

Aboriginal and Torres Strait Islander Social Justice Commissioner, Third Report 1995

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Introduction

"I've let my frustrations go, and I wonder about the others, will they let their frustrations out here or release them on the community?"

I often wonder, with the experience I have of frequently visiting this place, how different I will be when I get released from prison"¹

In 1995 Indigenous Australians are dying in custody at the highest rate yet recorded. This is an appalling reality. Despite continued government assertions of the successful implementation of the Royal Commission into Aboriginal Deaths in Custody recommendations, at this rate 1995 will see the greatest number of deaths since the conclusion of the Commission.

While these lonely deaths in cells are the most extreme manifestation of the problems endemic to Australia's criminal justice system, they do not convey the extent of the malaise.

Between 1989 and 1995 the general prison population of New South Wales increased by 40 percent: the Indigenous prison population increased by 113 percent. Disproportions of this magnitude demonstrate that the core problem of Indigenous over-representation in the criminal justice system has remained untouched or has deepened, depending which jurisdiction is in question.

Moreover, what is now so bad will get worse.

The Royal Commission concentrated on the adult criminal justice system. I have chosen this year to examine the juvenile justice system. The same underlying issues of poor health, inadequate housing

¹ Maynard, R., *No More Than What You See*, Photographic Essay, 1993.

and education, gross unemployment, prejudice, substance abuse, despair and anger affect, even more viciously, our children. They are drawn into custody, separated from their families and given practical instruction that their futures are likely to be profoundly different to those of other Australian kids: 43 of the 99 Aboriginal people whose deaths in custody were investigated by the Royal Commission had a history of separation from their families as children.

Our kids are 18.6 times more likely to be held in detention than other Australian kids.

There is another difference. It is one of demographics: 22 percent of the general population is under 15 years of age; 40 percent of the Indigenous population is under the age of 15 years; 7 percent of the general population is under 5 years; 15 percent of Indigenous kids are under 5 years. These children are moving towards the threshold of the system. When the current rates of over-representation are projected over this population base, it is plain to see that what is now so bad will get worse.

It disturbs me to recite these statistics and to contemplate a future more wretched than the present.

Australia is in a period of profound transformation. There is a growing recognition of Aboriginal and Torres Strait Islander peoples as the First peoples of this country. There is increased pride and strength in our peoples, a renaissance of our cultures. The High Court's recognition of our laws as a source of contemporary rights to land catalysed an imperfect but positive response by the Australian Government. Leadership was found at the highest level. Closer to the general community, I believe the sight of Cathy Freeman carrying the Aboriginal flag and the National flag, before the world, touched the hearts and aspirations of the vast majority of Australians.

And yet the life expectancies of Aboriginal people and Torres Strait Islanders are 17 to 20 years less than the life expectancies of non-Indigenous people. The criminal justice system of this country continues to imprison Indigenous men, women and children at grossly disproportionate rates, perverting the right to equality before the law.

On a daily basis in Christmas Creek, Horn Island, Ernabella, throughout Australia in small remote communities and in the inner suburbs of capital cities, the lives of our peoples are brought down. Without malice, passively, the vast majority of Australians condone the consistent and predictable denial of human rights which they enjoy so fully, in a country whose development was underwritten by our dispossession.

Responsibility cannot be avoided. In Chapter 1, *Juvenile Justice*, I pose the question as to what, on current trends, will be the rate of imprisonment of our children in 2001? In the year 2000 the world's focus will turn briefly, but intensely, on this country. No doubt the cultures of Australia's Indigenous peoples will be on display at the opening ceremony of the Olympic Games. I also have no doubt that the fault line between the Indigenous and non-Indigenous people of Australia will be examined with equal intensity. At the very least I anticipate that French documentary teams will explore, with great enthusiasm and graphic images, the hypocrisy of this nation's selective interest in human rights.

The High Court has sought, in a temperate and principled way, to give real significance to international human rights standards in the interpretation of Australian law. The recognition of native title in the *Mabo* decision was assisted by the Court's affirmation that:

*The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights*²

² *Mabo and Others v The State of Queensland [No:2]* (1992) CLR 1, per Brennan J, at 42.

In April 1995 the High Court handed down its judgment in the *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*.³ The judgment arrived at the modest conclusion that the Australian Government's ratification of international treaties must carry some meaning for the people of this country. The formal acceptance of the terms of a treaty cannot be dismissed as a "merely platitudinous or ineffectual act".⁴

The Court found that government decision-makers must at least turn their minds to treaty provisions in the performance of their functions. Individuals affected by their decisions have a legitimate expectation that decision-makers will directly consider, although not be bound by, the terms of treaties ratified by the Government. The logical and ethical quality of the High Court's position is unassailable. As Chief Justice Mason and Justice Deane expressed it:

*...ratification of a Convention is a positive statement by this country to the world and Australian people that the executive government and its agencies will act in accordance with the convention.*⁵

In response, the Australian Government is determined to set this illusion to rest. Legislation is proposed to make it clear that the ratification of a treaty will give rise to no legitimate expectation that its terms will be taken into account by agents of the Government. The act of ratification will, in fact, be reduced to a "merely platitudinous or ineffectual act".

In Chapter 2, *Australian Human Rights Developments*, I consider the implications of the "Teoh" decision and the Government's reaction. Chapter 3 follows through with a further examination of *Australian Human Rights Developments* in the context of the *International Covenant on Civil and Political Rights (ICCPR)* and the *Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)*.

Article 27 of the *ICCPR* provides for the right to the enjoyment of culture practised in community with others who share that culture. It is a seminal article for Indigenous peoples and, through the mechanism of the Optional Protocol to the *ICCPR*, the extent and meaning of this right is being actively explored. In Australia, article 27 has played only a peripheral role in the development of law and policy regarding Aboriginal and Torres Strait Islander peoples. This will change as the opportunities provided by Australia's recent accession to the Optional Protocol become more widely known and understood. Communications to the United Nations' Human Rights Committee may serve as vehicles to expand the recognition of our cultural rights.

The nature of Indigenous cultural rights are poorly understood in Australia. For example, the dominant Judaeo-Christian notion of freedom of religion is essentially one of freedom of individual conscience and belief, which may be practised in community: *wherever a number of you are gathered together in my name*. By contrast, Aboriginal spiritual beliefs are embedded in specific places: our beliefs give collective identity to our peoples, uniting us with both the physical and metaphysical worlds. Access to our culture entails access to the places of its source and practice.

The Australian continent is criss-crossed with the tracks of the Dreamings: walking, slithering, crawling, flying, chasing, hunting, weeping, dying, giving birth. Performing rituals, distributing the plants, making the landforms and water, establishing things in their own places, making the relationships between one place and another. Leaving parts or essences of

³ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353 ("Teoh").

⁴ "Teoh", *op.cit.*, at 365.

⁵ "Teoh", *op.cit.*, per Mason CJ and Deane J at 362.

themselves, looking back in sorrow; and still travelling, changing languages, changing songs, changing skin...

Where they travelled, where they stopped, where they lived the events of their lives, all these places are sources and sites of Law. These tracks and sites, and the Dreamings associated with them, make up the sacred geography of Australia; they are visible in paintings and engravings; they are sung in the songs, depicted in body paintings and engravings; they form the basis of a major dimension of the land tenure system for most Aboriginal people. To know the country is to know the story of how it came into being, and that story also carries the knowledge of how the human owners of that country came into being. Except in cases of succession, the relationship between the people and their country is understood to have existed from time immemorial—to be part of the land itself.⁶

There is no need to share our beliefs in order to respect them.

One of the fundamental problems in Australia (since the active and conscious endeavour to destroy our cultures was dropped as official policy) is that only those aspects of our cultures which are understood and valued by whitefellas have been considered valid. The recognition and protection of Indigenous cultures has been extended from a non-Indigenous perspective. Our values have been filtered through the values of others. What has been considered worthy of protection has usually been on the basis of its scientific, historic, aesthetic or sheer curiosity value. Current laws and policy are still largely shaped by this cultural distortion and fail to extend protection in terms which are defined by our perspective.

Even article 27 of the *ICCPR* is expressed in terms of the cultural rights of ‘ethnic, religious or linguistic minorities’. In numbers we are a minority. In identity we are the Indigenous peoples of this country, holding distinct cultural values and distinct cultural rights. The *Draft Declaration on the Rights of Indigenous Peoples* articulates the distinct rights of our peoples. It asserts our collective right to self-determination and approaches our cultural rights from a viewpoint substantially shaped by Indigenous peoples themselves. The *Draft Declaration* has been developed by Indigenous representatives from all over the world participating in the deliberations of the United Nations Working Group on Indigenous Peoples (Working Group) over a period of approximately eight years.

This year the *Draft Declaration* began its perilous route from the Working Group to the General Assembly. The path to the General Assembly is perilous because it has now left a forum which has provided unprecedented, direct participation by our peoples. The *Draft Declaration* now lies in the hands of governments, who are the constituent members of the United Nations. Many of those governments remain hostile to our interests.

It is for this reason that the future role of the Australian Government will be closely watched by Aboriginal and Torres Strait Islander peoples. Within the Working Group the Australian Government has played an active and positive role. Given the Government’s ambiguous stance towards substantial respect for human rights, demonstrated by its reaction to the “*Teoh*” decision, the future role of the Australian Government in the progression of the *Draft Declaration* will be a litmus test of commitment. It has highly significant implications for the reconciliation process.

The vulnerability of Indigenous interests in the United Nations’ current structure is only too clear. Our lands were colonised by others who now control the governments of the nations built over our dispossession. We are marginalised within domestic political structures and, until recently, almost

⁶ Rose, D. B., *The Nourishing Terrains of Aboriginal Australia*, unpublished paper, 1995.

voiceless in the official forums of international structures such as the United Nations which is comprised of national governments.

The participation of Indigenous peoples in the Working Group has catalysed a movement to provide for our broader participation. These developments are explored in Chapter 3. I presented a paper entitled *Permanent Forum in the United Nations for Indigenous Peoples*, as a stimulus for discussion during the eleventh Session of the Working Group. A major goal of the International Decade of the World's Indigenous Peoples must be the creation of a permanent place for Indigenous peoples within the United Nations.

The difficulties faced by Aboriginal and Torres Strait Islander peoples in gaining a direct voice in international forums are identical to those faced by Native Americans, Sami, Mayan, Karen, Inuit, Maori and other Indigenous peoples throughout the world. International exchanges, meetings, formal and informal discussions between our peoples who share so many common historical experiences and so many common contemporary problems is a source, not only of solidarity, but of ideas.

International comparative studies are an invaluable source of stimulus. As in all other fields, so in the recognition of Indigenous rights, Australia should look to international best practice. Reference to international experience is intended as a stimulant for thought. It is my endeavour to promote understanding, not to urge the wholesale adoption of models drawn from other places. For example, my consideration of Canadian land settlements is focussed on processes and structures rather than the specific terms of any agreement made in the Canadian context.

This is a fundamental point. It underpins my submission to the Parliament of Australia on the Social Justice Package—the Government's final stage of its threefold response to the *Mabo* decision. The attainment of social justice for Indigenous Australians is fundamentally dependent on adopting right processes and structures. At a primary level it is not about goods and services delivered by governments.

The recognition of our status as the First peoples of this country is the keystone. From this central point the structures which will shape our relationships with governments may be negotiated and built. The building blocks are our specific rights as Indigenous peoples which include the right to practise and enjoy our distinct cultures, the right to control our natural resources and the right to self-determination.

The corollary of these rights are responsibilities. The history of Indigenous policy in Australia is characterised by two things: the denial of our rights and the abysmal failure of the policies based on this denial. The practical effects of refusing the recognition of our rights has been to keep our peoples in a position of dependency, still looking for that government ration truck.

Even more pernicious is the attitude which demands responsibility while continuing to deny the active exercise of rights. The *Children (Parental Responsibility) Act 1994 (NSW)* is considered in Chapter 1. While Aboriginal parents can be held immediately accountable for their children's actions, who is immediately, legally accountable for the breaches of human rights which the Royal Commission found to be the underlying causes of the grotesque over-representation of our kids in the juvenile justice system?

Aboriginal and Torres Strait Islander parents are not only separated from their children, they are separated and alienated from the juvenile justice system itself. The yielding of a genuine place and participation as of right in community-based justice programs is but one example of how the practical achievement of social justice is dependent on the recognition of rights and our genuine ability to assume responsibilities within structures negotiated with government. As I have said before, effective

resolutions of the problems we face in our communities will not arrive on the back of a truck. They will be built by us in our communities.

This is the thrust of my submission to the Parliament of Australia. An edited version of which is found in Chapter 4, *Social Justice Strategies and Recommendations*. Getting the processes and structures right will be a matter for development over time. The issues for negotiation range from local participation in community policing through to regional agreements and the constitutional entrenchment of Indigenous rights.

The same philosophy underpins my approach to the design of human rights and education programs implementing Royal Commission Recommendations 211 and 212. Chapter 5 details the work of the teams within my office charged with the creation of programs to equip our peoples, not with an abstract instruction in anti-discrimination legislation, but with processes to effectively assert their rights.

