state/territory or regional studies in areas such as health and education give greater insight. Until very recently there have been few comprehensive nation-wide surveys of the lives of Indigenous people. This makes any comparison between statistics relating to Indigenous people from past decades and today very difficult.

Compiling an accurate profile of Aboriginal and Torres Strait Islander people in Australia remains an ongoing task. The National Aboriginal and Torres Strait Islander Survey (NATSIS) was the first nation-wide survey of Indigenous people conducted from April to July 1994, with the aim of providing Aboriginal and Torres Strait Islander people and Commonwealth, State and Territory governments with statistics in a range of social, demographic, health and economic areas. The survey was conducted as part of the Government's response to a recommendation by the Royal Commission into Aboriginal Deaths in Custody.<sup>348</sup> As crucial as it was in providing much needed information about Indigenous people in areas such as family and culture, health, housing, education and training, employment and income, law and justice, the NATSIS is by no means conclusive.

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<sup>348</sup> 15,700 Aboriginal and Torres Strait Islander people were interviewed by especially appointed Indigenous interviewers. The survey was designed to be nationally representative, with households selected at random from throughout the 35 ATSI regions and Torres Strait area. It is important to remember that all estimates from the NATSIS are based on a sample of Indigenous Australians, so are thus subject to sampling variability and cannot be viewed in the same way as Census figures.

It has only been 30 years since the Commonwealth was required to count Indigenous (+-) people in the Census. Each Census shows a significant increase in people identifying as Aboriginal and Torres Strait Islander than was ever predicted by statisticians (see table, p.??). The recently released population figures from the 1996 Census indicate that since the 1991 Census there has been a 33% increase in Australia's Indigenous population.

The general Australian population has only increased 5% during the same five years. The Australian Bureau of Statistics (ABS) attributes the increase to more of the Indigenous population choosing to inform them that they are Indigenous than in any previous Census,<sup>349</sup> and the greater effort made to record Indigenous people in the 1996 Census. The ABS also points to the fact that on average Indigenous women have more babies than non-Indigenous women, and that non-Indigenous women can have children who may be nominated as Indigenous if their partner is an Indigenous man.

Doreen Kartinyeri, an Indigenous woman from South Australia, attributed increases in the Indigenous population to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.

*There are a lot of people that didn't realise they were Aboriginal or of Aboriginal descent, even though they had darker skins than white children. Since opening up the stolen generation inquiry and releasing names, people have found out about their roots and are acknowledging them.*<sup>350</sup>

There is clearly no one defining reason for the 33% increase, but the result certainly calls into question the representative accuracy of much previous data, and highlights the great need for more comprehensive research.

Statistics such as those included in this appendix should always be approached with a recognition of the survey/sample size and limitations. The main difficulty associated with compiling comparative statistics is the use of different sources, that is, of comparing different survey groups and conditions unproblematically. This is true for comparing Indigenous and non-Indigenous people, as well as comparing different surveys from different times.

## Population figures

The number of people in Australia who identified as Indigenous increased by 33% between 1991 and 1996, from 265,458 to 352,970. This means that Indigenous people now make up 2.0% of the total Australian population, increasing from 1.6% in 1991.

Over half (55.8%) of Australia's Indigenous people were counted in two states: New South Wales and Queensland. A further 14.4% were counted in Western Australia and 13.1% in the Northern Territory. Indigenous people represented only 3% or less of the total population in each state, although in the Northern Territory Indigenous people made up 26.4% of the population.

The increase since 1991 in the numbers of people reporting to be of Indigenous origin was not uniformly distributed across Australia. The ACT and Tasmania recorded the highest rates of increase (increasing by 79.7% and 56.3% respectively), while the Northern Territory (16.3%) recorded the lowest rate.

<sup>349</sup> This may be a result of the ABS 1994 National Aboriginal and Torres Strait Islander Survey, and particularly of its use of Indigenous surveyors.

<sup>350</sup> Quoted in *The Advertiser*, Wednesday 16 July, 1997, p. 1.

### Census count, place of usual residence, 6 August 1996 and 6 August 1991

	1991 Census			1996 Census		
	Indigenous population	% of state/territory population	% of Aust's Indigenous population	Indigenous population	% of state/territory population	% of Aust's Indigenous population
<b>NSW</b>	69,993	1.22	26.38	101,636	1.69	28.79
<b>VIC</b>	16,701	0.39	6.29	21,503	0.49	6.09
<b>QLD</b>	70,072	2.43	26.41	95,374	2.94	27.02
<b>SA</b>	16,227	1.15	6.11	20,421	1.42	5.79
<b>WA</b>	41,844	2.65	15.77	50,699	2.97	14.36
<b>TAS</b>	8,912	1.95	3.36	13,929	3.00	3.95
<b>NT</b>	39,857	25.02	15.02	46,362	26.44	13.13
<b>ACT</b>	1,583	0.57	0.60	2,844	0.95	0.81
<b>JBT</b>	182	25.45	0.07	181	31.48	0.05
<b>AUS</b>	265,371	1.58	100.00	352,970	1.99	100.00

JBT: Jervis Bay Territory

Note: Australia in 1996 includes Cocos (Keeling) Islands and Christmas Island. Overseas visitors are excluded.

Source: Australian Bureau of Statistics, 1996 Census data, publication pending.

### Percent increases from 1991 to 1996, Census count, place of usual residence

	1991	1996	% Change
<b>NSW</b>	69,993	101,636	45.21
<b>VIC</b>	16,701	21,503	28.75
<b>QLD</b>	70,072	95,374	36.11
<b>SA</b>	16,227	20,421	25.85
<b>WA</b>	41,844	50,699	21.16
<b>TAS</b>	8,912	13,929	56.29
<b>NT</b>	39,857	46,362	16.32
<b>ACT</b>	1,583	2,844	79.66
<b>JBT</b>	182	181	-0.55
<b>AUST</b>	<b>265,371</b>	<b>352,970</b>	<b>33.01</b>

JBT: Jervis Bay Territory

Note: Australia in 1996 includes Cocos (Keeling) Islands and Christmas Island. Overseas visitors are excluded.

Source: Australian Bureau of Statistics, 1996 Census data, publication pending.

### Indigenous people, Censuses 1966-1996, place of enumeration

	1971	1976	1981	1986	1991	1996
<b>NSW</b>	23,873	40,451	35,367	59,011	69,993	101,636
<b>VIC</b>	6,371	14,760	6,057	12,611	16,701	21,503
<b>QLD</b>	31,922	41,344	44,698	61,268	70,072	95,374
<b>SA</b>	7,299	10,714	9,825	14,291	16,227	20,421
<b>WA</b>	22,181	26,125	31,351	37,789	41,844	50,699
<b>TAS</b>	671	2,943	2,688	6,716	8,912	13,929
<b>NT</b>	23,381	23,750	29,088	34,739	39,857	46,362
<b>ACT</b>	255	828	823	1,059	1,583	2,844
<b>JBT</b>	-	-	-	-	182	-
<b>AUST</b>	<b>115,953</b>	<b>160,915</b>	<b>159,897</b>	<b>227,645</b>	<b>265,371</b>	<b>352,970</b>

JBT: Jervis Bay Territory

Note: Australia in 1996 includes Cocos (Keeling) Islands and Christmas Island. Overseas visitors are excluded.

Source: Australian Bureau of Statistics, 1996 Census data, publication pending.

Not all migration data from the Census has been processed, which makes it difficult to tell whether there have been significant movements of Indigenous people between States. However, early results show that there has been some movement from New South Wales and Victoria into Queensland, and some movement between the Northern Territory and Queensland. Early indications are that movement is mostly from rural to urban areas within a State, rather than between states.

## Deaths in Custody

Aboriginal people are heavily over-represented in all forms of custody. This has remained the case since the final report of the Royal Commission into Aboriginal Deaths in Custody was tabled in Federal Parliament in 1991.<sup>351</sup> Since then, 78 Aboriginal people and two Torres Strait Islanders have died in police, prison or juvenile justice custody.<sup>352</sup> While there has been a minimal reduction in the total number of deaths in 1996, the alarming trends reveal that in recent years the number of Aboriginal and Torres Strait Islander people in Australia's prisons is continuing to increase, as is their level of over-representation in custody.<sup>353</sup>

### Australian Deaths in Custody 1990-95

Year	Adult Populations (15yrs+)*		Deaths in Custody		Rate per 100,000		Over-representation
	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	
1990	168,317	13,141,817	12	54	7.1	0.4	17.3
1991	172,462	13,326,044	13	56	7.5	0.4	17.9
1992	176,827	13,501,987	9	58	5.1	0.4	11.8
1993	181,341	13,649,262	10	70	5.5	0.5	10.8
1994	185,836	13,810,095	14	66	7.5	0.5	15.8
1995	190,438	13,995,940	22	64	11.6	0.5	25.3
<b>Total/Average</b>			<b>80</b>	<b>368</b>	<b>7.4</b>	<b>0.5</b>	<b>16.5</b>

\* Population figures supplied by the Australian Bureau of Statistics.

Source: *Indigenous Deaths in Custody 1989-1996: Aboriginal and Torres Strait Islander Commission, A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996, AGPS, p. 24.*

### Australian Deaths in Custody 1996

Adult Populations (15 years+)*		Deaths in Custody			Rate per 100,000		Over-representation
Aboriginal	Non-Aboriginal	Aboriginal	Torres Strait Islander	Non-Indigenous	Aboriginal	Non-Aboriginal	
195,099	14,211,986	15	2	63	8.7	0.4	19

<sup>351</sup> Dalton, V., *Australian Deaths in Custody and Custody-related Police Operations 1996*, Australian Institute of Criminology, 1997, p. viii.

<sup>352</sup> *Ibid.*, p. 30.

<sup>353</sup> *Ibid.*, p. 31.

\* Population figures supplied by the Australian Bureau of Statistics.

Source: Dalton, V., *Australian Deaths in Custody and Custody-related Police Operations 1996*, Australian Institute of Criminology, 1997, p. 13.

- In 1996 there were 80 deaths in custody: 15 Aboriginal people, 63 non-Aboriginal people, and for the first time, 2 Torres Strait Islanders. The only female to die in custody in 1996 was an Aboriginal woman in prison custody.<sup>354</sup>
- Thirty-two (40%) of the total number of Indigenous people who died in 1996 occurred in New South Wales, followed by Queensland with 15 deaths (19%). The two Torres Strait Islander deaths both occurred in prison custody in Queensland.<sup>355</sup>
- The number of Aboriginal and Torres Strait Islander deaths for 1996 (17) is lower than the previous year (21), but higher than all previous years since 1990.<sup>356</sup>
- The most frequent cause of death for both Aboriginal and non-Aboriginal people in 1996 was hanging, followed by death from illness and death from injuries. Contrary to earlier years when disease accounted for a larger proportion of Aboriginal deaths in custody, during 1996 deaths from hanging and disease were similar in number.<sup>357</sup>
- Indigenous people were, on average, 16.5 times more likely than non-Indigenous people to die in custody between 1990 and 1995.<sup>358</sup>
- During 1996, Aboriginal people were 19 times more likely to die in custody than non-Aboriginal people.<sup>359</sup>
- While Aboriginal people make up less than 2% of the population, they accounted for 21% of all deaths in custody.
- The risk of dying for Aboriginal people in prison custody was 22 times greater than for non-Aboriginal people.<sup>360</sup>
- The average age of Aboriginal people who died in custody is 29.2 years. This is five and a half years less than non-Aboriginal people who die in custody who have an average age of 35 years. 1995.<sup>361</sup>
- Female prisoners accounted for 11.3% of Aboriginal deaths in custody but only 5.2% of non-Aboriginal deaths in custody. The rate of death for Indigenous women in custody was higher than the corresponding rate for Indigenous men.<sup>362</sup>

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<sup>354</sup> Dalton, V., *op. cit.*, p. vii.

<sup>355</sup> *Ibid.*, p. 3.

<sup>356</sup> *Ibid.*, p. vii.

<sup>357</sup> *Ibid.*

<sup>358</sup> Aboriginal and Torres Strait Islander Commission, *Indigenous Deaths in Custody 1989–1996: A Report* prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996, p. 25.

<sup>359</sup> Dalton, V., *op. cit.*, p. viii.

<sup>360</sup> *Ibid.*, p. viii.

<sup>361</sup> *Indigenous Deaths in Custody 1989-1996, op. cit.*, p. 26.

<sup>362</sup> *Ibid.*



### Deaths by Custodial authority: 1990-1995

Year	Indigenous				Non-Indigenous			
	Police	Prison	JDC	Total	Police	Prison	JDC	Total
1990	5	6	1	12	26	27	1	54
1991	5	8	-	13	25	31	-	56
1992	7	2	-	9	24	34	-	58
1993	3	7	-	10	27	42	-	69
1994	3	11	-	14	23	42	1	66
1995	5	17	-	22	21	42	2	65
<b>Total</b>	28	51	1	80	146	218	4	368
<b>%</b>	<b>35%</b>	<b>63.8%</b>	<b>1.3%</b>	<b>100%</b>	<b>39.7%</b>	<b>59.2%</b>	<b>1.1%</b>	<b>100%</b>

JDC: Juvenile Detention Centre

Source: *Indigenous Deaths in Custody 1989-1996: Aboriginal and Torres Strait Islander Commission, A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996, AGPS, p. 27.*

### Deaths by Custodial authority: 1996

	Indigenous				Non-Indigenous			
	Police	Prison	JDC	Total	Police	Prison	JDC	Total
1996	5	12	-	17	22	40	1	63
<b>%</b>	<b>30%</b>	<b>70%</b>	<b>0</b>	<b>100%</b>	<b>35%</b>	<b>63%</b>	<b>2%</b>	<b>100%</b>

JDC: Juvenile detention centre

Source: Dalton, V., *Australian Deaths in Custody and Custody-related Police Operations 1996*, Australian Institute of Criminology, 1997, p. 3.

### Death rate per general population by jurisdiction 1990-95

		NSW	VIC	QLD	WA	SA	TAS	NT	ACT/ TH	AUST
<b>Deaths</b>	<b>Indigenous</b>	27	6	23	14	12	2	5	0	80
	<b>Non-Indigenous</b>	154	84	71	30	36	16	6	5	368
<b>Rate per 100,000</b>	<b>Indigenous</b>	8.3	7.2	7.5	7.9	14.8	5.8	3.0	0.0	7.4
	<b>Non-Indigenous</b>	0.5	0.4	0.4	0.4	0.5	0.7	1.1	0.4	0.5
<b>Over-representation</b>		17.0	18.8	16.8	20.5	31.7	7.7	2.8	0.0	16.5

Source: *Indigenous Deaths in Custody 1989-1996: Aboriginal and Torres Strait Islander Commission, A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996, AGPS, p. 27.*

The over-representation rate is the highest in South Australia, where Indigenous people are 31.7 times more likely to die in custody. In New South Wales the over-representation rate is 27 times that of the non-Indigenous population, and Indigenous people are 23 times more likely to die in custody in Queensland.

### Juvenile Justice

Indigenous children and young people are grossly over-represented in Australia's juvenile justice system, both in police custody and in juvenile detention centres. 40% of all young people held in police custody during the 1995 National Police Custody Survey period were Indigenous. Indigenous

children and young people comprise only 2.6% of the national youth population. Indigenous young people are placed in custody at a rate 26 times that of non-Indigenous youth.

### National Police Custody Survey, August 1995

Age	Indigenous youth		Non-Indigenous youth		Total	
	No.	%	No.	%	No.	%
10	-	-	1	100	1	100
11	4	57	3	43	7	100
12	24	67	12	33	36	100
13	65	59	46	41	111	100
14	105	59	73	41	178	100
15	151	44	190	66	341	100
16	155	38	250	62	405	100
17	200	30	474	70	674	100
<b>Total</b>	<b>704</b>	<b>40</b>	<b>1,049</b>	<b>62</b>	<b>1,753</b>	<b>100</b>

Source: Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS, 1997, p. 492, [‘Bringing them home’].

As can be seen from this table, the majority of children taken into police custody aged 14 years and under were Indigenous. As highlighted by the report into the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,<sup>363</sup> it is of great concern that children of such a young age should be separated from their families and communities, particularly when such separations are not a feature of police interaction with non-Indigenous children.

### Young people in police custody in each State and Territory, August 1995

State	Indigenous youth		Non-Indigenous youth		Total	
	No.	%	No.	%	No.	%
NSW	108	36	192	64	300	100
VIC	16	7	209	93	225	100
QLD	176	42	245	58	421	100
WA	228	61	146	39	374	100
SA	123	39	196	61	319	100
TAS	3	9	31	91	34	100
NT	45	69	20	31	65	100
ACT	5	33	10	67	15	100
<b>AUST</b>	<b>704</b>	<b>40</b>	<b>1,049</b>	<b>60</b>	<b>1,753</b>	<b>100</b>

Source: Human Rights and Equal Opportunity Commission, *Bringing them home: op. cit.*, p. 493.

This table demonstrates the different patterns of policing Indigenous and non-Indigenous children and young people throughout Australia. The majority of young people held in police custody in Western Australia and the Northern Territory were Indigenous. In particular, in Western Australia 61% of young people held in police custody were Indigenous. Of all Indigenous young people held in police custody, Western Australia accounted for 32% and Queensland for 25% of the total.

On 30 June 1996, 36% of youth in juvenile correctional centres were Indigenous. The rate of incarceration for Indigenous youth was almost 22 times that of non-Indigenous youth.

<sup>363</sup> Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, [‘Bringing them home’], 1997, p. 492.