While the Royal Commission found that Indigenous under utilisation of anti-discrimination and equal opportunity legislation demonstrated a need for community education programs, an increase in the number of Aboriginal and Torres Strait Islander complaints is not necessarily the best means of ensuring the practical exercise and enjoyment of rights protected by such legislation. The ability to pick up problems of discrimination and negotiate an immediate resolution in a local context is a more powerful and constructive experience.

The knowledge that complaint mechanisms provide fall back positions is essential. But both the National Community Education Project and the National Indigenous Legal Curriculum Development Project are based on enabling Indigenous peoples to actively shape the particular outcomes they desire.

Within the confines of my resources, both projects have been guided by extensive community consultation and negotiation.

Chapter 6, the final chapter of this report, in many ways draws together the various thematic issues. Not so much by intention but by the banal consistency with which they appear and reappear and appear again in the consideration of any particular Indigenous issue in Australia.

Section 46 C (1) (d) of the *Human Rights and Equal Opportunity Act 1986* (Cth) requires me to examine proposed enactments to appraise their impact on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples. Chapter 6 deals with my performance of this function.

My first observation is to note that the primary responsibility to ensure respect for our human rights does not lie with my office. The Australian Government holds that responsibility.

My office was originally established in demonstration of the Commonwealth's "...*commitment to implementing its undertakings to Aboriginal and Torres Strait Islander people arising from the recommendations of the Royal Commission into Aboriginal Deaths in Custody*".⁷ As the current rate of deaths in custody demonstrates, these undertakings are yet to be fulfilled. Similarly, the establishment of my watch-dog role is no substitute for the Government fulfilling its own commitment to formulate legislation which proactively promotes the exercise and enjoyment of the human rights of our peoples.

⁷ *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992*, Second Reading Speech by the then Attorney-General, the Hon. Michael Duffy, MP, House of Representatives, Hansard 3, November 1992.

The current system's failure to adequately ensure the legislative protection of Indigenous rights reflects inadequate processes of policy development and the subsequent translations of policy into law. The marked omission is in the right of Aboriginal and Torres Strait Islander peoples to participate in all stages of policy development. Consequently, proposed enactments affecting our rights are shaped, at best, by imprecise understandings of our cultures: at worst, by ignorance or indifference to them.

The filtering of our values is done within the bureaucracy. The Australian Law Reform Commission's report on the Recognition of Customary Law was delivered in 1986. Its recommendations were clear. They were conservative and practical: concerned with functional recognition to accord equality to such things as marriage in accordance with Indigenous law.

Some ten years later the characteristic governmental response—State, Territory and Commonwealth—has been to enable marriage in our law to equate with a *de facto* relationship. This is not merely offensive, it betrays a deep cultural bias that while we may, from our perspective, speak of marriage—all that is perceived by others is two blackfellas living together.

There is a need for change. At a structural level I am endeavouring to establish liaison with Commonwealth departments likely to develop legislative proposals impacting on the exercise of our rights. Specific recommendations are made to this effect at the conclusion of Chapter 6. Further recommendations are made with respect to ministerial responsibility for legislation developed within their portfolios. In previous reports I have not made so many formal recommendations. As stated in my First Report, I consider it useful to put forward precise proposals only where immediate steps can be taken to bring them into effect.

One of my recommendations concerns government policy officers becoming more aware of the impact of their proposals. It is an obvious thing to say. Recommendations for cross-cultural training, increased awareness of Indigenous perspectives and direct negotiations with us are as old as the hills. Yet our lives and values continue to be brokered by others. Our best interests are interpreted for us by remote bureaucrats, united by their knowledge of Canberra and by the fact that they have never spoken with an Aboriginal person or Torres Strait Islander.

The most bitter experience of our best interests being best understood by others is the removal of our children. The stealing of Aboriginal and Torres Strait Islander babies and children in order that they could be assimilated into the ways of the whitefella, uncontaminated by contact with their families and cultures, is a stain which Australia will never bleach out. It cannot be denied. It cannot be justified. It cannot be removed by compensation. It must be looked at with unflinching honesty: to serve as a point of resolution for the future.

On 11 May 1995 the Attorney-General, the Hon. Michael Lavarch, signed terms of reference for the Human Rights and Equal Opportunity Commission (HREOC) to conduct a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children. Subsequently these terms were amended. Broadly, they require a report by December 1996, covering three major issues:

- the past and continuing effects of separation;
- what should be done in response to the effects of separation; and,
- the present situation of Aboriginal and Torres Strait Islander children.

While I will participate in the conduct of the Inquiry with other Indigenous people, the President, Sir Ronald Wilson, and other Commissioners of the HREOC, the Inquiry will not be run from my office. A Secretariat has been established for that purpose. Information concerning the conduct of the Inquiry and contact with the Secretariat may be found at the end of this report.

Naturally, I will not pre-empt the findings of the Inquiry in any way. However, it is appropriate to place its significance in the wider context of achieving social justice for Indigenous Australians.

The various laws, policies and practices which resulted in the separation of our families were a particularly vicious subset of a general approach to the management of Aboriginal and Torres Strait Islander people. The Royal Commission into Aboriginal Deaths in Custody concluded:

The reality of control over Aboriginal lives can be readily demonstrated. It was no less brutal for the fact that the policies which achieved the control were often justified by their authors on humanitarian or paternalistic grounds. In the process of investigating the lives and deaths of each of the ninety-nine Aboriginal people who died in custody Commissioners had access to the files held by government departments and agencies concerning them.

No matter what their age at death they all had files—in many cases hundreds of page of observations and moral and social judgments on them and their families; considerations of applications for basic rights, determinations about where they could live, where they could travel, who they could associate with, what possessions they could purchase, whether they could work and what, if any, wages they could receive or retain. Welfare officers, police, court officials and countless other white bureaucrats, mostly unknown and rarely seen by the persons concerned, judged and determined their lives. The officials saw all, recorded all, judged all and yet knew nothing about the people whose lives they controlled.

Aboriginal people were removed at the whim of others, crowded into settlements and missions and in impoverished camps on cattle stations. Always there were non-Aboriginal people giving orders, making decisions in which the opinions of the Aboriginal people were not sought nor, if volunteered, heeded. Aboriginal families could be separated, children removed if judged too light skinned, placed in homes or boarded out as servants of non-Aboriginal families.

It is essential to realize that here I am not describing ancient events. This control—these horrors of subjugation—were still occurring in the 1960s and for much of the 1970s. The anger in the demands for self-determination is so strong because the totality of control is so recent, and the effects of it are continuing and remain painful. It is no exaggeration to say—and the individual case reports demonstrate the fact—that the impact of the control over the deceased and their families was a factor in the deaths in custody.⁸

This tendency to control our lives now takes more subtle forms. It is manifest in the juvenile justice system, in the failure to respect marriage in accord with our law, in the unwillingness to protect the real substance of our cultural lives, the list is seemingly endless. Pre-eminently, it is demonstrated in the denial of our right to self-determination, as distinct from the provision of government formulated policies of self-determination and self-management.

People whose mouths were washed out with soap, for speaking their own language, still live. The traumas of childhood removals continue to scar individuals, families and communities. Our current problems of family violence, alcohol abuse and mental illness have a trail that threads back to the past breaking of families. As do deaths in custody. Mistrust, depression, grief and anger pass between generations.

While so many young Indigenous mothers felt guilt when their children were taken from them, the purpose of confronting the suffering of our peoples is not to excite guilt in others. It is to make real what has been, and in many ways continues to be, our place in this land. In a sense Indigenous

⁸ Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991, Vol. 2, pp. 502-503.

Australians have lived, and continue to live, in another country. There will be no reconciliation without justice. There can be no reconciliation without human understanding.

The Government must answer to us all what the meaning of the files, why it was done to us...put things straight...to show we now know how to deal with all things that happened in past, the white people must learn all what has been done to us to have better understanding how all Aboriginals people feel about the life we had, and what was done to us in home. We were brought up as white people, we have been taught how to fight for our right and we must put it into action, to see all how people that have suffered and as not got any help still I am one person that will speak out to fill all our needs and make sure we all get some compensations for our suffering of the past, making sure that all childrens will know what has happened to me when I was a child that so they will not let happened again to my grand childrens.

Majorie Woodrow
One of the Lost Generation

Chapter 1: Juvenile Justice

A now deceased elder from one of the Kimberley communities explained his people's view of the learning process. He drew a small spiral in the sand. That represented the mother's womb.

"When you emerge from the womb you start learning; learning how to suck the mother's breast, how to hunt and so on. As you learn more your spiral gets bigger, your world gets bigger.

*Aboriginal law kept people moving further out on that spiral. The more law you can learn, the richer your life gets and the bigger the spiral and the closer your link with the land."*⁹

The truth is that the spiral of a young life is diminished by contact with the juvenile justice system.

Traditional Aboriginal law grows up responsible young women and men who value, and are valued by, their community.

By contrast the Australian juvenile justice system is 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.

This is so for all kids. But it has a particular impact on Indigenous kids who are being drawn into custody at a phenomenal rate.

At any one time, roughly 30 percent of the 'clients' at Minda Juvenile Justice Centre in Sydney are Aboriginal kids between the ages of 10 and 17 years.¹⁰ Our kids represent less than 1.9 percent of the juvenile population of New South Wales.¹¹

This gross over representation in the youth prison population is not peculiar to New South Wales. Nationally, Aboriginal and Torres Strait Islander kids between the ages of 10 and 17 years are 18.6 time more likely to be held in detention than other kids.¹²

⁹ Crawford, F., *Jalindari Ways – Whitefellas Working in Aboriginal Communities*, Curtin University of Technology, 1989, p. 27.

¹⁰ Interview with P. Reberger, Executive Director, Minda Juvenile Justice Centre, September, 1995.

¹¹ Australian Bureau of Statistics, Census 1991. The 1994 Census figures are not yet available.

¹² Australian Institute of Criminology, "Persons in Juvenile Justice Corrective Institutions" No. 66, March 1994. Compiled by Dagger, D. and edited by Mukherjee, S., Table 9.

These national figures hide grotesque jurisdictional variations.

In Western Australia, Indigenous kids of the same age are 32.4 times more likely to be held in detention than non-Indigenous kids.¹³ In that state Aboriginal kids make up 57.9 percent of those in detention – yet comprise only 2.7 percent of the WA juvenile population.¹⁴

In Queensland, Aboriginal kids make up 45.4 percent of the kids in detention while comprising 3.6 percent of the juvenile population.¹⁵ They make up 37 percent of final court appearances, which suggests that charges stick more easily to some people than others.¹⁶

A crisis is approaching.

Five years ago the Royal Commission into Aboriginal Deaths in Custody identified the over representation of our kids at every level of the juvenile justice system as having “... *potentially dangerous repercussions for the future*”.¹⁷ That dangerous future has arrived.

At one level it is a simple matter of arithmetic.

Consider this,

- 22 percent of the whole population of Australia is under 15 years of age, 40 percent of the Indigenous population is under 15
- 7 percent of the whole population of Australia is under 5 years of age, 15 percent of the Indigenous population is under 5.¹⁸

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

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

- in six years, by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention.
- In 16 years, by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention.¹⁹

This is the crisis. It is on us already. It will simply become more acute in the future, as our kids, who are now babies, move with the relentlessness of mathematics into what has become their birthright as the Indigenous children of this country. Just as, on average, adult Aboriginal and Torres Strait Islander peoples can expect to die 18 to 20 years earlier than other Australians,²⁰ so our kids can expect more abrasive encounters with the police, more frequent arrest and more frequent detention.

The difference in the expectations of non-Indigenous kids and our kids is one of race.

¹³ Australian Institute of Criminology, “Persons in Juvenile Justice Corrective Institutions”, *op.cit.*, Table 9.

¹⁴ *Ibid.*, Tables 7 and 9.

¹⁵ Australian Institute of Criminology, *op.cit.* and Australian Bureau of Statistics, 1991.

¹⁶ Queensland Department of Family and Community Services, based on 1994 data.

¹⁷ Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS, 1991, Vol. 2, p. 252.

¹⁸ Australian Bureau of Statistics, 1991 census figures.

¹⁹ Australian Institute of Criminology, *Discussion Paper No. 52*, 9 June 1995, based on demographic projections from Centre for Aboriginal Economic Policy Research.

²⁰ Australian Institute of Health & Welfare, *Australia's Health 1994*, AGPS, 1994, p. 26.

Australians generally recoil from the notion that they are racist. I have to believe that relatively few Australians are overtly prejudiced against Aboriginal and Torres Strait Islander peoples. However, the punitive outcomes of the health, education and criminal justice systems are consistent, predictable and tolerated.

Indirect, systemic racism is more subtle but no less offensive and damaging.