### Young people in juvenile corrective institutions, 30 June 1996

State	Indigenous youth		Non-Indigenous youth		Total	
	No. <sup>a</sup>	%	No. <sup>a</sup>	%	No. <sup>a</sup>	%
NSW	102	30	238	70	340	100
VIC	4	6	66	94	70	100
QLD	84	61	53	39	137	100
WA	61	57	45	43	106	100
SA	18	22	65	78	83	100
TAS	6	23	20	77	26	100
NT	9	69	4	31	13	100
ACT	1	14	6	86	7	100
<b>AUST</b>	<b>285</b>	<b>36</b>	<b>497</b>	<b>64</b>	<b>782</b>	<b>100</b>

a. These figures do not include young people over the age of 17 years who are held in juvenile correctional centres. Some jurisdictions (such as NSW) have significant numbers of young people in this category. Nationally, at 30 June 1996 an additional 37 Indigenous young people 18 years or older were held in juvenile institutions.<sup>364</sup>  
 Source: Human Rights and Equal Opportunity Commission, *Bringing them home*, op. cit., p. 495.

This table shows that while the majority of young people in juvenile correctional institutions were Indigenous in the Northern Territory (69%), Queensland (61%) and WA (57%), New South Wales actually had the highest number of Indigenous young people incarcerated (102). Nationally, 87% of Indigenous young people in detention were held in only three states: New South Wales, Western Australia and Queensland.

### Level of over-representation for Indigenous youth, 30 June 1996

Age	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	AUST
<b>10-17</b>	20.5	9.8	41.1	31.6	13.7	8.2	3.8	19.0	21.3

Source: Human Rights and Equal Opportunity Commission, *Bringing them home*, op. cit., p. 496.

This table shows the level of over-representation of Indigenous young people to non-Indigenous young people in correctional institutions by comparing the rates of incarceration in each jurisdiction. In Queensland, for example, an Indigenous young person is 41.1 times more likely to be in juvenile correctional institutions than a non-Indigenous young person.

### Comparing males and females in juvenile corrective institutions, 30 June 1996

	Males		Females		Total	
	No.	%	No.	%	No.	%
<b>Indigenous</b>	258	90.5	27	9.5	285	100
<b>Non-Indigenous</b>	465	93.6	32	6.4	497	100
<b>Total</b>	<b>723</b>	<b>92.5</b>	<b>59</b>	<b>7.5</b>	<b>782</b>	<b>100</b>

Source: Human Rights and Equal Opportunity Commission, *Bringing them home*, op. cit., p. 496.

Young males, Indigenous and non-Indigenous, make up the majority of youth in detention centres. However, this table indicates that Indigenous girls comprise 46% of all girls incarcerated, while Indigenous boys comprise 36% of all boys.

<sup>364</sup> Atkinson, L. & Dagger, D., *Persons in Juvenile Corrective Institutions*, Amended Series 64 to 67, New Series 68 to 75, Australian Institute of Criminology, 1996.

## Removal

It is often claimed that Indigenous children who were separated from their families benefited from removal in terms of education and employment opportunities. However, in comparing the life circumstances of Indigenous people who were removed as children against those of people raised by their families and communities, the 1994 National Aboriginal and Torres Strait Islander Survey found no significant difference between the two groups.

### Post-school qualifications for adults 20 years and above

Qualification	Taken away	Not taken away
Higher Education	1.9%	2.0%
TAFE	1.9%	1.8%
Other	0.6%	1.0%
None	95.6%	94.8%
Not stated	-	0.3%
<b>Total</b>	<b>100%</b>	<b>100%</b>

Source: 1994 ABS National Aboriginal and Torres Strait Islander Survey, tables supplied for *Bringing them home*, p. 14.

### Employment status of adults 20 years and above

Status	Taken away	Not taken away
Employed non-CDEP	22.8%	25.0%
Employed CDEP	8.2%	8.5%
Unemployed	22.2%	20.0%
Not in labour force	39.2%	38.3%
Not applicable	7.6%	8.2%
<b>Total</b>	<b>100%</b>	<b>100%</b>

Source: 1994 ABS National Aboriginal and Torres Strait Islander Survey, tables supplied for *Bringing them home*, p. 14.

People removed as children from their families are also less likely to earn higher incomes in adulthood. The fact that removed people are more likely to be in the \$8,000-\$12,000 bracket while those not removed are more likely to be in the \$0-\$3,000 bracket does not necessarily indicate higher income, but that removed people are more likely to benefit from social security. According to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,<sup>365</sup> this is probably due to the greater urbanisation of this group as compared with people not removed, the latter being more likely to live in their traditional and historical communities.

<sup>365</sup> *Bringing them home*, op. cit., p. 14.

## Personal income for adults 20 years and above

Personal income	Taken away	Not taken away
\$0-3,000	13.3%	21.5%
\$3,001-5,000	1.9%	5.0%
\$5,001-8,000	17.7%	18.2%
\$8,001-12,000	24.7%	18.3%
\$12,001-16,000	15.2%	9.6%
\$16,001-20,000	5.7%	7.1%
\$20,000-25,000	7.0%	7.4%
\$25,001-30,000	5.7%	4.8%
\$30,001-40,000	3.8%	3.8%
\$40,001 +	1.9%	1.8%
<b>Total</b>	<b>100%</b>	<b>100%</b>

Source: 1994 ABS National Aboriginal and Torres Strait Islander Survey, tables supplied for *Bringing them home*, p. 15.

Those removed in childhood were twice as likely to have been arrested more than once in the last 5 years (22% as compared with 11% of those not taken away).<sup>366</sup> According to the National Inquiry, this tallies with evidence heard of the very damaging effects of institutionalisation on personal emotional development and on the individual's sense of self-worth. The same factors also have an impact on health prospects.<sup>367</sup>

The following table summarises the findings of the Western Australia Aboriginal Legal Service survey of 483 clients who had been forcibly removed.

### After-effects of forcible removal

Effects	Yes	No	No answer	Total
Physical ill-health	21.4%	36.6%	40.0%	100%
Mental problems	14.1%	48.4%	37.5%	100%
Substance abuse	16.4%	44.7%	38.9%	100%
Imprisonment	25.3%	40.0%	34.7%	100%

Source: Aboriginal Legal Service of Western Australia submission 127 to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, pp. 54-55, *Bringing them home*, p. 200.

## Care and Protection Orders

Indigenous children are over-represented among children on care and protection orders. At 30 June 1996, 1,951 of the 13,241 children on care and protection orders (15%) were Indigenous children,

<sup>366</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings*, AGPS, 1995, p. 58.

<sup>367</sup> *Bringing them home*, op. cit., p. 15.

yet they make up only 3% of the population aged 0-17 years.<sup>368</sup> This over-representation was evident in all States and Territories, for both guardianship and non-guardianship car and protection orders.<sup>369</sup>

Source: Broadbent, A. & Bentley, R., *Children on care and protection orders Australia: 1995-96*, Australian Institute of Health and Welfare Child Welfare Series no. 18, 1997, p. xi & 11.

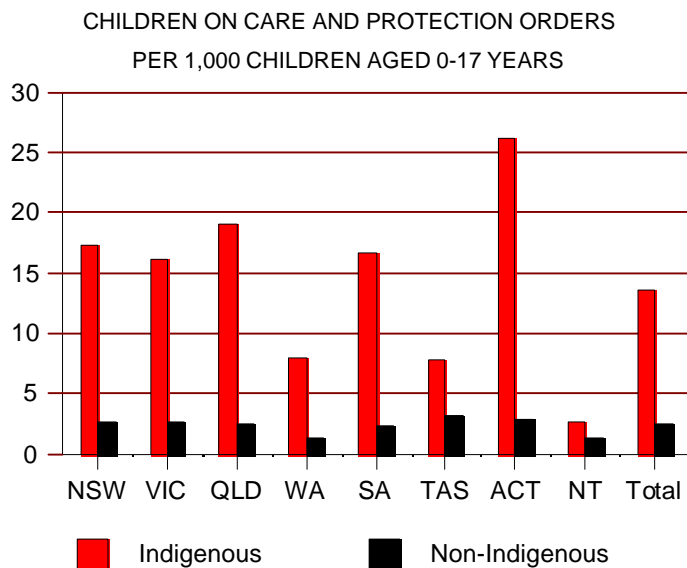
### Children on care and protection orders per 1,000 aged 0-17 years, 30 June 1996

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
<b>Indigenous</b>	17.3	16.2	19.0	8.0	16.6	7.8	26.2	2.6	13.6
<b>Non-Indigenous</b>	2.6	2.7	2.5	1.3	2.4	3.3	2.8	1.3	2.5

Notes: 1. Children whose Aboriginality was unknown are included with non-Indigenous children.

2. Rates for the ACT should be interpreted carefully given its small Indigenous population.

Source: Broadbent, A. & Bentley, R., *Children on care and protection orders Australia: 1995-96*, Australian Institute of Health and Welfare Child Welfare Series no. 18, 1997, p. 12.



<sup>368</sup> It should be noted that the number of Indigenous children on care and protection orders is definitely underestimated. New South Wales could not provide details on Aboriginality of children on supervisory orders at 30 June 1996 (884 children), and as it is not possible to estimate what proportion of these children are Indigenous children, all 884 children have been included with non-Indigenous children. Broadbent, A. & Bentley, R., *Children on care and protection orders Australia: 1995-96*, Australian Institute of Health and Welfare Child Welfare Series no. 18, 1997, p. 8.

<sup>369</sup> *Ibid.*, pp. xi, 11.