Indigenous kids are less likely to receive the benefit of cautions. Indigenous kids are:

- More likely to be arrested than receive a summons
- More likely to be refused bail
- More likely to receive a detention order.²¹

Statistics are not a matter of bad luck. They represent an active denial of social justice. Even if discretionary decisions by police, magistrates, judges, prosecutors and correctional officers may not be made on the basis of race, the context of their decisions are shaped by race. The family circumstances, education and employment history of young Indigenous offenders – the product of other established and predictable forms of systemic discrimination – are marshalled against our kids. Even when their ‘best interests’ are upper most in the minds of those exercising judgment, the end results of their judgments serve to deepen and add another level of knock-on oppression to young lives, to disrupt or crush their spiral.

The plea of good intentions cuts no ice. As our children so often hear in courts, absence of malice may mitigate the punishment – it does not excuse the offence.

The Australian juvenile justice system is racist. In Western Australia where Indigenous juvenile over representation is highest, the non-Indigenous juvenile incarceration rate is normal, and roughly equivalent to the national average.²² The system operates with a pronounced disparate impact on Aboriginal and Torres Strait Islander kids and contravenes the right to equality before the law guaranteed by Australia’s ratification in 1975 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Article 5 provides:

1. *...States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
 - (a) *The right to equal treatment before the tribunals and all other organs administering justice;*
 - (b) *The right to a security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institutions;*

...

²¹ See, for example, Luke, G., and Cunneen, C., *Aboriginal Over Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council of NSW, January 1995; Cunneen C. and White, R., *An Australian Perspective on Juvenile Justice*, Oxford University Press, 1995; Gale, F., Bailey-Harris, R. and Wundersitz, J., *Aboriginal Youth and the Criminal Justice System*, Cambridge University Press, 1990.

²² Broadhurst, R., et al., *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, report commissioned by Western Australian Aboriginal Affairs Department and prepared by the Crime Research Centre, University of Western Australia, 1994, p. 73. Figures based on 1993 data.

While formal equality of treatment is axiomatic in Children's Courts throughout Australia, it is not reflected in outcomes. While skin colour does not determine specific sentences the systemic effect is to incarcerate our kids in a disproportionate and discriminatory fashion. The subtle processes of fractionally negative treatment, from the likelihood of police contact on the street, to refusal of bail, to custodial sentences, rather than non-custodial options, operate cumulatively to result in a gross denial of the basic right to "*equality before the law*".

In Western Australia, Aboriginal juveniles are 4.1 times more likely to be imprisoned, if convicted of a crime, than the next non-Aboriginal kid to stand in the same dock and get the guilty verdict.²³ The average number of charges per Aboriginal kid at each court appearance in Western Australia is 8.6, more than twice that per non-Aboriginal offender. It rises to 12.5 in Metropolitan areas.²⁴

This occurs in the context of claims of biased policing for trivial matters and of a multiple charge syndrome where police arrest a juvenile for offensive language and it quickly becomes 'offensive –resist–assault.'²⁵

In New South Wales a convicted Aboriginal kid has roughly twice the chance a convicted non-Aboriginal kid has of being imprisoned: rates in South Australia and Queensland are similar. Although the discrepancy can sometimes be explained by taking into account the prior record of the juvenile, my real concern is that the prior record, and perhaps arrest and bail status, may in themselves be the result of differential treatment.²⁶

The subtleties of these negative exercises of discretion are reflected in the blatant statistics of over representation. They are also reflected in the knowledge and experience of Indigenous kids and their parents. Parents are hardened when they complain about police treatment of their children, and the police respond by jacking up the bail sought. We know the system and experience it as a perversion of justice. Alienation and disaffection, in turn, becomes a further source of negativity and aggression. It is a law of diminishing returns that sets Indigenous community attitudes against a system, which should be a source of support, not of deepening of disadvantage.

The general statistics of over representation are not the only evidence of discrimination at work. The interesting phenomenon of discrimination within discrimination demonstrates that choices are being made and that prejudicial factors in fact operate to varying degrees.

Consider again the jurisdictional variations. In Western Australia, Aboriginal kids are 32.4 times more likely to be held in detention than non-Aboriginal kids. In New South Wales they are 17.3 times more likely to be held in detention. The national multiplying factor is 18.6.²⁷

These variations may be accounted for in two ways. First, it could be supposed that Aboriginal kids in WA are inherently more 'criminal' than other Aboriginal kids. In fact, they must have almost twice the propensity to commit crimes deserving imprisonment than the Koori kids in NSW. They must have almost this criminal propensity than the national average Aboriginal person between 10 and 17 years of age.

²³ *Ibid.*, p. 56.

²⁴ *Ibid.*, pp. 56-57.

²⁵ R. Finney, Senior ALS Solicitor, Radio 2RN, 27 September 1995.

²⁶ Luke, G. and Cuneen, C., *Aboriginal Over Representation and Discretionary Decisions in the NSW Juvenile Justice System*, *op. cit.*, pp. 26-28

²⁷ Australian Institute of Criminology, "Persons in Juvenile Corrective Institutions", *op.cit.*, Table 9.

If this deterministic explanation causes some discomfort, if in fact it appears to be nonsense, perhaps an alternative explanation holds more water.

The differential likelihood of Aboriginal kids being held in detention in different jurisdictions is a direct reflection of the intensity of systemic discrimination in each jurisdiction. The greater the prejudice in the police force, the more aggressive the police tactics, the deeper the systemic discrimination in health, housing, education and employment, which shape 'neutral' discretionary decisions by the police and judiciary, the deeper the alienation and hostility felt by Indigenous youth, the deeper their despair and recklessness – all factors that conspire to inflate the negative, punitive results of the juvenile justice system.

Two extremely important points can be drawn from this explanation of jurisdictional variations.

First, despite the hopelessness which frequently flows from the entrenched patterns of the imprisonment of our kids, they are not the product of immutable factors. They can vary. They can change. They can be improved.

Second, the factors that must change are largely those resulting from government laws, policies and practices.

The deep underlying issues, identified by the Royal Commission into Aboriginal Deaths in Custody as producing the gross over representation of Indigenous adults in custody, apply with equal, if not greater, force to kids: health, housing, education, employment, the legacy of historical abuse, denigration and loss of identity, substance abuse and despair. These are deep rooted, chronic and will not shift easily. But the super-added factors of laws, policies and criminal justice practices are more immediately responsive. They can be changed swiftly.

Certainly politicians of major Australian political parties (Liberal, National and Labor) push the idea that they can directly effect the outcomes of the criminal justice system by legislative and policy shifts. Platforms of law and order, truth in sentencing, and the jingle of more keys turning in more locks are common refrains. They were heard most stridently in the recent New South Wales elections.

Unfortunately, crass punitive approaches, while superficially attractive to some, are worse than dead ends. Doing it harder, longer and stronger to 'criminals' is in the long term counterproductive to the very object that I believe the Australian community most desires: greater safety in a more cohesive, civilised community.

In the adult criminal justice system an element of retribution for the damage caused by an offender has its place.

But it needs to be balanced with wider more constructive considerations of rehabilitation and reintegration with society: the curbing of future offences. The idea that safety is enhanced by harsher sentences and plain punishment is a simplistic illusion. It fails to see prisons for what they are – equilibrium reactions. Where a prison door opens to receive a prisoner it also opens to release one. More prisons not only hold more prisoners, they also release more. Frequently these people are more damaged, more angry and ill-adapted to lead mild, productive lives.

The results of Truth in Sentencing in NSW are dramatic. Between 1989 and 1995 the general prison population increased 40 percent. The Aboriginal prison population increased by 113 percent.²⁸ These extraordinary increases are not matched by equivalent increases in criminal offences. They are

²⁸ Figures from the NSW Department of Corrective Services

generated by tough law and order policies made attractive by the public's perception of increased danger which is wildly out of kilter with the facts.²⁹

Increased danger breeds faster in the gaols than on the streets. True reduction in crime and enhanced safety lies in the more difficult areas of better education and increased employment. The truest sentencing policy is to keep as many offenders out of the prison system rather than to expand its malign influence. The better correctional policy for those in custody is not to stay there longer in bleaker circumstances but to improve their living skills. This is not leniency. It is commonsense and reflects the enlightened self-interest of a public who pays, first, for the massive costs of more punitive sentences and second, in higher rates of recidivism by people inured to punishment by adaption to long term prison life.

All this is not radical theory. It is basic criminological orthodoxy.³⁰

I have spelt out these truisms of crime and punishment merely to paint the scene of how politicians who pump iron in their rhetoric, and follow it through with dull minded punitive approaches to keeping the peace, actually do a disservice to the public who interests they claim to be protecting. And whatever can be said of the adult criminal justice system can be said with greater force of the juvenile justice system who 'clients' are children.³¹

The net effect of inflexible law and order policies in the juvenile system is to produce more crime. The earlier the entry, the more frequent and longer are detention sentences for kids. The higher is the likelihood of repeat offending and the greater the escalation of seriousness in the offences committed.

Ironically, of course, the more aggressive the police tactics in 'crack downs' and 'targeted' policing, the greater the arrest and imprisonment rates. In a self-fulfilling criminogenic spiral tough law and order policies beget their own justifications.³²

It is in this context that we should examine the Western Australian figures and relate them to the social and political climate, which has found so many Aboriginal kids deserving of detention.

In response to intense media attention on the tragic end of a high speed car chase, in which an innocent woman and her child died, stringent new juvenile laws were introduced in WA. It was a barely disguised endeavour to attack the perceived problem of rampant Aboriginal kids. The *Crimes (Serious and Repeat Offenders) Sentencing Act 1993* (WA) started out with a plain breach of human rights. It provided for indeterminate sentences for adults, and no maximum sentence was set for juvenile motor vehicle offences.³³ The grossness of such a breach visited on children was eventually recognised and the legislation was allowed to lapse. However, without a hint of negotiation with Aboriginal groups in the drafting of the Bill, the *Young Offenders Act 1994* (WA) followed with such provisions as a power in the Director of Public Prosecutions to ask for a Special Order of the Court to add eighteen months onto the sentence of any young person who exhibits a pattern of re-offending and who has committed a serious offence.³⁴ Because the *Young Offenders Act* relies on an

²⁹ See, for example, Wundersitz, J., "Some Statistics on Youth Offending: an Inter-Jurisdictional Comparison" in *Juvenile Justice: Debating the Issues*, Naffine, N. and Wundersitz, J. (eds), 1993, p. 23.

³⁰ Naffine, N., "Philosophies of Juvenile Justice" in *Juvenile Justice: Debating the Issues*, *op.cit.*, p. 2.

³¹ In *R v GDP* [1991] 53 A Crim R 122 the NSW Court of Criminal Appeal held that rehabilitations, not retribution or general deterrence, was to be the primary aim when sentencing juveniles.

³² Luke, G. and Cunneen, C., *Aboriginal Over Representation and Discretionary Decisions in the NSW Juvenile Justice System*, *op.cit.*, p. 12.

³³ Section 10, schedule 3.

³⁴ Sections 124, 125 and 126. See, Broadhurst, R., et al., *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, *op.cit.*, pp. 69-71.

exhibited pattern of repeat detention, and Aboriginal juveniles are detained after conviction at 4.1 times the rate of non-Aboriginal offenders, they are more likely to bear the brunt of these Special Orders.³⁵

Provisions such as these are grafted onto a juvenile justice system in WA which is already founded on a primary philosophy of punishing a child for misbehaviour. And, the logic runs, if that doesn't work, increase the punishment. A quarter of Aboriginal juveniles locked up in Western Australia were convicted of their first offence between 7 and 10 years of age.³⁶

Police tactics reflect the same insight.³⁷ 'Operation Sweep' relied on s.138B of the *Child Welfare Act 1947* (WA) which allows police to apprehend a child and "*forthwith take the child to their place of residence*". While directed at children in 'moral danger' the name of the operation aptly identifies that the section is being used as an instrument to clean the streets. Often, instead of complying with the statutory mandate to immediately take kids home, they have illegally been put in paddy wagons and taken to the police station for their parents to collect.³⁸ It is not unusual for such apprehensions to precipitate reactive behaviour leading to charges, and so the first entry into the criminal justice system. From welfare to crime, by the predictable means of police tactics which are well documented to produce precisely that result. And in whose welfare?

Aboriginal and Torres Strait Islander children are disproportionately the subjects of police surveillance and public order offences because of their use of public space and their perceived propensity to commit crime.³⁹ This is just one aspect of the self-fulfilling prophecy of prejudice and law and order policies generating crime which, in turn, give the mandate for stricter policies.

The juvenile justice system rather than serving as a safety net and source of genuine education, care and correction becomes like a fishing line hooked with police crack-downs and punitive sentencing policies. It is cast into the most vulnerable section of our communities. Among kids struggling with difficult home lives, little education, poor health, minimal prospects of work, discrimination, anxiety and alienation. Their frustrations and violence is most frequently visited on each other or on themselves.⁴⁰ Why does Australia have the fourth highest youth suicide rate in the industrialised world? Why is the Indigenous youth suicide rate almost twice the general Australian rate? Why do Indigenous kids experience so much frustration that they can be so reckless with themselves and with the welfare of others?

These are kids. Without denying their responsibility for their behaviour, our kids are not 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.

Politicians and the public who create and tolerate this situation are not innocent bystanders. Just as the courts tell kids that, while they have sympathy with their circumstances, certain things cannot be tolerated. A judgment must be made.

³⁵ Research undertaken by Dr P. Omaji and Dr Q. Beresford at Edith Cowan University in Western Australia, to be published in 1996, shows that 82% of Aboriginal juveniles in detention in WA had previously been incarcerated.

³⁶ *Ibid.*

³⁷ A very good analysis of police street 'cleansing' operations Australia-wide can be found in Blagg, H. and Wilkie, M. *Young People and Police Powers*, Australian Youth Foundation, 1995, pp. 38-54.

³⁸ Hall, S., *West Side Saga: Juvenile Justice in Western Australia*, Aboriginal Law Bulletin, Vol 3, No 68, June 1994, p. 21.

³⁹ Blagg, H. and Wilkie, M., *Young People and Police Powers*, *op cit*, p. 31ff.

⁴⁰ Broadhurst., et al., *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, *op. cit*, pp. 14-28.

As I have acknowledged, most Australians are not racist in the simple sense of holding antipathy towards Indigenous peoples. However, the tolerance of the continued arrest and incarceration rates of our children is culpable. Professed ignorance or helplessness is no defence. Politicians are reactive creatures. Just as they will pull on tougher policies they are equally capable of adopting more productive and more effective strategies. If that is what the electors want.

The broad Australian community condones the institutionalised abuse of Aboriginal kids. This is not an unfair judgement. It is the real truth in sentencing.

If by some stroke of ill-fate non-Indigenous Australian parents awoke to a world where the disproportionate separation from their children took place day after day, as it does to our families, there would be an outcry. A Royal Commission would be called. Moreover, its recommendations would be acted on until equality of treatment was actually achieved. Like many of the Indigenous peoples of Australia, you would tell politicians of all persuasions where they could stick their 'reconciliation' until some plain justice was on offer.

Reflect for one moment. How would you feel about a reconciling arm around your shoulder if your children were eighteen times more likely to be taken away into detention than the children of the person offering to be your friend. And the police, the magistrates, the judges and the people who make the laws and run the prisons all seemed to share something in common: the colour of their skin. No reconciliation without justice is not a slogan. It is a minimal statement of reality.

If the only certain guarantee of current practices, and the demographics of our population, is that the current crisis will deepen and decimate the lives of future generations. What are we to do? For the many Australians of sense and goodwill the emotive description of the problem only intensifies their sense of helplessness. There are no simple solutions. But there is much that can be done.

The first steps are acts of recognition.

And the very first step is to recognise the critical nature of the situation. In 1991 the Royal Commission into Aboriginal Deaths in Custody put it in the plainest terms:

*That governments and Aboriginal organisations recognise that **the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need** for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.⁴¹ [emphasis added]*

The lethargic and superficial approach to the effective implementation of the Royal Commission's recommendations does not change. There is still no sense of the urgency perceived in 1991.

The second step is to recognise that aggressive, punitive, net-widening, fishing-line casting – call them what you will – approaches to juvenile offending will not reduce offences.

Across the board community perceptions of Indigenous juvenile offending are seriously out of kilter with the most compelling of facts and figures, clear evidence that crime rates are actually static or falling in most categories. Where they are increasing, the reaction is out of proportion to the increase and ultimately counter productive in its effects. The ever increasing number of Indigenous kids in the system is not indicative of a 'black crime wave'. It is more reflective of the policies being applied.

⁴¹ Royal Commission into Aboriginal Deaths in Custody, *National Report, op.cit.*, Vol 2, p. 252.

The myth of black youth out of control is a self fulfilling prophecy. The rates of recidivism after release from juvenile detention centres demonstrate the worse than futile approach of doing it harder, longer and stronger. If you want more damage – both to society and to our kids – lock more up: 43 of the 99 Aboriginal people whose deaths in adult custody were investigated by the Royal Commission into Aboriginal Deaths in Custody had a history of childhood separation from their families and placement in institutions.⁴²

From that point on, Glenn's life follows the tragic and well worn path of many Aborigines brutally separated from their families and thrown into an alien environment, cut off from family warmth, maternal care and any sense of identity. Torn from his mother at the age of four, his behaviour become so disturbed that the staff of a receiving home threatened to resign if this small child was not removed.⁴³

The third act of recognition is to appreciate that the problems our kids encounter and the problems they cause are felt first, most immediately and most deeply, by our own families and communities.

It is facile and dishonest to pretend that many of our kids don't get into trouble.

Given the circumstances they are born into, the stack of disadvantages against them, they are not doing too badly. Any group of young people growing up in our world, with our socio-economic profile, would act up and get into strife. Lay the veneer of history, prejudice and cultural disjuncture over their starting point and the problem deepens.

But this does not mean that their mothers, fathers, aunties, uncles, grandparents and cousins are not concerned, or pass off all responsibility onto whitefellas. It may be difficult, but our kids need to bear responsibility too.

Back in 1899 Spencer and Gillen spoke of intergenerational friction.

The old men see with sorrow that the younger ones do not care for the time-honoured traditions of their fathers, and refuse to hand them on to successors who, according to their ideas, are not worthy to be trusted with them ...⁴⁴

Today, from Perth to Cape Barren Island, Bamaga to Port Augusta communities are horrified by what is happening to our young people – suicide, petrol sniffing, chronic unemployment, alcoholism, random destruction of property, abuse of old people.

Young people feel frustrated and have no hope for the future...the situation is deteriorating, with acts of vandalism, petrol sniffing and domestic violence on the increase.⁴⁵

A young man who died in Beatrice Hill Prison in the Northern Territory, asphyxiating on his own vomit after sniffing fire extinguisher fluid, had 'No Future' tattooed into his skin. This lack of hope, this recklessness, this utter disregard for their own and for others well-being, is endemic among our young people.

⁴² *Ibid.*, Vol. 1, p. 44.

⁴³ Wootten J.H., *Report of the Inquiry into the Death of Glenn Allan Clark*, Royal Commission into Aboriginal Deaths in Custody S10, AGPS, 1990, pp. 83-4.

⁴⁴ Spencer, B. and Gillen, F.J., *The Native Tribes of Central Australia*, MacMillan, London, 1899, p. 8.

⁴⁵ Letter to Commissioner Dodson from L. Joshua, Chairperson of Numbulwar School Council, 23 February 1994.

Shocked Yarrabah residents are desperately trying to halt suicides among young Aboriginal men in their community which have left two dead and one in tensive care in the past three weeks...young men were “bored out of their brains” because of a lack of challenging employment in the town and had lost the will to live.⁴⁶

The crudeness and ineffectuality of punishment as a response to this malaise is patently obvious.

Before our young people are seen as a ‘problem’ for society at large they are our children in distress. We will fight to protect them and get them their rights. We will fight you if that is necessary.

It should not be necessary if there is a simple extension of human understanding. Our concerns and our fears are the same as yours, but we experience them daily in our homes and communities. It need not be a black and white problem.

This perception, if it is truly taken onboard, leads to the final act of recognition. It is about self-determination.

The standing of Aboriginal and Torres Strait Islander parents, families and communities to actively participate in and shape juvenile justice programs, which have such a disproportionate impact on our children, should be beyond question.

Current laws, practices and policies that so disproportionately separate our children from us are merely the latest installment of state activities that, in the living memory of people, were avowedly racist forms of social engineering intended to bleach our Indigenous culture. These assimilation policies were forcibly imposed on us. The police and welfare officers were the state’s front line.

Continuing mistrust and active antagonism towards these agencies should not be underestimated. Given the disillusioning experience of ineffective action of the Royal Commission into Aboriginal Deaths in Custody recommendations, it is difficult for our communities to believe that there is a genuine desire to lift up and value our kids rather than to continue to regard them as the most recent generation of the ‘Aboriginal problem’ to be curbed and contained.

The recently enacted *Children (Parental Responsibility) Act 1994* (NSW) empowers police to remove children from any public place where they consider this removal would “*reduce the likelihood of a crime being committed*”.⁴⁷ This form of pre-emptive strike policy frequently results in conflict where kids, not unnaturally in any democracy, resist being apprehended for standing around, doing nothing. The trifecta is not an unusual result: charges of offensive language, resist arrest, assault police. Three more offences for the stats and a court appearance.

The superficiality of imposing ‘Parental Responsibility’ without the active support and involvement of parents and communities in the justice system is cynical. I will consider cooperative and community-based approaches below, but the actual balance in the system should not be lost sight of. It is based on force and coercion not support, involvement and a genuine devolution of power.

Empowerment will not be achieved until indigenous communities can secure responsibility and authority over programs which directly impact on their own communities. Increasing responsibility without authority will only produce negative outcomes for communities and the programs which have been imposed upon them. Firstly, it will create false expectations as to what outcomes the community can realistically achieve. Secondly, without authority, indigenous communities will become dependent upon the program and the bureaucratic

⁴⁶ “Suicide Shock for Yarrabah”, *The Cairns Post*, 18 February 1995.

⁴⁷ Council for Civil Liberties, *Children First*, Melbourne, 1995, p. 4.

*mechanisms which operate it. Thirdly, indigenous participation will decline when it is realised that the community's initial expectations cannot be met. Therefore, a program originally intended to increase indigenous responsibility and participation as an administrative bridge from dependency towards autonomy will only create further dependence and frustration unless the community is recognised as having the authority, ownership and control of the program.*⁴⁸

Self-determination in the context of the juvenile justice system means genuine cooperation. It is not an invitation to state agencies to relinquish their own responsibilities – expecting the Aboriginal and Torres Strait Islander Commission or other Indigenous funding sources to foot the bill for community programs. It means recognising mutual responsibilities and working out specific policies and programs based on negotiation.

This was the unequivocal view of the Royal Commission into Aboriginal Deaths in Custody. It is worthwhile repeating the terms of Recommendation 62:

*That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for **governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.** [emphasis added]*

All governments supported this recommendation. However, the commentary on its implementation by the Aboriginal Legal Service of Western Australia (WALS) is characteristic of the Jekyll and Hyde policies adopted in all jurisdictions:

*The former WA government supported this recommendation saying that the State Government Advisory Committee on Young Offenders has examined strategies and recommended changes and reforms. Family Support programs have been introduced and Aboriginal Child Placement principles are applied rigorously. A cautioning system and the Killara program assists in the courts system. However, this response ignores the fact that the former government introduced the most draconian sentencing legislation for juveniles convicted of certain offences, particularly those involving car theft, for lengthy periods of time, i.e. minimum sentences of eighteen months for repeat offenders, then for an indeterminate length of time.*⁴⁹

Part 5 of the *Young Offenders Act* bears the promising heading 'Dealing with Young Offenders Without Taking Court Proceedings'. While this new diversionary scheme sounds good, lack of any component within the scheme likely to empower Aboriginal families or the Aboriginal community in dealing with their youth means, in the opinion of the WALS, that "*current systemic discrimination against Aboriginal youth in the operation of those diversionary processes will be perpetuated by the new legislation*".⁵⁰

Characteristically, these diversionary schemes are dependent on police discretion:

⁴⁸ Sykes, R., *Self-Determination: Implications for Criminal Justice Policy Makes in Justice Programs for Aboriginal and other Indigenous Communities: Aust, NZ, Canada, Fiji, PNG*. Proceedings-Aboriginal Criminal Justice Workshop No 1., Hazelhurst, C. (ed), AIC, Canberra.

⁴⁹ Ayres, R., *Striving for Justice*, Aboriginal Legal Service of Western Australia (Inc.), Report to the Western Australian Government on the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1994, Vol. 1, p. 35.

⁵⁰ Ayres, R., *Way Out West: Implementation of Royal Commission into Aboriginal Deaths in Custody recommendations in Western Australia*, Aboriginal Law Bulletin, Vol. 3, No. 68, June 1994, p. 20.

...they control access to the caution scheme and access to Juvenile Justice Teams. Currently only 15% of youth who receive cautions or are referred to Juvenile Justice Teams are Aboriginal. This contrasts with 65% of all youth in detention centres being Aboriginal. There is nothing in the legislation which is likely to empower Aboriginal families or the Aboriginal community in dealing with their youth...it does not give the parent or responsible adult the right to be part of the decision making process.⁵¹

There is a confusion of approach to juvenile offending throughout Australia. The philosophy of back to basics – spare the rod and spoil the child – has grown in its appeal to a community with a grossly exaggerated view of the problem, influenced by the media’s irresponsible reporting of ‘youth outrages’. At the same time some tentative steps are being taken to pick up community-based programs, family counselling and diversionary schemes. But there is no firm political resolve to lift the debate and unambiguously commit to a system that will open a bridge between state agencies, children, their parents and communities. Our children are not only separated from us, we are separated from the system that claims them.

Indigenous self-determination is not only sound in principle it is sound in practice.