**Children on care and protection orders by state/territory, 30 June 1996**

Type of order		NSW %	VIC %	QLD %	WA <sup>d</sup> %	SA %	TAS %	ACT %	NT %	Total %
<b>Guardianship<sup>a</sup></b>	<b>Indigenous</b>	0.54	0.7	1.76	0.8	1.47	0.6	0.44	0.2	0.92
	<b>Non-Indigenous (c)</b>	0.16	0.12	0.23	0.13	0.21	0.25	0.05	0.11	0.16
<b>Non-<sup>b</sup> Guardianship</b>	<b>Indigenous</b>	1.19	0.92	0.14	-	0.19	0.19	2.18	0.06	0.44
	<b>Non-Indigenous<sup>c</sup></b>	0.11	0.15	0.02	-	0.03	0.07	0.23	0.02	0.09

a Guardianship orders involve the transfer of legal guardianship of the child to an authorised department.

b Non-guardianship care and protection orders include custody and supervisory orders and undertakings.

c Includes children whose Aboriginality was unknown.

d Western Australia does not have non-guardianship care and protection orders.

Source: Broadbent, A. & Bentley, R., *Children on care and protection orders Australia: 1995-96*, Australian Institute of Health and Welfare Child Welfare Series no. 18, 1997, p. 14.

For guardianship orders at 30 June 1996, Indigenous children were represented at almost 16 times the rate for non-Indigenous children. The rates for Indigenous children on guardianship orders were highest in Queensland (1.76%) and lowest in the Northern Territory (0.2%).<sup>370</sup>

**Indigenous children on guardianship orders, 30 June 1996**

Living arrangements	NSW %	VIC %	QLD %	WA %	TAS %	ACT %	NT %
<b>Living with parent(s) or relatives(s)</b>	17	31	21	25	3	-	16
<b>Foster care</b>	57	52	68	61	45	75	63
<b>Residential facility:</b>	2	8	1	1	34	25	2
-residential child care							
-family group home	5	8	1	5	-	-	14
-other residential care	-	-	1	3	-	-	5
-corrective establishment	-	2	1	1	-	-	-
<b>-total residential facility</b>	7	18	4	10	34	25	21
<b>Other adult living arrangement</b>	10	-	3	2	-	-	-
<b>Living independently</b>	3	-	2	2	17	-	-
<b>Other/Unknown</b>	4	-	1	-	-	-	-
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

Note: South Australia was unable to provide details of the living arrangements of children on care and protection orders.

Source: Broadbent, A. & Bentley, R., *Children on care and protection orders Australia: 1995-96*, Australian Institute of Health and Welfare Child Welfare Series no. 18, 1997, p. 32.

**Health****Mortality**

Only Western Australia, South Australia, and the Northern Territory were considered by the Australian Bureau of Statistics to have acceptable quality of Indigenous identification on death

<sup>370</sup> *Ibid.*, pp. xi, 11.

records<sup>371</sup> when the most recent comprehensive study of Indigenous mortality was carried out in 1992-94. As a result, there are no national figures for Indigenous mortality or life expectancy which can be compared with any accuracy with non-Indigenous rates. According to the 1996 Census population information, 66.2% of Australia's population live in New South Wales, Queensland, Victoria, Tasmania and the ACT, thus assumptions of national statistics for patterns in Indigenous mortality are, to say the least, problematic. Nevertheless, figures from Western Australia, South Australia and the Northern Territory do indicate enough of a disparity between Indigenous and non-Indigenous rates of death to be significant, as long as their limitations in providing national trends or figures is recognised.

In 1992-94, Indigenous Australians in Western Australia, South Australia and the Northern Territory experienced much higher rates of death than did non-Indigenous Australians.<sup>372</sup> The mortality of Indigenous people in 1992-4 for those areas was about 3.5 times greater than expected for males and about 4 times greater than expected for females, based on comparisons with non-Indigenous rates. The differences were particularly pronounced for those aged 25-54 years, for whom there were 6-8 times the expected number of deaths.<sup>373</sup>

Between 1985 and 1994, overall death rates for Indigenous males declined by an estimated 1.5% per year, but this improvement was not enough to reduce the disparity between Indigenous and non-Indigenous males, as the death rates fell by similar amounts. For Indigenous females, death rates did not decline at all.<sup>374</sup>

Available data shows that life expectancies in 1992-4 for Aboriginal and Torres Strait Islander men and women were 15-20 years below those of other Australians.<sup>375</sup>

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<sup>371</sup> P., Kuldeep, B. & Cunningham, J. *Occasional Paper: Mortality of Indigenous Australians 1994*, Aboriginal and Torres Strait Islander Health and Welfare Information: a joint program of the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, AGPS, 1996, p. 1.

<sup>372</sup> Mortality rates for the Indigenous population in the NT, WA and SA are measured relative to the non-Indigenous population through the use of standardised mortality ratios (SMR) in which the number of observed deaths is compared to those which would be expected based on non-Indigenous death rates. Population estimates for 1992-94 are Australian Institute of Health and Welfare projections calculated by the ABS.

<sup>373</sup> Anderson, P., Kuldeep, B. & Cunningham, J., *op. cit.*, p. 1.

<sup>374</sup> *Ibid.*

<sup>375</sup> Australia's Health 1996, *op. cit.*, p. 21.



*Age-specific death rates 1992-94*

Age group (years)	Male			Female		
	Indigenous Rate %	Non-Indigenous Rate %	Rate Ratios	Indigenous Rate %	Non-Indigenous Rate %	Rate Ratios
<1	2.264	0.567	4.0	2.050	0.463	4.4
1-4	0.178	0.035	5.1	0.094	0.031	3.0
5-14	0.055	0.018	3.1	0.039	0.013	3.0
15-24	0.288	0.104	2.8	0.134	0.178	3.5
25-34	0.657	0.120	5.5	0.281	0.046	6.1
35-44	1.170	0.148	7.9	0.686	0.084	8.2
45-54	2.237	0.337	6.6	1.331	0.211	6.3
55-64	4.377	1.057	4.1	3.384	0.562	6.0
65-74	6.254	2.968	2.1	6.698	1.576	4.2
75+	14.685	9.465	1.6	12.853	7.056	1.8

Source: Australian Bureau of Statistics, *Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 1997*, AGPS, p. 87.

Age-specific death rates are higher for Aboriginal and Torres Strait Islander people in those areas with sufficient mortality data than for other Australians at virtually every age. Specifically, Indigenous men aged 35-44 die at a rate of 7.9 times higher than other Australian men, while Indigenous women of the same age group die at a rate of 8.2 times the average for Australian women.<sup>376</sup>

### Infants

Statistics on Indigenous births remain limited, as perinatal collection forms throughout Australia only records information about mothers and their babies. Therefore it is not possible to identify babies who may have a non-Indigenous mother and Indigenous father. Paternity is recorded through the Registrar of Births, Deaths and Marriages in each State and Territory, and it is becoming more common to link these registrations with the information from the perinatal forms. As a result, in the future more accurate information about the number of Indigenous babies (as opposed to the number of babies of Indigenous mothers) may become available. Identification of mothers as Indigenous also relies on the midwife or medical practitioner involved specifically asking the mother if she identifies as Aboriginal or Torres Strait Islander, and filling out the perinatal form appropriately. The following statistics should be viewed in light of these factors, as well as noting that there are no figures for Tasmania as, until 1996, the perinatal collection form in that state did not record Indigenous status.<sup>377</sup>

<sup>376</sup> *Ibid.*

<sup>377</sup> Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, AGPS, 1997, p. 60-61.

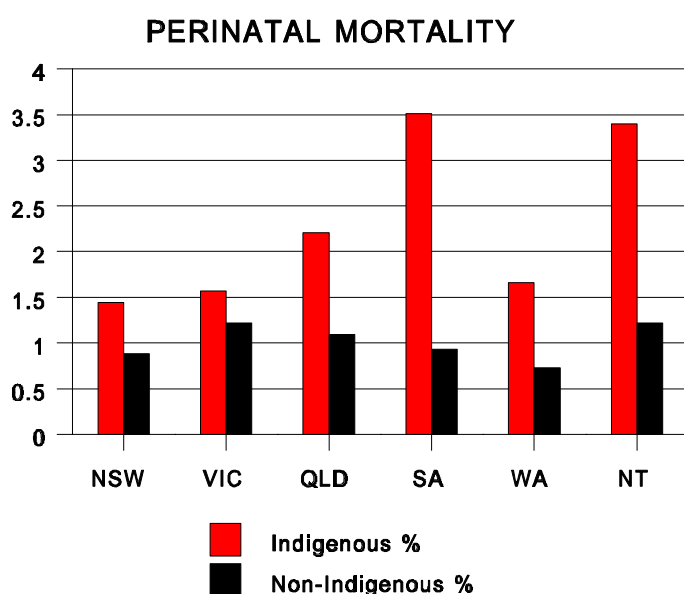
**Perinatal mortality<sup>a</sup>**

	NSW	VIC	QLD	SA	WA	NT
<b>Indigenous %</b>	1.44	1.57	2.21	3.51	1.66	3.4
<b>Non-Indigenous %</b>	0.88	1.22	1.09	0.93	0.73	1.22

a Perinatal deaths include stillbirths and neonatal deaths (death of a liveborn infant within 28 days of birth).

Source: Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples AGPS, 1997*, p. 64.

In all states except Victoria, the perinatal mortality rate was much higher for babies of Indigenous mothers than for babies of non-Indigenous mothers. In South Australia, where this disparity was most pronounced, the mortality rate for babies of Indigenous mothers was almost four times that of the non-Indigenous perinatal mortality rate.



More detailed information has been published about Indigenous mothers and babies in the Northern Territory, where 35% of all births were to Indigenous women. A 1994 Northern Territory Midwives Collection report<sup>378</sup> found that nearly half of all Indigenous mothers had a medical condition complicating their pregnancy compared to 17% of non-Indigenous mothers, that 4.4% of Indigenous mothers and 0.3% of non-Indigenous mothers had no antenatal care, and that nearly 30% of Indigenous mothers had to travel away from their home location to give birth, mainly due to the remoteness of much of the Northern Territory's Indigenous population.<sup>379</sup>

A key indicator of the health of babies born in Australia is the proportion with a birthweight of less than 2500g. Low-birthweight infants have a greater risk of dying, of needing longer periods of hospitalisation after birth and of developing significant disabilities.<sup>380</sup>

<sup>378</sup> Markey, P., McComb, J. & Lin, M., *Mothers and babies 1994*, Northern Territory Midwives Collection, 1996.

<sup>379</sup> Australian Bureau of Statistics, *op. cit.*, p. 65.

<sup>380</sup> Australian Institute of Health and Welfare, *Australia's Health 1996, the fifth biennial report of the Australian Institute of Health and Welfare*, AGPS, 1996, p. 43.

**Birthweight (grams)**

	Less than 500	500-999	1000-1499	1500-1999	2000-2499	2500-2999	3000-3499	3500-3999	4000 and over
<b>Indigenous %</b>	0.4	1.2	1.2	2.3	7.8	23.3	34.1	21.9	7.9
<b>All Australia %</b>	0.2	0.5	0.6	1.2	3.8	15.3	36.4	30.5	11.5

Source: Day P., Lancaster P. & Huang J., *Australia's Mothers and Babies 1994*, AIHW National Perinatal Statistics Unit: Perinatal Statistics Series No. 5, 1997, p. 78 & 81.

As the table and graph above show, 12.8% of Indigenous babies born in 1994 had a birthweight of less than 2500g, compared to a national average of 6.3%. The disparity between Indigenous and non-Indigenous birthweights would be even greater than these statistics indicate, since the rate for the national average of all Australian babies includes the Indigenous rate.

Low birthweight in Indigenous babies was more likely among Indigenous births in South Australia (16.2%), the Northern Territory (14.4%) and Western Australia (14.2%) than in the other States.<sup>381</sup>

**Maternal Details**

The most recent publication by the Australian Institute of Health and Welfare National Perinatal Statistics Unit,<sup>382</sup> which contains national data on births in Australia in 1994, found that Indigenous mothers are more likely to have their babies at younger ages, and to have more babies, than other mothers.<sup>383</sup>

**Number of children born to Australian mothers - Total Births excluding still births**

No. of live births	Indigenous				Non-Indigenous			
	1986		1996		1986		1996	
	No.	%	No.	%	No.	%	No.	%
<b>0</b>	16621	23.5	28174	25.6	1652831	27.6	2062033	29.5
<b>1</b>	8894	12.6	14519	13.2	650258	10.9	779362	11.2
<b>2</b>	9151	12.9	17472	15.9	1339654	22.4	1696600	24.3
<b>3</b>	7784	11.0	15052	13.7	925230	15.4	1134473	16.2
<b>4</b>	5653	8.0	10240	9.3	459876	7.7	519004	7.4
<b>5</b>	3821	5.4	5882	5.3	191724	3.2	194425	2.8
<b>6+</b>	8147	11.5	8599	7.8	187911	3.1	164999	2.4
<b>Not stated</b>	10643	15.1	10015	9.1	582821	9.7	437240	6.3
<b>Total</b>	<b>70714</b>	<b>100.0</b>	<b>109953</b>	<b>100.0</b>	<b>5990305</b>	<b>100.0</b>	<b>6988136</b>	<b>100.00</b>

Source: Australian Bureau of Statistics, 1996 Census data, publication pending.

<sup>381</sup> Day P., Lancaster P. & Huang J., *Australia's Mothers and Babies 1994*, AIHW National Perinatal Statistics Unit: Perinatal Statistics Series No. 5, 1997, p. 28.

<sup>382</sup> Day P., Lancaster P. & Huang J., *Australia's Mothers and Babies 1994*, AIHW National Perinatal Statistics Unit: Perinatal Statistics Series No. 5, 1997.

<sup>383</sup> *Ibid.*, p. 10.

**Maternal age**

	<b>Under 15</b>	<b>15-19</b>	<b>20-24</b>	<b>25-29</b>	<b>30-34</b>	<b>35-39</b>	<b>40 and over</b>
<b>Indigenous %</b>	0.9	23.7	35.8	23.3	11.9	3.8	0.6
<b>All Australia<sup>a</sup> %</b>	0.1	5.2	19.5	33.1	29.5	10.9	1.8

a 'All Australia' includes Indigenous figures.

Source: Day P., Lancaster P. & Huang J., *Australia's Mothers and Babies 1994*, AIHW National Perinatal Statistics Unit: Perinatal Statistics Series No. 5, 1997, p. 53.

As is evident from the table above, almost a quarter (24.6%) of all Indigenous mothers in 1994 were teenagers.

Although maternal death<sup>384</sup> is an uncommon event, it is substantially more common among Aboriginal and Torres Strait Islander women than among other Australian women. The Australian Institute of Health and Welfare estimates that about 30% of maternal deaths occur in Aboriginal and Torres Strait Islander women, who make up only about 3% of women giving birth each year.<sup>385</sup>

**Disease****Diabetes**

Death rates for diabetes mellitus increased between 1985 and 1994 by almost 10% per year for Indigenous males and by over 5% per year for Indigenous females. By 1994, recorded Indigenous deaths from diabetes were about 12 times greater than for the general Australian population. In particular, death rates for diabetes were 17 times greater for Indigenous females than for non-Indigenous females.<sup>386</sup>

A survey recorded in a recent report commissioned by the Commonwealth Minister for Health and Family Services found that in 1994-5, 40% of Torres Strait Islanders surveyed over 35 years of age had diabetes.<sup>387</sup>

**Trachoma**

Trachoma is chronic conjunctivitis caused by repeated episodes of infections with the obligatory intracellular bacterium, *Chlamydia trachomatis*. The early stages of infection, 'follicular trachoma', are largely seen in young children and if long-standing and moderately severe lead to 'cicatricial trachoma' in later life. Severe scarring of the eyelids causes in-turning of the eyelashes, opacification of the cornea and blindness. Australia is noted by World Health Organization as one of the 54 countries that still has hyperendemic blinding trachoma.<sup>388</sup>

<sup>384</sup> Maternal mortality as defined by the World Health Organization is the death of a woman during pregnancy, childbirth or 42 days after childbirth from any cause related to or aggravated by the pregnancy or its management.

<sup>385</sup> Australian Institute of Health and Welfare, *op. cit.*, p. 22.

<sup>386</sup> Anderson, P., Kuldeep, B. & Cunningham, J., *op. cit.*, p. 1.

<sup>387</sup> Taylor, H., Eye Health in *Aboriginal and Torres Strait Islander Communities*, Report of a review commissioned by the Commonwealth Minister for Health and Family Services, 1997, p. 71.

<sup>388</sup> *Ibid.*, p. 81.

### ***Current prevalence of follicular trachoma in children***

<b>Region</b>	<b>Year</b>	<b>Prevalance</b>
Pilbara	1996	55%
Central Desert	1994	36%
Katherine	1996	19%
Kimberley	1996	15%

Source: Taylor, H., *Eye Health in Aboriginal and Torres Strait Islander Communities, the Report of a review commissioned by the Commonwealth Minister for Health and Family Services, 1997, p. 83.*

For those areas where recent data is available, substantial numbers of children are affected by follicular trachoma. The prevalence in many areas appears to be still at hyperendemic levels, that is, more than 20% of children under 10 years of age have follicular trachoma.<sup>389</sup>

### ***Blindness***

The Northern Territory Eye Health Program found that overall Aboriginal people in rural Australia suffered from blindness at a rate nearly ten times that of non-Aboriginal people. The rates of blindness were 1.49% in Aboriginal people compared with only 0.16% of non-Aboriginal people.<sup>390</sup>

The causes of blindness were substantially different for Aboriginal people and non-Aboriginal people. Corneal disease was responsible for 50% of blindness among Aboriginal people, including 41% due to trachoma. Only 7% of blindness among non-Aboriginal people examined was due to corneal disease. Cataract caused 39% of the blindness among Aboriginal people, and 23% among the non-Aboriginal people. Retinal disease caused 52% of blindness among non-Aboriginal people, but only 6% among Aboriginal people.<sup>391</sup>

### ***Hookworm, iron deficiency and anaemia***

A recent study of hookworm, iron deficiency and anaemia in a community in the Kimberley region found that hookworm infections were endemic in the Aboriginal population in this community. 77% of Aboriginal people studied were infected with hookworm, with the highest level of infection occurring in the 5-14 years age group (93%).