A statement by a superintendent of the NSW Police Service illustrates two points about differential police practice for the Aboriginal community in inner Sydney:

Our normal surveillance activities can’t operate in a place like the black community. You stand out like you know what...where do you survey the activity of people when they are all the one breed? So you’ve got to look at alternative methods and that was what today was all about.⁵²

The first point is that the statement reveals an attitude endemic to a police service that looks upon the community it is intended to serve as a “breed” apart. The second, more positive point, is the recognition that traditional policing methods in Aboriginal communities are inept. The statement was made following a community meeting. It reveals the distance that must be travelled but, at least, represents a step on the way to negotiation and fresh thoughts.

It is useful to take a brief look at particular efforts.

In Victoria community justice programs and panels have been operating since before the Royal Commission. The Shepparton program is the only one funded to have a full time employee, the remaining schemes have some expenses defrayed by the Department of Justice but are substantially run on volunteer participation. Given the responsibility they assume in the criminal justice system this lack of funding by government represents a deplorable lack of commitment. Various community schemes in Western Australia identify problems and develop local solutions. Street patrols take people affected by alcohol or other substances to shelters or their homes, remove under-age drinkers from licensed premises and patrol well known trouble spots.

As with the innovative Julalikari Town Camp Night Patrols described by the Royal Commission,⁵³ community-run patrols offer Aboriginal communities an opportunity to become directly involved in their own forms of policing and mediation, diffusing and resolving disputes. Abrasive contact with the police can be avoided while enabling police services to operate more effectively if needed. Community patrols divert people from custody and reduce the risk of self-harm and socially disruptive behaviour. In WA they now operate in ten locations. In 1994 new patrols were started in

⁵¹ Ayres, R., *Striving for Justice*, *op. cit.*

⁵² *Sydney Morning Herald*, February 1990.

⁵³ Royal Commission into Aboriginal Deaths in Custody, *National Report*, *op.cit.*, Vol. 5, p. 49.

Mullewa, Kununurra, Carnarvon, Fitzroy Crossing and Halls Creek. The Mullewa patrol has reduced juvenile arrests from an average of six per month to one per month.

Throughout Australian juvenile jurisdictions innovations are being introduced. The common thrust of the various strategies employed is in the 1993 NSW Green Paper “*Future Directions for Juvenile Justice in New South Wales*”, which mirrors the approaches advocated by the Royal Commission into Aboriginal Deaths in Custody:

- *the use of arrest as a last resort*
- *the use of community alternatives to court processing, including the establishment of offence resolution mechanisms*
- *enhanced police cautioning*
- *providing credible alternatives to custody*
- *examining methods of reducing the over representation of Aboriginal young people in the juvenile justice system*
- *establishing bail hostels and alternative accommodation placements*
- *amending legislation so lack of accommodation or family ties does not prevent the granting of bail where it would otherwise be granted.*

*The participation of the community in the juvenile justice system is an underlying theme of the Green Paper and far greater coordination across government agencies is also highlighted to achieve consistent goals, avoid duplication and better manage scarce resources.*⁵⁴

The thrust is good. But in New South Wales, as in the rest of Australia, little substantial headway has been made. Instances of success are overwhelmed by the continuation of attitudes and practices, which draw so many of our kids into cells and dormitories.

The Green Paper refers to a Crime Prevention Foundation established to fund crime prevention programs. Its budget is \$5 million. When the direct cost of juvenile crime and the cost of incarceration in correctional institutions – let alone the cost in human misery both to the children involved and their communities – is taken into account, a total of \$5 million is offensive. It is an effective abandonment of responsibility. This criticism is illustrated by the NSW Government’s half-hearted position. It is equally applicable in all jurisdictions. The cost harvest of under expenditure in the prevention of juvenile offending and in the diversion of offenders from custody will be reaped in future non-discretionary expenditure in the adult system. And in ruined lives.

It is my intention to continue monitoring the effects of the juvenile justice system on the rights of Indigenous kids. I propose to examine the characteristics of successful youth programs in the future. My examination will be mindful of the following observations:

Reforms at the individual and community level are now operating in the juvenile justice system in New Zealand and in some rural areas of New South Wales. Here, family conference schemes that bring together youthful offenders and their supporters with victims and their supporters have been successful in ‘bringing shame and personal and family accountability for wrongdoing back into the justice process’. The family conferences ‘empower families to come up with a plan, a package of measures, to heal the wound caused by the offence and to put an end to the offender’s shame’. As successful as these conferences have been seen to be, this should not be interpreted as a plea for their universal implementation. To do so would be to supplant more white administration into Aboriginal communities. Instead, the schemes need to

⁵⁴ Juvenile Justice Advisory Council, A Synopsis of the Green Paper *Future Directions For Juvenile Justice in New South Wales*, 1992, p. 3.

develop in their own way at the local level. Indeed, these schemes are noted here only as one example of innovative justice practices that should be trialed in Aboriginal communities.

The solutions that point to greater Aboriginal control over their living conditions should not be interpreted as just another facile call for self-determination. At the outset we borrowed from Braithwaite the view that the Western Criminal justice system was an abject failure for indigenous peoples – that the State disempowers people through its criminal justice system. This does not apply to indigenous populations for ‘less and less do we rely on individuals, more and more we rely on organisations to protect us, feed us, educate and entertain us. In a world where organisational action increasingly supplants individual action, we are stuck with a criminal law locked into the ideology of individualism’.⁵⁵

This latter point has resonance for all of us. I return to the words of one of our Elders from the Kimberly:

He drew a small spiral in the sand. That represented the mother’s womb.

The relationship between our law and our kids is not untroubled. That old man went on to say that “...when the young people go down south their spiral starts to get smaller because they lose the law and begin to want material things... The children change their way of thinking. Their spiral of life is disrupted and they are not fit to take their proper place on return to the community”.⁵⁶

The tensions between the values of different generations are as old as humanity. But there is accuracy in the perception of another senior man in the Northern Territory:

Western law took traditional law away from Aborigines but nothing was given to take its place. Numbulwar now exists in a vacuum with no law enforcement at all.⁵⁷

This loss of meaning, coherence and processes once provided by traditional law is not limited to remote communities. It is experienced even more deeply in urban and rural communities where the loss was experienced earlier. As appropriate, and as determined by particular Indigenous communities, the recognition of traditional forms of responsibility and sanctions offers one way of reinvigorating the effective treatment of young offenders in their communities.

But the loss that cuts most deep, which is not limited to Aboriginal and Torres Strait Islander communities, the abandonment of the philosophy that underpins Indigenous law. It never rested on the ideology of individualism, simple prohibitions and punishments. The Australian Juvenile Justice System is a massive failure in providing guidance and growth for our kids. It is a fruitless tree for the non-Indigenous community as well as ours. The crisis of the system for Indigenous kids should cause a broad re-examination of the entire juvenile justice system and its objectives.

Drafted 30 years ago by Danish jurists for their former colony (Greenland is now semi-autonomous), the unique Greenland Criminal Code attempts to graft traditional Inuit concepts of rehabilitation onto a Western, and specifically Danish, system of laws and procedures. The philosophy behind even the enlightened Danish penal system is punishment – a repressive means of social control whose object is forced conformity with society’s norms. In contrast to this “conformity model”, the object of Inuit customary law is neither punishment nor justice,

⁵⁵ Lincoln R and Wilson, R., “Aboriginal Offending: Patterns and Causes” in Chappell, D., *The Australian Criminal Justice Systems-the mid 1990s*, Reed International Books Australia, 1994, p. 86.

⁵⁶ Crawford, F., *Jalinardi Ways-Whitefellas Working in Aboriginal Communities*, op.cit., p. 27.

⁵⁷ Letter to Commission Dodson from L. Joshua, Chairperson of Numbulwar School Council, 23 February 1994.

*but the elimination of conflict and the restoration of harmony – a philosophy dubbed the “the Arctic Peace Model”.*⁵⁸

The damage that the Australian Juvenile Justice System actively visits on our kids and yours must stop. Because of the racially specific intensity of this damage, Indigenous parents and communities are more active than any others in attempting to shift its operation. That will continue, with support and sometimes in the face of opposition. We are not only worried for our children, but for yours.

Human Rights and Our Kids

There is no doubt in my mind that Australian governments have shown themselves to be guilty of serious and repeated breaches of the human rights of Indigenous children.

In December 1990 the Australian Government ratified the *Convention on the Rights of the Child* (CROC). This Convention had been adopted by the United Nations only a little over a year earlier. Following ratification, the Australian Government added the Convention to the list of international instruments in respect of which the Human Rights and Equal Opportunity Commission (HREOC) exercises its powers and responsibilities. In other words, CROC is declared an instrument under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The rights set out in this international instrument fall under the definition of human rights in the Act. Complaints about acts or practices of the Commonwealth that breach these international standards can be conciliated by the Commission.

I must be quick to add that CROC is not incorporated into domestic law of Australia through being scheduled to the Human Rights and Equal Opportunity Commission Act. The minimum standards outlined in the Convention cannot be enforced in Australia by individuals or groups. Indeed, even if someone complains to HREOC about a breach of the Convention little can be done by the Commission to ensure any decision it makes on the matter is adhered to. The HREOC has the power to inquire into an alleged breach and report to the Commonwealth Government. The power to take effective action rests with the Government.

Unfortunately, unlike the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), CROC provides no international complaint mechanism. Indigenous individuals cannot complain directly to the United Nations about the treatment of their kids.

In 1990 at the World Summit for Children the Australian Government also adopted the *World Declaration on the Survival, Protection and Development of Children*. In adopting this instrument the Government undertook to prepare a national program of action to achieve the goals of this declaration.

In 1993 the Government also attended the World Conference on Human Rights and adopted the *Vienna Declaration* which in paragraph 21 calls on states to effectively implement CROC. This paragraph reiterates that:

*“[i]n all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight. National and international mechanisms and programs should be strengthened for the defence and protection of children, in particular, ... children in detention”.*⁵⁹

⁵⁸ Schechter, E.J., *The Greenland Criminal code and the limits to legal pluralism*, *Etudes/Inuit/Studies*, 1983, Vol. 7, No. 2, p. 79.

⁵⁹ *The Vienna Declaration and Program of Action*, June 1993, UN Department of Public Information, 1995.

The Australian Government looked good as it swiftly endorsed these international instruments and agreed with the international community to protect and promote the rights of its children in accordance with the international standards outlined by the Convention and the declaration.

Now, four years down the track from CROC's ratification, I find myself asking what difference has it made to Aboriginal and Torres Strait Islander kids in the criminal justice system?

This positive international action has not translated into domestic activity. Both domestically and internationally Australia is failing to live up to its own ideals and failing to fulfil the terms of its contract with the world.

This apathy is perhaps most profoundly illustrated by the Government's commitment to its reporting responsibilities under the Convention.

CROC requires the Australian Government to report on its implementation of the Convention every five years. At the end of my reporting period, Australia was over two years late in filing its first report under this instrument and so has not been subjected to the scrutiny of the United Nations Committee set up under the Convention to monitor states' performance. There are provisions for individuals to deliver information to the Human Rights Committee, which can be raised by Committee members in their questioning of the Australian Government's commitment to the reporting process the efficacy of this process has yet to be tested.

Australia's commitment to accounting to the world community on its performance under this instrument comprised, until recently, one part time officer within the Attorney-General's Department straining in an ultimately futile bid to meet our international deadlines.

In 1993 the Department of Foreign Affairs and Trade claimed:

*...the Convention [CROC] will have an increasingly important impact on law and policy in Australia.*⁶⁰

The High Court's decision in "*Teoh*" gave at least some tangible meaning to this bold assertion. Yet, when face with the Court's judgement, the Australian Government's reaction was to legislatively extinguish even the legitimate expectation that government decision-maker would take the terms of CROC into account before potentially overriding them.⁶¹

The Government made a contract with the world when it signed CROC.

This lack of commitment to fulfilling the terms of Australia's contract is perhaps partially explained by the fact that the treatment of Indigenous kids by the Australian criminal justice system clearly breaches international law.

Breaches occur on a number of levels.

Amnesty International has criticised Australia for the gross over representation of Indigenous children in the criminal justice system.⁶²

⁶⁰ Department of Foreign Affairs and Trade, *International Human Rights Handbook 1993*, p. 120.

⁶¹ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353, ("*Teoh*") is discussed in detail in Chapter 2.

⁶² Amnesty International, *Australia: A Criminal Justice System Weighted Against Aboriginal People*, 1993.

This gross over representation of Aboriginal and Torres Strait Islander kids in juvenile corrective institutions raises issues under the CERD.

It is hardly controversial to suggest the juvenile justice system is racist in its operation and that Indigenous kids are treated less favourably by the system.

The figures that reflect the disproportionate representation of Aboriginal and Torres Strait Islander children at all levels of the system are evidence of the fact.

As are the stories from our kids about ongoing, relentless police surveillance, their descriptions of humiliating verbal and physical harassment at the hands of police officers and their talk of magistrates and judges who treat them differently because they are black.

Almost 10% of all persons aged 13 years and over reported being hassled by police during the 12 months prior to be interviewed. Some 14% of males said they were hassled compared to 5% of females. An estimated 22% of males aged between 15 and 19 years reported being hassled.