Of the Aboriginal children in the community, 72% aged less than five years were anaemic. Iron deficiency was prevalent in Aboriginal children in the 5-14 years age group category (79%) and in Aboriginal women aged over 14 years (72%).

The significant associations observed between hookworm infection and both anaemia and iron deficiency in individuals aged over 14 years suggest that hookworm infection is a major contributor to iron-deficiency anaemia in the Aboriginal community.<sup>392</sup>

### ***Cervical cancer***

In 1992-94, the standard mortality rate recorded for Indigenous women from cervical cancer was over eight times that of non-Indigenous women.<sup>393</sup>

<sup>389</sup> Taylor, *op. cit.*, pp. 83.

<sup>390</sup> Royal Australian College of Ophthalmologists, *National trachoma and eye health program*, 1980, in Taylor, H., *op. cit.*, pp. 93.

<sup>391</sup> Royal Australian College of Ophthalmologists, *op. cit.*, p. 94..

<sup>392</sup> Source: Hopkins, R. et al. "The prevalence of hookworm infection, iron deficiency and anaemia in an Aboriginal community in north-west Australia" *Medical Journal of Australia*, Vol 166 3, March 1997, p. 241-244.

<sup>393</sup> Anderson, P., Kuldeep, B. & Cunningham, J., *op. cit.*, p. 16.

### ***Tuberculosis***

A 1993 study of tuberculosis in Australia<sup>394</sup> found that although rates of the disease had fallen and remain some of the lowest in the world, the notification rate of tuberculosis for Aboriginal and Torres Strait Islander people was still seven times the rate of Australians born here.<sup>395</sup>

### ***Hepatitis A***

A study of hospital records in the Torres Strait area over the period 1984-1994 found that hepatitis A was endemic in the area, observing incidence of hepatitis A was found to be 17 times higher than the Queensland rate.<sup>396</sup>

### ***Gonorrhoea and chlamydia***

In a recent study of central Australian Aboriginal communities, 20.9% of men tested were found to be infected with either gonorrhoea or chlamydia.<sup>397</sup>

### **Smoking**

According to a 1996 ABS Occasional Paper on cigarette smoking among Indigenous Australians,<sup>398</sup> cigarette smoking is an important health risk factor for a variety of diseases and conditions, including circulatory disease, respiratory disease, cancer and low birthweight, and it is these conditions which are major factors in the disparity between Indigenous and non-Indigenous Australians. According to ABS surveys, about half of all deaths among Indigenous people are due to circulatory disease, respiratory disease or cancer. While these diseases are a major cause of death for many non-Indigenous people, they are recorded as the cause of death 1.5 - 8 times more for Indigenous people, depending on age.<sup>399</sup>

### ***Comparison of smoking prevalence***

<b>Age group in years</b>	<b>Indigenous males<sup>a</sup> %</b>	<b>Indigenous females<sup>a</sup> %</b>	<b>All Australians<sup>b</sup> %</b>
<b>18-24</b>	59	53	50
<b>25-34</b>	66	60	31
<b>35-44</b>	61	53	25
<b>45-64</b>	51	39	21
<b>65 and over</b>	38	16	11

a National Aboriginal and Torres Strait Islander Survey 1994

b Australian Bureau of Statistics, *National Health Survey 1995: First results*, AGPS, 1996

Source: Australian Bureau of Statistics Occasional Paper: *Cigarette Smoking Among Indigenous Australians 1994*, AGPS, 1997, p. 5.

<sup>394</sup> Hargreaves, J. "Tuberculosis notifications in Australia, 1993", *Communicable Diseases Intelligence* 19, 1995, p. 334-43.

<sup>395</sup> Australia's Health 1997, *op. cit.*, p. 66.

<sup>396</sup> *Ibid.*, p. 19.

<sup>397</sup> Skov, S. et al., "Urinary diagnosis of gonorrhoea and chlamydia in men in remote Aboriginal communities" *Medical Journal of Australia*, Vol 166, 5, May 1997, p. 468-471.

<sup>398</sup> Australian Bureau of Statistics, *Occasional Paper: Cigarette Smoking Among Indigenous Australians*, 1994, AGPS, 1997, p. 1. Based on the findings of the National Aboriginal and Torres Strait Islander Survey.

<sup>399</sup> See Australian Bureau of Statistics, *Occasional Paper: Mortality of Indigenous Australians*, 1994, AGPS, 1996, p. 15.

To view the above statistics in context, it is important to note that the comparative figures come from two different surveys, and to note the classification of those who were counted in the NATSIS figures. Participants in the 1994 NATSIS were classified as smokers if they indicated that they smoked at least one cigarette a day, but also if they answered that they 'sometimes' smoked.<sup>400</sup> This may have resulted in Indigenous people being classified as smokers when they did not smoke regularly. The number of cigarettes smoked per day by Indigenous smokers actually appears to be less than or similar to the number smoked by their non-Indigenous counterparts. For example, in the National Drug Strategy surveys of 1993 and 1994, daily cigarette consumption was reported to be lower among urban Indigenous smokers than among smokers in the general urban community, with 12% of Indigenous regular smokers and 32% of general urban regular smokers reporting that they smoked more than a pack of cigarettes per day.<sup>401</sup> In addition, about 15% of Indigenous males and 14% of Indigenous females aged 13-15 years said they smoked, a proportion lower than that observed in the 1993 Australian Cancer Society survey of school children.<sup>402</sup>

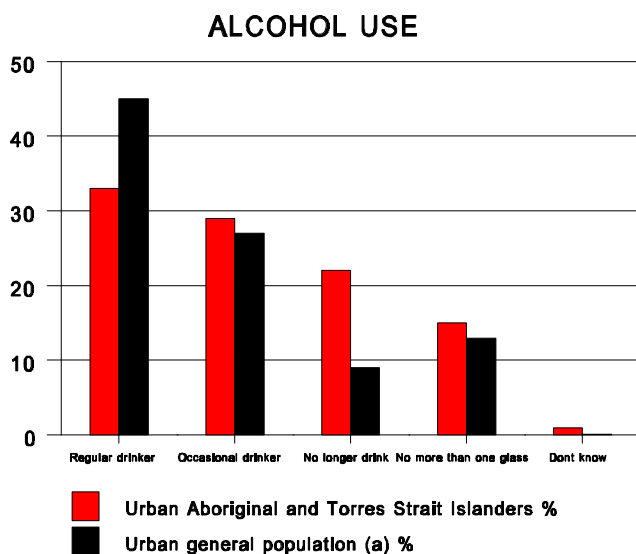
## Alcohol

### *Summary of alcohol use, Indigenous and non-Indigenous Australians*

	Regular drinker	Occasional drinker	No longer drink	No more than one glass	Don't know
<b>Urban Aboriginal and Torres Strait Islanders %</b>	33	29	22	15	1
<b>Urban general population<sup>a</sup> %</b>	45	27	9	13	6

a National Drug Strategy Household Survey 1993, Commonwealth Department of Health, Housing, Local Government and Community Services.

Source: *National Drug Strategy Household Survey: Urban Aboriginal and Torres Strait Islander Peoples Supplement 1994*, Commonwealth Department of Human Services and Health, AGPS, p. 27.



<sup>400</sup> Australian Bureau of Statistics, *Occasional Paper: Cigarette Smoking Among Indigenous Australians*, op. cit., pp. 5-6.

<sup>401</sup> Commonwealth Department of Human Services and Health, *National Drug Strategy Household Survey: Urban Aboriginal and Torres Strait Islander Peoples Supplement 1994*, AGPS, 1996.

<sup>402</sup> Hill, D., White, V. & Segan, C., "Prevalence of cigarette smoking among Australian secondary school students in 1993", *Australian Journal of Public Health* Vol.19 (5), p. 445-449.

*Never drank alcohol: Indigenous males and females by part of state*

	Capital city	Other urban	Rural	Total
<b>Males %</b>	16.5	15.7	25.3	19.0
<b>Females %</b>	21.4	31.2	48.0	33.5

*Never drank alcohol: Indigenous males and females by age*

	13-17	18-24	25-44	45-54	55 & over	Total
<b>Males %</b>	65.1	7.1	7.5	11.3	20.8	19.0
<b>Females %</b>	67.2	21.1	21.7	32.8	54.5	33.5

Source: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Health of Indigenous Australians, 1996*, p. 42.

**Dental**

As early as 1925 Aboriginal groups were reported as having a substantial advantage over other Australians with regard to dental health. Although there is little published information specifically comparing the level of decay of contemporary Aboriginal people with that of other Australians, the existing literature indicates a loss of this historical advantage. For instance, while there has been a major decrease in dental decay and associated problems in other Australian children since the 1970s, there has been an increase in decay reported for Aboriginal children.<sup>403</sup>

Aboriginal children have a greater number of infant teeth affected by decay than either other Australian-born children, or overseas-born children. At 12 years Aboriginal children have almost 3 times the number of decayed teeth of other Australian-born children. Aboriginal children thus have a double disadvantage: they suffer more from decay and associated problems, and they experience a higher ongoing rate of untreated decay.<sup>404</sup>

**Housing****Nature of occupancy of Indigenous households**

	Capital City	Other Urban	Rural	Total
<b>Renters %</b>	63.8	76.6	62.5	69.0
<b>Purchasers %</b>	20.5	9.3	7.0	12.4
<b>Owners %</b>	13.4	11.4	13.4	12.5
<b>Other/not stated %</b>	2.4	2.7	17.1	6.0

Source: Australian Bureau of Statistics, *Housing Characteristics and Conditions, National Aboriginal and Torres Strait Islander Survey 1994, AGPS, 1996*, p. 35.

At the time of the Aboriginal and Torres Strait Islander Survey in 1994, by far the majority of Indigenous households were renting, with 59 600 households or 69% of private households falling

<sup>403</sup> Australian Institute of Health and Welfare, *Australia's Health 1996*, *op. cit.*, p. 28.

<sup>404</sup> *Ibid.*, p. 29.



into this category. This compares with 27% of non-Indigenous private households who rented their homes.

The home ownership rate (owners and purchasers combined) for Indigenous households was 25%, a vastly lower rate than for non-Indigenous households (71%).<sup>405</sup>

Amongst Indigenous households, Tasmania had the highest rate of home ownership at 52% while the NT had the lowest at 10%. There was much less variation around Australia for the non-Indigenous population with all States having around 70% home ownership.<sup>406</sup>

In 1994 an estimated \$3.1 billion was required to cover the accumulated backlog of Indigenous housing and infrastructure need in rural, remote and urban areas. According to the Aboriginal and Torres Strait Islander Commission, this backlog will take 20 years to address at existing levels of funding.<sup>407</sup>

Between 1986 and 1991 there was no overall reduction in the backlog of housing need of Indigenous Australians, suggesting that the housing provision for Indigenous people has just kept pace with population growth and family formation.<sup>408</sup>

## Conditions

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

- 34% of discrete communities had a water supply which was below the standard set by the Commonwealth Government as being safe for human consumption.
- 13% of discrete communities did not have a regular water supply.
- 64% of discrete communities had less than 50% of their internal roads sealed.
- 71% of discrete communities had less than 50% of their access roads sealed or had no road access.<sup>409</sup>

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

- 17% of all families are in housing need, while 38% of Indigenous families live in housing need.<sup>410</sup>
- Indigenous families are 20 times more likely to be homeless than non-Indigenous families.<sup>411</sup>

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<sup>405</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings*, AGPS, 1995, p. 48.

<sup>406</sup> *Ibid.*

<sup>407</sup> Aboriginal and Torres Strait Islander Commission, *Annual Report 1994-95*, AGPS, Canberra, 1995, p. 148.

<sup>408</sup> Jones, R., *The Housing Need of Indigenous Australians, 1991*, Centre for Aboriginal Economic Policy Research, ANU, 1994, p. 164.

<sup>409</sup> Summary of Survey in 'Building a Partnership', *Discussion Papers of the Indigenous Australians Shelter Conference*, November 1993, p. 39. A discrete community is a community with a majority Indigenous population.

<sup>410</sup> ACOSS, Federal Budget Priorities Statement 1996-97: ACOSS Paper No. 79, June 1996, p. 85.

<sup>411</sup> Jones, R., *op. cit.*, p. 158.

## Education

### Higher Education

A survey of over one hundred students from the Faculty of Aboriginal and Islander Studies (FAIS) and other faculties of the University of South Australia found a much lower level of persistence and performance for Aboriginal and Torres Strait Islander students than for their non-Indigenous peers.

For Indigenous students the need for expanded and improved support services was a major recommendation in reviewing factors affecting the performance of Aboriginal and Torres Strait Islander students at university. Staff attitudes were seen as a problem by almost one-third of the Indigenous students interviewed. Accommodation and financial difficulties were two critical issues for many Aboriginal and Torres Strait Islander students who also felt homesick and academically unprepared for university life. Over half of the Indigenous students who dropped out had not felt welcome at university.

### Completion of degree - Indigenous and non-Indigenous students surveyed

	Indigenous %	Non-Indigenous %
<b>Successful</b>	59.3	83.3
<b>Incomplete</b>	40.7	16.7
<b>Total</b>	100	100

*Source: Bourke, C., Burden, J. & Moore, S., Factors Affecting Performance of Aboriginal and Torres Strait Islander Students at Australian Universities: A Case Study, Department of Employment, Education, Training and Youth Affairs Evaluations and Investigations Program, Higher Education Division, 1996, p. 105.*

These figures show that of those students surveyed at the University of South Australia, significantly more non-Indigenous students completed their degrees than Indigenous students. 40% of all Indigenous students did not complete their degree, compared with 16.7% of non-Indigenous students.

### Length of attendance (in months) before leaving university: Indigenous and non-Indigenous Students who did not complete university

Months	1-6	7-12	13-18	19-24	25-30	31+
<b>Indigenous</b>	30.3	45.5	6.1	6.1	3.0	9.1
<b>Non-Indigenous</b>	25	25	-	25	-	25

*Source: Bourke, C., Burden, J. & Moore, S., Factors Affecting Performance of Aboriginal and Torres Strait Islander Students at Australian Universities: A Case Study, Department of Employment, Education, Training and Youth Affairs Evaluations and Investigations Program, Higher Education Division, 1996, p. 116.*

These statistics show that over 75% of Indigenous students who didn't finish their degrees discontinued university in the first year of study. Non-Indigenous students who didn't end finish their degrees dropped out of university at a more gradual rate. That 75 % of Indigenous students left before completing first year indicates that education support networks and processes are failing Indigenous students.

## School Education

A Northern Territory Public Accounts Committee, in a report published in August 1996, found extremely poor levels of literacy and numeracy in remote Aboriginal schools in the Northern Territory. The average level of achievement for students aged 11 to 16 in a Multilevel Assessment Program conducted in these schools was mid Year Three. In urban primary schools children aged 8 usually achieve Year Three level and 11 to 16 year olds are expected to achieve at year 5 to year 10 levels. This indicates that students in remote Aboriginal schools perform 3 to 7 years behind urban students of the same age in literacy and numeracy tests.

There are, according to the report by the Public Accounts Committee, very few secondary aged students in remote Aboriginal communities in the Northern Territory working at a Year Ten level. The report states that the poor performance of Aboriginal students from remote Aboriginal Schools in literacy and numeracy tests may well be attributable to English being a second language for many of them. In the 1996 Census, it was found that as a proportion of the total population aged five years and over, the Northern Territory recorded the highest percentage of people speaking a language other than English at home (22.5%). 70.9% of those people spoke an Indigenous language. Aboriginal students, however, are not recognised by the Commonwealth as requiring ESL funding and support.<sup>412</sup>

### Type of educational institution attending

	Indigenous				Non-Indigenous			
	1991		1996		1991		1996	
	No.	%	No.	%	No.	%	No.	%
<b>Pre school</b>	8078	3.0	8557	2.4	260123	1.6	247848	1.5
<b>Infant/primary government</b>	35976	13.6	53790	15.2	1168608	7.3	1212877	7.2
<b>Infant/primary non-government</b>	4563	1.7	7542	2.1	392893	2.4	450618	2.7
<b>Secondary government</b>	17011	6.4	22406	6.3	770258	4.8	761276	4.5
<b>Secondary non-government</b>	2713	1.0	4741	1.3	374519	2.3	413482	2.5
<b>TAFE college</b>	5486	2.1	8859	2.5	419696	2.6	432619	2.6
<b>CAE/university</b>	3309	1.2	5563	1.6	536803	3.3	624332	3.7
<b>Other</b>	1591	0.6	1455	0.4	123683	0.8	99070	0.6
<b>Not stated</b>	25854	9.7	26468	7.5	498363	3.1	463904	2.7
<b>Not attending</b>	160878	60.6	213589	60.5	11505134	71.7	12168430	72.1
<b>Total</b>	265459	100.0	352970	100.0	16050080	100.0	16874456	100.0

Source: 1996 Census data, publication pending

The higher proportion of the Indigenous population at pre school, infant and primary school is attributable to the different age structures of the Indigenous and non-Indigenous population. 40.06 percent of Indigenous people are under 14 years of age, compared with 21.33 of Australia's non-Indigenous population.

The proportion of Australians attending a CAE or university has increased by 0.4 per cent for Indigenous and non-Indigenous people in the last five years, however, non-Indigenous people are still more than twice as likely to attend university as Indigenous people. The amount of Indigenous

<sup>412</sup> Report on the Provision of School Education Services for Remote Aboriginal Communities in the Northern Territory, Legislative Assembly of the Northern Territory, Public Accounts Committee Report No. 27, August 1996, PP. 13, 21.

people who attend TAFE has also increased by 0.4 per cent, and the proportion of the Indigenous and non-Indigenous population who are now at TAFE is almost equal.