Approximately 3% of persons aged 13 years and over said they were physically assaulted by the police in the 12 months before interview.⁶³

Article 2 of the CERD requires state parties to undertake, by all appropriate means and without delay, a policy of eliminating racial discrimination. This policy is to include measures to: eliminate acts or practices that **result** in racial discrimination; and, review governmental policies and measures to amend, rescind or nullify laws or regulations, which have the **effect** of creating of perpetuating racial discrimination.

The ongoing disadvantage Indigenous kids face when they come into contact with police, magistrates, judges and correctional officers indicates that Australia is far from realising the international standard set down in article 2.

Article 5 of CERD requires Australia to ensure equality before the law for all its citizens and in particular to eliminate racism before tribunals and all other organs administering justice. The domestic state of play with regard to Indigenous children suggests that Australia's compliance with this article falls far short of the minimal international standard set down in the Convention.

The discriminatory response of the juvenile justice system to our kids raises clear human rights issues under CROC and CERD. The same system can also be impeached under the ICCPR and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*.

A brief consideration of Western Australia and the *Young Offenders Act 1994 (WA)* enables us to consider some of these issues in a specific context.

Section 125 of the legislation directs the court to give primary consideration to the protection of the community when sentencing young offenders and to place this consideration ahead of all others and all matters referred to in section 46 of the Act. Section 46 of the legislation states that accepted notions of justice must be incorporated into sentencing decisions.

This relegation of all other considerations to a status below that of the protection of the community breaches on eof the fundamental principles of CROC contained in article 3. This article makes the

⁶³ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994*, Detailed Findings, ABS, Canberra, 1995.

best interests of the child a primary consideration in all actions of state parties concerning children. Putting kids first is hardly controversial. The recognition of that principle by CROC is merely the official international acceptance of a practice which has shaped the way numerous cultures have treated generations of children. But, in its response to the “*Teoh*” decision, the Government intends to remove this as a legitimate expectation.

It has also long been accepted that detention is arbitrary if it is imposed by a process contrary to “*accepted notions of justice*”.⁶⁴ These provision of the Young Offenders Act, therefore, breach article 9(1) of the ICCPR, which protects individuals from arbitrary arrest or detention and article 37(b) of CROC, which protects children from unlawful or arbitrary deprivation of liberty. “*Accepted notions of justice*” are made secondary consideration by section 125.

Section 125 imposes a more severe sentencing regime on a class of juvenile offenders than is applicable to adult offenders. The *Beijing Rules*, and well accepted law, require that rehabilitation should be “...*always important if not the dominant consideration*” in the sentencing of juveniles.⁶⁵ Rule 26 of the *Beijing Rules*, for example, outlines the objective of the institutional treatment of juveniles. The rule states that the training and treatment of juveniles in institutions should provide care, protection, education and vocational skills with the objective of assisting juveniles to assume socially constructive and productive roles in society. Section 125, however, subordinates such considerations to the duty to protect the community. A short sighted notion of what constitutes ‘community protection’ is made the paramount consideration. It overrides rehabilitation, which may well be considered a better source of long-term protection.

Article 37(b) of CROC also states that detention should be an option of last resort and that it should be for the shortest appropriate period of time., This principle is mirrored in Part III of the *Beijing Rules*, in particular, rule 19.1 which states that “*placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period*”. Rule 17.1(b) requires that the restriction on the personal liberty of a child should only occur after careful consideration and should be limited to the possible minimum. This rule encourages the use of alternatives to institutionalisation to the maximum extent possible and some of these alternatives measures are listed in rule 18.1, which requires states to be flexible in their treatment of juvenile offenders.

The fact that the Western Australian legislation allows the Director of Public Prosecutions to request an inflexible block of an additional eighteen months on the sentence of a juvenile clearly breaches these international standards. And it flies in the face of the findings of the Royal Commission. In particular, Recommendation 92, which states that governments should legislate to enforce the principle of imprisonment as a sanction of last resort.⁶⁶

It is a clear illustration of the blatant disregard that the WA Government has for the Royal Commission’s recommendations and for its international obligations. The policy underpinning the Act is, in respect of an abstract class of juveniles, imprisonment is the preferred option. And as a matter of general policy, eighteen months should be added on top of the particular sentence for their current conviction.

The Western Australian Government may not rely on the provisions of the Young Offenders Act itself as justification for its failure to comply with international standards. The Western Australian Government cannot argue that enacting the legislation, which it claims purports to reflect the wishes of the community and to provide community safety, excuses it from liability under international law. It is a long accepted principle of international law, codified in the *Vienna Convention on the Law of*

⁶⁴ *Mabo v The State of Queensland* (1988) 166 CLR 186, per Deane J at 226.

⁶⁵ *Yorkshire v the Queen* (unreported, CCA WA, 7169/1988 per Wallace and Smith JJ.

⁶⁶ Royal Commission into Aboriginal Deaths in Custody, *National Report, op.cit.*, Vol. 3, p. 64.

Treaties, that internal laws of a country cannot water-down or extinguish a country's international obligations.⁶⁷ Of course the government answerable in the international forum is the Australian Government.

Consider watch-house conditions where juveniles are initially held, in the context of the *United Nations Standards Minimum Rules for the Treatment of Prisoners*. Are they healthy, well ventilated and lit, with adequate space as outlined in rule 10? And are the sanitary installations adequate to enable every prisoner to comply with the needs of nature where necessary and in a clean and decent manner as stipulated in rule 12?

And does the removal of Indigenous kids from their families and from their country to far away detention centres comply with article 9(1) of CROC, which requires that states parties ensure children are not separated from their families except where such separation is necessary for the best interests of the child? And does it comply with rule 18.2 of the *Beijing Rules* which states that a juvenile should not be removed from parental supervision unless the circumstances of the case make it necessary?

And do the various mechanisms put in place by some state and territory governments to provide families with the means to travel and with accommodation so that they may visit a family member in detention sufficiently fulfil article 9(3) of the Convention, which states that a child separated from his or her parents is entitled to maintain personal relations and direct contact with both parents on a regular basis?

The reality for many Indigenous kids falls far short of these international requirements. The tyranny of distance means that many Aboriginal and Torres Strait Islander children receive infrequent visits from parents and other family members despite even the best of departmental intentions to encourage contact between institutionalised kids and their families. A brief visit from an exhausted mother who has had to leave her other kids and other responsibilities and travel from Moree to Sydney after much negotiation with the relevant government department, is hardly a satisfactory outcome for either mother or child and has little hope of meeting the international standards outlined above.

I could continue this list of typical breaches but reciting chapter and verse, the failures of Australian governments to maintain and promote internationally acceptable standards towards Indigenous kids, will do nothing to change the essence of the problem. And for Aboriginal and Torres Strait Islander peoples its old, old news. We are the ones who live these abuses, its our kids and their futures that are at stake. We're tired of stating the obvious and we're tired of being ignored.

The Australian Government must act with commitment, urgency and energy to fulfil the promises it has made to the world, it must truthfully account to the international community and its own citizens on its progress to date and it must compel the States and Territories to take seriously their obligations at international law.

With all the pomp and ceremony of the emperor parading his new clothes the Australian Government has sent human rights delegations into the backyards of many other countries.

Perhaps you think the Government of the Peoples Republic of China and the State Law and Order Restoration Council of Myanmar have nothing constructive to say about human rights but, from where I sit, they have only too rightly said to Australia 'clean up your own backyard before you begin criticising ours'.

⁶⁷ *Vienna Convention on the Law of Treaties*, adopted by the United Nations 22/5/69. Entered into force 1980.

Chapter 2: Australian Human Rights Developments

In April 1995, the High Court handed down its judgment in *The Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*. The High Court ruled that Australian administrative decision-makers must have regard to the human rights standards and principles set out in treaties ratified by Australia. The Commonwealth Government has resolved to override the High Court. It proposes legislation to remove any obligation on decision-makers to consider treaty provisions when making decisions. This will include treaties scheduled to the *Human Rights and Equal Opportunity Commission Act, 1986* (Cth).

Of even greater concern than the impact of the proposed legislation is its implication. It appears to be the Government's view that ratifying an international human rights treaty should have no impact whatsoever on Australian domestic law and practice, unless provided for in express legislation.

The importance of international law for Indigenous rights

When Australia ratifies international human rights treaties, it undertakes to take all steps necessary to ensure Australian authorities apply the provisions of the treaty. The Government's action therefore sanctions a breach of Australia's contractual agreement and violation of international law. Even more worrying, is that the Government's action may signal a shift away from full and consistent commitment to Australia's international human rights treaty obligations. I am deeply concerned that such a trend would threaten the already precarious state of Indigenous peoples' rights in this country.

The Government's action did not occur in a vacuum. A small, but highly vocal group of critics of international human rights standards would have Australia quarantined from what they see as 'un-Australian' interference in the affairs of Australians. They ask questions like: 'why should Australian law and policy take account of international human rights law?', 'why are international human rights standards so important to Indigenous peoples?', 'why can't Australian domestic law and policy guarantee the human rights of all Australians?' They argue that Australians elected the Government to represent and protect their interests through parliamentary procedures.

Unfortunately, the principle of democracy does not protect the rights of all peoples. In any country the interests of the Government and the interests of individuals or groups will at times be at odds. The decisions and laws of the Government will never reflect the interests of all parties, but good democratic government balances competing interests to establish fair governance. In this country, the result of this equation rarely serves Indigenous peoples. As a small minority with little economic, industrial or political power, Indigenous peoples and our interests are already easy to overlook but our marginalisation is not just a problem of numbers—it lies at the heart of the way Australia developed and functions as a modern nation.⁶⁸

As Justice Brennan stated in *Mabo*:

*As the Governments of the Australian colonies, and latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes the land in this country during the last two hundred years, the Australian Aboriginal people have been substantially dispossessed of their traditional lands... Their dispossession underwrote the development of the nation.*⁶⁹

⁶⁸ The difference between minorities and Indigenous peoples is discussed in Chapter 3.

⁶⁹ *Mabo and Others v The State of Queensland [No:2]* (1992) 175 (CLR) 1. ("*Mabo*") at 68-69.

Unlike the law of each nation, international law does not necessarily reflect the interest of the dominant group in any one state. Potentially, it provides space to encode the basic principles of universal justice.

This is particularly the case in international human rights law, which protects fundamental, inherent and universal human rights.

However, if national laws reflect particular (non-Indigenous) interests, and international law demands that the laws of states protect all interests without discrimination, international law will, at times, demand shifts in national law.

That is why international human rights law is a powerful ally for Indigenous peoples. For Indigenous Australians international human rights laws are not just ‘another set of laws’. International law has been, and continues to be a principal buffer between us and systemic discrimination by the state.

If left to its own devices, in splendid isolation, the Australian legal system would never have addressed the systemic and structural injustices faced by Indigenous peoples. This is not just a theoretical analysis of legal and political conflict—it is an empirical observation.

To a great extent, the shifts we see grow out of Australia’s increasing willingness to commit to international obligations and to reform domestic law in line with international standards for human rights. Both the Federal Government and the courts have explicitly acknowledged the injustice of the law and made a commitment to make the law just.

The High Court’s decisions in *Koowarta*⁷⁰ and *Mabo*, the passage of the *Racial Discrimination Act* 1975 (Cth), the passage of the *Native Title Act* 1993 (Cth)—the key turning points in recognising the rights of Indigenous peoples—were conceived and upheld in the international legal arena.

This trend has been a great source of hope for Indigenous peoples. Any signs of derogation from the trend will provoke our suspicions about the Government’s commitment to social justice.

In the last year, critics have reinvigorated objections to the influence of international human rights law on Australian law. I would suggest that these critics reflect on the weight we give to respect for universal human rights elsewhere.

The demand for the application and recognition of international law in domestic contexts is not peculiar to Indigenous peoples.

Since the formation of the United Nations in 1945, and well before, the peoples of the world clearly recognised that leaving human rights issues entirely in the hands of sovereign states was neither adequate, nor moral. Do we think, for example, that the rights of the Moslems in the former Yugoslavia is a matter for a Serb Government to decide? Or the Turkish Government in relation to the Kurds? What about the Jews in Germany fifty years ago? No, we think that those peoples should have recourse to universal human rights standards irrespective of where they happen to live, or who happens to be in Government.

When governments of other countries systematically abuse the rights of a section of their population, our thoughts turn automatically to universal human rights standards, and we do what we can to require them to abide by those standards. The same principle must apply to Australia.

⁷⁰ *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

Nor did Australians scoff at international systems designed to protect human rights when Australia sought to join New Zealand in re-opening a case before the International Court of Justice against the French for testing nuclear weapons in the Pacific.

Australia has built a fine reputation as a country which contributes to the development of international human rights laws and vigorously promotes accession to and conformity with those laws. It has been active (albeit selectively) in promoting respect for human rights in the Asia-Pacific region. If the Australian Government now derogates from basic principles of domestic compliance with international standards, what does that say to the world about the authenticity of its commitment to human rights? If the Government feels no compunction about ignoring the consequences of entering treaties, it is signalling to the world that ratification is no more than a blithe and empty performance designed to do little more than enhance its international reputation—in the short term, at least.

Australia's compliance with international treaties is not just a matter of morality or consistency—it is also a question of honouring legal contracts. When a state becomes party to a treaty, it agrees to take all steps to adopt any legislative and other measures that may be necessary to give effect to the rights recognised in the provisions. Treaties also require states to make effective remedies available for people whose rights are violated, including access to competent judicial, administrative or legislative authorities.⁷¹

When Australia fails to bring national laws or policies into line with the provisions of a treaty, or fails to offer adequate remedies, it is in breach of the contract. When the Commonwealth passes legislation explicitly stating that decision-makers in Australia may ignore the provisions of treaties it has ratified, it is doing nothing less than flying in the face of its international agreements.

The relationship between international law and domestic law

Some principles and standards set out in international human rights treaties are already part of Australian law and practice when we ratify a treaty. However, in other areas additional action is required to ensure full conformity.

The principal method for incorporating international treaty obligations is through Commonwealth legislation. The Commonwealth has passed a number of seminal pieces of legislation to give partial effect to major human rights instruments. For Indigenous peoples, the most important of these are the *Racial Discrimination Act 1975 (Cth)*, based on the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*, based on six instruments, principally the *International Covenant on Civil and Political Rights*.

These Acts contribute to implementation, but do not give full effect to the international instruments.

For example, at the end of this reporting period, the *Racial Discrimination Act* still did not cover racial vilification, although Article 4(a) of the *Convention* requires legislation outlawing racial violence and incitement to racial hatred.

The *Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act)* certainly does not give full effect to the *International Covenant on Civil and Political Rights*. The fact that the *Covenant* is scheduled to the *HREOC Act* only means that the rights it sets out fall under the definition of human rights in the Act and that the Human Rights and Equal Opportunity Commission

⁷¹ See, for example, *International Covenant on Civil and Political Rights* articles 2 and 3.

can investigate and conciliate allegations of violations of rights in the *Covenant* by the Commonwealth. However, they fall short of being justiciable or enforceable rights. The Commission has no power to make enforceable determinations, nor can any courts hear matters of violations under the *Covenant* or other scheduled instruments.⁷² In addition, the Act is concerned only with actions of the Commonwealth, whereas State and Territory Governments, as the major arms of Government responsible for service delivery, are the most frequently responsible for violations.

Legislation is only one aspect of protection of human rights. Courts also have a role in applying international legal rules. In recent years international law has played an increasingly important role in decisions of the courts. The High Court in particular has considered the influence of both international customary law, and international human rights instruments, and has endorsed certain uses of international treaty provisions which fall short of importing full legal rights.

Specifically, when interpreting ambiguous aspects of a statute or the common law, courts can use international conventions ratified by Australia by way of assistance. In fact, the High Court recently held that we should favour the interpretation of ambiguous statutes which is in line with international obligations,⁷³ although the situation is less clear with respect to interpreting the common law.⁷⁴

The High Court has also acknowledged that the Australian common law should have regard to international legal standards. International law played an important part in the High Court's decision in *Mabo* with Justice Brennan in particular referring to both treaties and international customary law:

*The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*⁷⁵

We must, however, distinguish between the influence of treaties and the incorporation of international law into domestic law. Only legislative incorporation leads to justiciable rights and our courts are confined by the conventional rule that international treaties are not incorporated into Australian law unless the Parliament passes legislation with that objective. The High Court has consistently adhered to this basic principle:

*It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia... To achieve this result the provisions have to be enacted as part of our domestic law, whether by a Commonwealth or state statute.*⁷⁶

While the High Court has never derogated from the principle, it has elaborated its meaning by insisting that if a convention “has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law”.⁷⁷

The scope of influence of unincorporated treaties has been subject to consideration in a number of recent cases, and extensive public and academic debate.

⁷² *Dietrich v R* (1992) 109 ALR 385 per Toohey J at 434-5. Scheduling an international instrument to an Act does not confer justiciable rights.

⁷³ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*, (1995) 128 ALR 353 (“*Teoh*”) per Mason CJ and Deane J at 362.

⁷⁴ *Ibid.*, at 363.

⁷⁵ *Mabo [No:2]*, *op.cit.*, per Brennan J, at 41-2.

⁷⁶ *Koowarta v Bjelke-Peterson*, *op.cit.*, per Mason J, at 224-225.

⁷⁷ “*Teoh*”, *op.cit.*, per Mason CJ and Deane J at 362.

In *Dietrich* the High Court considered whether the right to a fair trial included the right to legal representation. The plaintiff sought to rely on Article 14 of the *International Covenant on Civil and Political Rights*, which explicitly includes the right to legal representation as part of the right to a fair trial, where justice requires. The majority found that the right to a fair trial in this case required legal representation. However, only two of the majority judges referred to international instruments, and even then, they were used as an indication of community values, not as a source of law.⁷⁸

*The Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*⁷⁹ is the most recent contentious legal development.

The “Teoh” Decision

In April 1994 the High Court heard an appeal against a decision by the Department of Immigration to deport Mr Ah Hin Teoh. Ah Hin Teoh is a Malaysian citizen who came to Australia on a temporary visa in 1988, married an Australian citizen, and applied for permanent residency. In 1990 he was convicted on serious drug related offences.

A requirement for permanent residency is that applicants be of good character. As such, the serious nature of Ah Hin Teoh’s criminal convictions could disqualify his application and trigger a discretionary decision to deport him under the *Migration Act 1958* (Cth).

However, the fact that Mr Ah Hin Teoh is also the father and stepfather of a number of children who are Australian citizens, complicated the case. On the one hand his crimes called for deportation, on the other, the considerable hardship his children would suffer if he was deported called for his residency to be granted. Because the *Migration Act* does not provide clear statutory guidance, it was up to the administrator to balance competing factors and use his or her discretion.

What was essentially at issue was the tension between the policy to deport a non-resident charged with serious criminal offences, and the rights of his children.

In its decision, the High Court, by a four to one majority, found the Department of Immigration had given insufficient consideration to the rights of the children. Three of the Justices held this was because there is an obligation on Australian administrative bodies to take into account international treaties when making administrative decisions.

They stated Australia’s ratification of an international treaty, in this case the *Convention on the Rights of the Child*, gives rise to a legitimate expectation that an administrative decision-maker will take the terms of the treaty into account in the exercise of his or her administrative discretion.

The court did **not** say the administrator’s decision must in fact be consistent with the treaty. However, if the decision-maker is going to depart from the requirements of the treaty, he or she must notify the person affected and give them the opportunity to present a case as to why the treaty should be complied with.

This decision alters the status quo of unimplemented treaties by acknowledging they have some force in domestic law, albeit very weak. Nevertheless, it did not depart from (in fact the justices explicitly affirmed) the conventional rule concerning the incorporation of treaties, and clearly distinguished between, on the one hand, the legal right to enforce a treaty, and on the other, the procedural right to have a treaty considered. The legal right applies only to incorporated treaties. The procedural right

⁷⁸ *Dietrich v R*, *op.cit.*, per Deane J at 416-7 and Gaudron J at 444.

⁷⁹ “Teoh”, *op. cit.*

applies to all treaties to which Australia is a party, regardless of whether they have been incorporated into the domestic law. Although the Court was careful to reassert that unimplemented treaties do not attract justiciable rights as such, the establishment of a procedural right provided a previously unrecognised way for unincorporated treaties to affect domestic law and policy.

In reaching their decision, the justices were highly critical of the idea that Governments and administrators can dismiss ratification as a “*merely platitudinous or ineffectual act*”. Chief Justice Mason and Justice Deane stated:

*Rather, ratification of a Convention is a positive statement by the executive of this country to the world and Australian people that the executive Government and its agencies will act in accordance with the convention.*⁸⁰

Justice Toohey took a similar view:

*...by ratifying the Convention, Australia has given a solemn undertaking to the world at large that it will: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” make “The best interests of the child a primary consideration”.*⁸¹

Justice Toohey referred to a recent case in New Zealand, where the Minister had argued that the Crown was entitled to ignore the provisions of unincorporated international treaties in relation to domestic matters.

In that case, Justice Cooke described the Minister’s submission as:

*...an unattractive argument, apparently implying that New Zealand’s adherence to the international instruments has been at least in part window dressing.*⁸²

Similarly, the High Court found it unacceptable that Australia could ratify a treaty which is supposed to send a message to the world that it will conform with its terms, without sending the same message to Australians. Australians have a right to expect that administrative decision-makers will act in conformity with those terms. Or at least they have a right to an explanation if decision-makers choose not to do so.

In my view the judgement did nothing but assert that there should be consistency between Australia’s international legal obligations and the operation of domestic law. This is the commitment that the Government makes when it ratifies a treaty. It is its contract with the world.

The High Court has already established that published, considered statements of Government policy create a legitimate expectation.⁸³ If the ratification of an international instrument is considered inferior in status to a published, considered statement of Government policy, what does that say about how seriously Australia takes the solemn commitment it makes when it ratifies a treaty?

This modest development is no more than an adjustment to ensure Australian decision-makers, at the very least, have regard to fundamental human rights principles—principles the majority of world nations have endorsed and Australians broadly support. When compared with other jurisdictions Australia’s approach is minimalist. The Chief Justice of Norway has supported a proposal to:

⁸⁰ “*Teoh*”, *op. cit.*, at 365.

⁸¹ *Ibid.*, at 373.

⁸² *Tavita v Minister for Immigration* (1994) 2 NSLR 257.

⁸³ *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

*... constitutionalise the so-called monistic principle, that is to say the principle that international law binding upon Norway shall be part of Norwegian law. That principle, which applies in many states, will in my opinion correctly express the positive attitude that should be taken on the part of the Norwegian state in relation to international law binding upon the state.*⁸⁴

It is therefore extremely disturbing that certain commentators and politicians are peddling the line that the High Court is busily making decisions, which not only exceed its authority, but are eroding both sovereignty and democracy. The Court stands accused of acting undemocratically by drawing directly on international law and bypassing the legislature.

Anyone who takes the time to examine the cautious manner in which the courts are using international law might question such criticisms. When stripped of the rhetoric, what they dress up as concern for democracy and sovereignty, is, in my view, little more than a reactionary objection to the possibility that the influence of human rights principles may disrupt the status quo.

The extent of judicial caution is well-illustrated by the bench's own statement in "Teoh" that:

*...the courts should act in this fashion with due circumspection when the parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law with reference to statutory policy and statutory material.*⁸⁵

The international conventions which appear to provoke so much fear do no more than articulate bottom line standards for human rights. From an Indigenous perspective, treaties are, if anything, an inadequate statement of the human rights standards which should be observed. The conventions in question all existed as Declarations supported by virtually all of the 185 member states of the United Nations. The convention at issue, the *Convention on the Rights of the Child* has been ratified by 174 States. Surely no reasonable person would object to Australian law and practice being updated in conformity with universally accepted principles?

But object they do. One commentator writes:

Every time the Commonwealth ratifies a treaty or convention, that is, it is in effect changing Australian law without reference to Parliament. It is also changing the Australian Constitution, since broad interpretation of external affairs power allows it to do just about anything it likes under the terms of a treaty.

*This is clearly a very unsatisfactory state of affairs for a country which is supposed to be a federal democracy. It means that much of our law is being made far away from our parliaments by people who have never been elected and the policy reasons for which are largely kept secret, or debated anywhere but in parliament.*⁸⁶

⁸⁴ Smith, C., "The Development of Sami Rights since 1980" in *Becoming Visible*, Proceedings of the Conference on Indigenous Politics and Self-Government, Brantenberg, T., Hansen, J., Minde, H., (eds), University of Tromsø, 1995, p. 69.

⁸⁵ "Teoh", *op.cit.*, at 362-363.

⁸⁶ McGuinness, P.P., "Parliament left behind in embrace of international treaties", *The Australian*, 18 May 1994.

Such comments reveal more about the fevered imagination of the commentator than the true implications of unincorporated treaties.

I see it as only proper that where Australian law and practice are patently out of step with internationally accepted human rights standards, they must undergo some evolution. The point was well made by Justice Brennan when he said that it was unacceptable for the common law to remain “frozen in an age of racial discrimination”.⁸⁷

If incorporating human rights standards requires a modest development in the Australian law then that should be embraced as a necessary correction of what is unacceptable in our law, and not resisted as an affront to a rigid sovereignty which should be stubbornly protected.

The decision has also raised objections on so-called ‘practical grounds’. Counsel for the Commonwealth in “*Teoh*” raised misleading concerns about the enormous uncertainty the decision would cause. The Court was forewarned of the administrative havoc that would ensue when administrators across the country had to consider each of Australia’s 920 treaties.

Both the distortion of the legal implications of the decision and the gross overstatement were quickly seized upon by a press eager to beat up unfounded paranoia.

*...in the Teoh judgement, the High Court has effectively instructed the Commonwealth to be aware of the contents of the 920 international treaties to which Australia is a signatory, and to make decisions in accordance with them.*⁸⁸

The supposed factual basis of such scaremongering was just plain wrong.

First, the decision imported nothing ‘holus-bolus’. Nor did it bind anyone to anything. Government decision-makers were left with their discretion in tact. It could just not be used arbitrarily to override human rights without any explanation.