### Age left school persons aged 15 and over

	Indigenous				Non-Indigenous			
	1991		1996		1991		1996	
	No.	%	No.	%	No.	%	No.	%
<b>Still at school</b>	9007	5.6	12767	6.0	604279	4.8	639882	4.8
<b>Did not go to school</b>	7275	4.6	5959	2.8	114242	0.9	94258	0.7
<b>14 or younger</b>	26530	16.6	33298	15.7	1895696	15.1	1839174	13.9
<b>15</b>	39977	25.0	51200	24.2	2660529	21.3	2682786	20.2
<b>16</b>	33066	20.7	43788	20.7	2446479	19.6	2576443	19.4
<b>17</b>	16967	10.6	26518	12.5	2446479	19.6	2576443	19.4
<b>18</b>	6810	4.3	12043	5.7	1202780	9.6	1665314	12.5
<b>19 years or older</b>	3890	2.4	5439	2.6	750074	6.0	515481	3.9
<b>Not stated</b>	16183	10.1	20562	9.7	760482	6.1	609289	4.6
<b>Total</b>	159705	100.0	211574	100.0	12512916	100.0	13274349	100.0

Source: Australian Bureau of Statistics, 1996 Census data, publication pending.

The higher proportion of Indigenous students still at school compared to non-Indigenous students is associated with the fact that 40.06 per cent of Indigenous people are under 14 years of age, compared with 21.33 of Australia's non-Indigenous population.

The proportion of all Australians who stated in the 1996 Census that they did not go to school has decreased in the last five years, particularly for Aboriginal and Torres Strait Islander people. Only 2.8 per cent of Indigenous people surveyed in 1996 said that they never went to school, compared with 4.6 per cent in 1991. However, this is still 6.5 times the number of non-Indigenous Australians who have never been to school.

A higher proportion of Indigenous Australians leave school aged 14 or younger, and 60.6 per cent of Aboriginal and Torres Strait Islander students leave school aged 16 or younger.

## Income

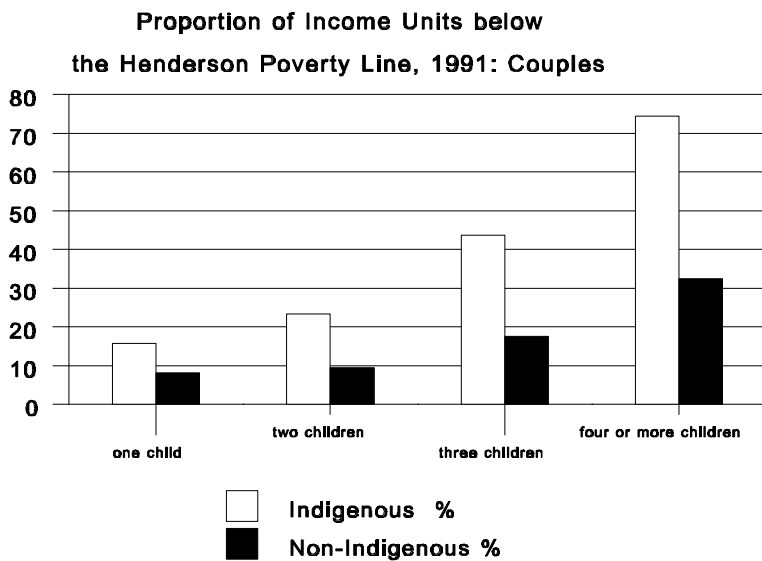
The First Main Report of the Henderson Commission of Inquiry into Poverty in April 1975 exposed the fact that Indigenous people in both rural and urban Australia were, by their definitions, the poorest Australians. A recent study of data from the 1991 Census,<sup>413</sup> shows that Indigenous poverty remains remarkably close to the level described by the Poverty Inquiry.

<sup>413</sup> Ross, R. & Mikalsuskas, A., "Income poverty among Aboriginal families with children: estimates from the 1991 Census" in Altman J.C. & Hunter, B., *Indigenous poverty since the Henderson Report*, CAEPR Discussion Paper No. 127, Centre for Aboriginal Economic Policy Research, ANU, April, 1997.

**Comparison of proportion of income units below the Henderson poverty line, 1991: Couples**

	One child	Two children	Three children	Four or more children
Indigenous %	15.7	23.3	43.6	74.4
Non-Indigenous %	8.1	9.4	17.6	32.5

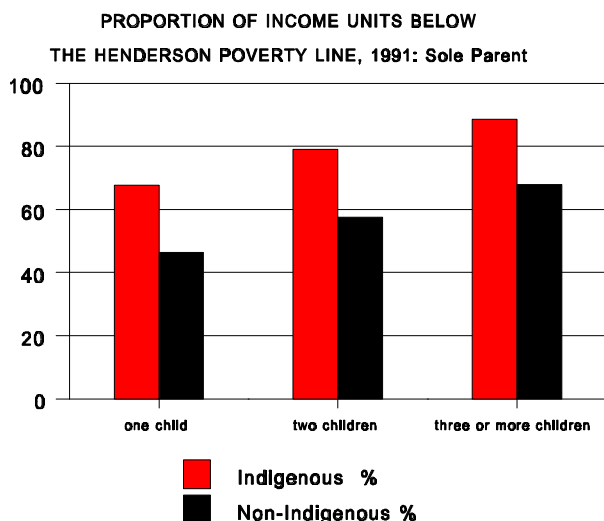
Source: Ross, R. & Mikalsuskas, A., "Income poverty among Aboriginal families with children: estimates from the 1991 Census" in Altman J.C. & Hunter, B., *Indigenous poverty since the Henderson Report*, Centre for Aboriginal Economic Policy Research Discussion Paper No. 127, Centre for Aboriginal Economic Policy Research, ANU, April 1997, p. 4.



**Comparison of proportion of income units below the Henderson poverty line, 1991: Sole Parent**

	One child	Two children	Three or more children
Indigenous %	67.6	79.1	88.6
Non-Indigenous %	46.3	57.5	67.8

Source: Ross, R. & Mikalsuskas, A., "Income poverty among Aboriginal families with children: estimates from the 1991 Census" in Altman J.C. & Hunter, B., *Indigenous poverty since the Henderson Report CAEPR Discussion Paper No. 127*, Centre for Aboriginal Economic Policy Research, ANU, April 1997, p. 4.



Comparative figures for Indigenous and non-Indigenous annual income from the 1996 Census are not yet available. However, an analysis of estimates from the 1991 Census and 1994 National Aboriginal and Torres Strait Islander Survey clearly indicates that Indigenous Australians earn far less than non-Indigenous Australians.

### Annual personal income, Persons aged 15 and over

	<\$12,000	\$12,000-\$25,000	>\$25,000	Not stated
<b>Indigenous %</b>	55.7	24.8	7.1	12.4
<b>Non-Indigenous %</b>	41.0	26.9	22.8	9.4

Source: Australian Bureau of Statistics 1991 Census, quoted in *Health and Welfare of Aboriginal and Torres Strait Islander Peoples*, AGPS, 1997, p. 103.

This table shows that 55.7% of Indigenous Australians in 1991 earned less than \$12,000 per year, compared with 41% of non-Indigenous Australians. In the 1994 NATSIS, again over half (59%) of the Indigenous people who were surveyed reported that they had annual personal incomes of \$12,000 or less. Only 11% said they had an income of more than \$25,000 or more. The mean annual income for Indigenous Australians in 1994 was \$14 046 (\$15 448 for males and \$12 702 for females).<sup>414</sup>

### Employment

In 1994, when the most recent comprehensive survey of Indigenous employment was carried out, the total number of Indigenous people in the labour force was estimated at 105,200 (56,100 employed and 49,100 unemployed), giving a labour force participation rate of 58% of persons aged 15 and over. [The labour force consists of all persons aged 15 and over who, at the time of surveys, were employed, or who were not employed but were actively looking for work and were available to start work.] There was a sizeable difference in the participation rate for males, 72%, and females, 44%.<sup>415</sup> The labour force rate for the rest of the population in 1994 was 62.8%.<sup>416</sup>

While the total unemployment rate of the general Australian labour force was 10.5% in 1994, the unemployment rate for Aboriginal and Torres Strait Islanders in the labour force was 38%. Australia's unemployment rate for 15-19 year olds was 23.8%,<sup>417</sup> compared with 50% for Aboriginal and Torres Strait Islander people.<sup>418</sup>

Considerable differences existed between the states with New South Wales recording the highest Indigenous unemployment rate at 46%, closely followed by South Australia with 45%. The lowest unemployment rate for Indigenous people was recorded in Tasmania with 29%.<sup>419</sup>

<sup>414</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings*, AGPS, 1995, p. 48.

<sup>415</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Summary*, AGPS, 1995, p. 45.

<sup>416</sup> Australian Bureau of Statistics, *Australian Social Trends*, AGPS, 1997, p. 90.

<sup>417</sup> *Ibid.*, p. 91.

<sup>418</sup> Australian Bureau of Statistics, *1994: Detailed Summary*, *op. cit.*, p. 45.

<sup>419</sup> *Ibid.*