Second, the decision would have called only a handful of human rights treaties into play certainly not the stable of some 920 which were cited. As Justice Toohey pointed out, only certain treaties will apply to certain decision-makers.⁸⁹ The vast majority of treaties are of no relevance to administrative decision-makers. They deal with matters like telecommunications, food standards and shipping.

Ironically, in areas where it suits the Government for authorities to follow international standards, such as postal services, maritime safety and broadcasting, it has passed legislation requiring decision-makers to conform with international standards.⁹⁰ It has imposed on them the burdens it says are unacceptable in the “*Teoh*” result. So, letters, ships and satellites benefit from international standards, but people do not.

Were the decision followed, administrative decision-makers would be required to have regard to human rights standards, which would mean their being trained in the relevant international instruments. This would admittedly demand an injection of some additional resources. However, if this is indeed a nation which values human rights, such an investment of resources should be seen as a matter of good and just government. With the advice of human rights experts a modest amount of targeted training would have sufficed and been quite within the means of the Commonwealth. This

⁸⁷ *Mabo [No. 2]*, *op. cit.*, at 42.

⁸⁸ “Australia: Read Before Signing”, *The Age*, 12 May 1995.

⁸⁹ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*, *op. cit.*, at 373.

⁹⁰ See s28(c) *Australian Postal Corporations Act 1989* (Cth); s7(d) *Australian Maritime Safety Authority Act 1990* (Cth); and, s160(d) *Broadcasting Services Act 1992* (Cth).

could, and should have been an appropriate response to the decision, particularly in this the UN International Decade of Human Rights Education.

In principle, human rights, and respect for those rights should not be evaluated in terms of budgets or administrative convenience. I recognise that governments have to be pragmatic, but such scaremongering is antithetical to the spirit of embracing human rights which all Australians might hope for. Already administrative decision-makers are expected and required to take numerous considerations into account. One would hope it would not be unreasonable to ask for a handful of human rights considerations to be among these.

One might well ask why such bile was provoked; or why such staunch defenders of sovereignty have not objected to the Internet, multinational media ownership or multinational mining companies.

Are the critics incensed by their loss of sovereignty when an international treaty allows them to send a letter overseas?

Or could it be that the suggestion of giving greater weight to human rights threatened to tip the balance a little more towards people whose human rights are implicitly abused in a system where democracy all too often fails to accommodate the rights of minorities?

As the Hon. P. J. Keating, the Prime Minister, said of the High Court's decision in *Mabo*, the decision presented an opportunity.

However, the Government's response to the decision in "*Teoh*" was very different to its response to *Mabo*.

Rather than building from the decision towards a greater attention to human rights standards in the administration of Government, the entire focus of the Government's response was on the perceived problem of 'uncertainty'.

On 10 May, 1995, the Attorney-General, the Hon. Michael Lavarch MP and the Minister for Foreign Affairs, Senator the Hon. Gareth Evans, released a joint statement to override the decision and restore the position to "*what it was prior to the Teoh case*":

*We state, on behalf of the Government, that entering into an international treaty is no reason for raising any expectation that Government decision makers will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic Australian law.*⁹¹

It was the Ministers' contention that "*because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced in Government activity*". Having asserted that dubious 'fact', their conclusion was presented as a logical outcome. That is "*it is not in anybody's interests to allow such uncertainty to continue*".

I cannot but conclude that when the Government speaks about "*anybody's interests*" it is thinking of bureaucratic convenience and not the human rights of Australians.

Those of us who might have interpreted the statement as a move to renege on Australia's solemn human rights commitments, were offered this scrap of reassurance:

⁹¹ *Joint statement* by the Attorney-General, the Hon. M. Lavarch MP and the Minister for Foreign Affairs and Trade, Senator the Hon. Gareth Evans QC, 10 May 1995.

*We should emphasise that the Government remains fully committed to observing treaty obligations. ...ratification is a message sent by the Government to the international community that it intends to observe the provisions of a treaty.*⁹²

“Observing” treaty obligations without giving them any practical effect is hardly reassurance. The statement sends a clear message to the international community and to Australians, that international obligations and commitments are, at least to some extent, international showmanship. Human rights scholars were highly critical of the statement and the announcement that legislation reversing the effect of the decision would follow. Justice Elizabeth Evatt, an eminent human rights jurist and member of the United Nations Human Rights Committee, said it was “*almost unthinkable*” Parliament would legislate to enable decision-makers not to follow treaty provisions which gave primacy to rights such as the rights of children.⁹³ In statements to the Senate Committee on Legal Constitutional Affairs Inquiry into the domestic significance of United Nations Human Rights Instruments, Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission, criticised the Government’s joint statement and draft Bill.⁹⁴ He focussed, in particular, on the effect that the statement and the proposed Bill would have in diminishing the status of all the instruments annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

The President, Sir Ronald Wilson, drew a sharp distinction between strictly unimplemented treaties, which were endorsed only by the executive and not by the legislature, and those which had in fact been scrutinised by Parliament, albeit not fully implemented. He pointed out that any instruments annexed to the *Human Rights and Equal Opportunity Commission Act* had first been sanctioned by both houses of Parliament in clear and unequivocal terms. Therefore, the argument that unimplemented instruments had never been approved by Parliament and so should have no status in domestic law did not apply to these treaties.

The very instrument invoked in the “*Teoh*” case, the *International Convention on the Rights of the Child*, is one of the treaties scheduled to the *Human Rights and Equal Opportunity Commission Act*. He noted that the *Human Rights and Equal Opportunity Commission Act* confers on these instruments the status of “*international instrument(s) relating to human rights and freedoms for the purposes of the Act*” (s47), and empowers the Commission to investigate and attempt to conciliate allegations that the Commonwealth is in breach of rights under the instruments. The Act thus confers on individuals the right to seek recourse for alleged breaches of the scheduled instruments by the Commonwealth. One would assume that in passing the Act, Parliament intended that it should provide a guide to the human rights standards the Commonwealth is obliged to meet in all its actions. Sir Ronald Wilson warned that the proposed legislation may have the effect of encouraging decision-makers to ignore international treaty obligations and refuse to conciliate complaints made under the *Human Rights and Equal Opportunity Commission Act*. The President also stated that the Government’s consideration of reversing the legitimate expectation created by the provisions of the *Human Rights and Equal Opportunity Commission Act* was “*unthinkable*”.⁹⁵

However, the Government did a lot more than think. As foreshadowed by the statement, it introduced the *Administrative Decisions (Effect of International Instruments) Bill 1995* into the Parliament on 28 June, 1995. The Commission reiterated its criticisms of the Bill in comments on the draft Cabinet submission on the implications of the “*Teoh*” decision. Nevertheless, the Bill as

⁹² *Ibid.*

⁹³ Evidence presented to the Senate Committee on Legal and Constitutional Affairs, Inquiry into the Domestic Significance of United Nations Human Rights Instruments, as reported in, *The Australian*, 17 May 1995.

⁹⁴ Letters from Sir Ronald Wilson to Mr K O’Connor, Acting Human Rights Commissioner, 16 May 1995, and to Ms A Twomey, Secretary, Senate Legal and Constitutional Committee, 24 July 1995.

⁹⁵ *Ibid.*, letter to Mr K O’Connor, Acting Human Rights Commissioner.

presented clearly establishes that unimplemented treaties, including those scheduled to the *Human Rights and Equal Opportunity Commission Act*, do not give rise to legitimate expectations.

The Bill attempts to allow the Government to retain its good-guy image while unambiguously diminishing the import of human rights considerations. The preamble of the Bill seeks to reassure those sceptics who may feel that the Government is recanting its international obligations stating that “*Australia is fully committed to observing its obligations under international instruments*”.

However, its substantive provisions would imply otherwise. Clause 5 entitled **International Instruments do not give rise to legitimate expectations** provides:

The fact that Australia is bound by, or party to, a particular international instrument, or that an enactment reproduces or refers to a particular instrument, does not give rise to a legitimate expectation, on the part of any person, that:

- (a) an administrative decision will be made in conformity with the requirements of that instrument; or*
- (b) if the decision were to be made contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course.*

Clause 6 reinforces the point already explicitly made in clause 5, that instruments referred to or attached to enactments (as with the schedules to the *Human Rights and Equal Opportunity Commission Act*) are not incorporated into Australian law, and do not apply in Australian law.

In response to objections to the draft Bill, including those put by this Commission, the Government was unwilling to remove any of the Bill’s substantive bitterness, but rather provided a metaphorical ‘spoon full of sugar’. The Government proposed that, in consultation with the Human Rights and Equal Opportunity Commission, the Attorney-General’s Department conduct a review to identify key areas of Commonwealth administrative decision-making where human rights obligations may be relevant.⁹⁶

The stated aim is to ensure that Australia’s treaty obligations are adequately considered in Commonwealth decision-making.

I would certainly join my fellow Commissioners in welcoming a review which would genuinely ensure that the Commonwealth complies with international human rights standards in its administrative decision-making. Indeed, such a review conforms with my specific function of assessing Commonwealth Government policy and legislation as to their conformity with international instruments. However, I cannot but consider the announcement of the review to be little more than a cynical exercise designed to quell criticism.

If the objective of the review is to genuinely bring Government administrative decision-making into line with the requirements of human rights instruments, would it not have the same effect as the original High Court decision? If so, why introduce legislation to override the decision?

Presumably, if the Government’s justification for the legislation was that the “*Teoh*” decision has cumbersome resource implications, it is acknowledging that human rights considerations contained in the provisions of international instruments do not currently form part of administrative decision-making. This should be a matter of concern to a Government which has signed treaties to the effect

⁹⁶ The Attorney-General, the Hon. M. Lavarch MP, press release, 5 July 1995, 66/95.

that it will take all legislative and other measures to ensure that the human rights expressed in international instruments are part of Australian law and policy. In addition, if this is true, then one would presume that a review to identify and correct the shortfalls would have similar resource implications.

I will be scrutinising the terms of the review, the resources allocated to it, and actions taken by the Government in response to problems it finds in current consideration of human rights obligations by administrative bodies. I will also bring the Government's decision to the attention of the Human Rights Committee and provide it with a report on the outcomes of the proposed review. I anticipate that at the forthcoming examination of Australia's third periodic report under the *International Covenant on Civil and Political Rights* the Committee may well question Australia's fulfilment of its core obligation to take all necessary steps to ensure conformity with the terms of the *Covenant*.

Finally, much of the criticism of the Government's reaction to the decision has pointed out that it sends a message to the international community that Australia is hypocritical when it comes to human rights. What about the message that it sends to Australians? What about the message that it sends to peoples whose human rights are at issue? What will they think of legislation which sanctions the disregard of their human rights?

The bottom line is, the Government has privileged 'administrative order' and 'certainty' over the legitimate human rights interests of Australians. I urge the Parliament, and all Australians, to seriously consider whether such priorities reflect the values of the Australia we would like to bring into the 21st century.

Chapter 3: International Human Rights Developments

Australia has 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.

There is a growing body of international law and practice on the content of article 27 as it applies to Indigenous peoples. Cases brought to the United Nations Human Rights Committee, and clarification provided by the Committee, as well as practice in other countries provide a guide to Australian Governments and Indigenous Australians as to the scope and application of international obligations concerning cultural rights.

Current recognition and protection of the cultural rights of Aboriginal and Torres Strait Islander peoples falls short of full or adequate implementation of article 27. This state of affairs may give rise to communications to the Human Rights Committee under the First Optional Protocol to the *International Covenant on Civil and Political Rights*.

The least understood, the least protected, and the most violated rights of Indigenous peoples are also the most important—our collective rights as peoples.

It is not sufficient for us to have formal 'equality of opportunity' or access to social goods to the same extent as other Australians (although these are necessary). If our cultural rights are not protected, then we will soon no longer exist as distinct peoples. That is an abhorrent prospect for Indigenous peoples—it should be unacceptable to all Australians.

Existing Australian law and policy for the protection and promotion of our cultural rights are poorly conceived and developed. I am not referring to the inadequate protection afforded in particular areas, such as cultural and intellectual property, access to and protection of sites, or customary law. I am

talking about recognizing and respecting our cultural rights as the basis of policy development in all areas, be that health, education, housing or resource development.

The poverty of recognition or protection of the cultural and collective rights of Indigenous peoples is, to a great extent, mirrored in international law with its ‘individual-rights’ focus. This deficiency is one of the key reasons why international law has largely failed Indigenous peoples, and the motivation for our insistence on a distinct instrument protecting the rights of Indigenous peoples.⁹⁷

However, there are certain limited provisions in international treaties, to which Australia is a party, that deal with collective and cultural rights. As Indigenous peoples around the world turn their attention to international law as a vehicle for promoting rights abused by governments in our own countries, the scope and meaning of those articles is being explored and clarified.

My analysis of those provisions leads me to two key conclusions:

1. Australia’s existing treaty obligations require far more extensive protection of the collective rights of Indigenous peoples to practice our culture than is currently provided; and,
2. Elaborations of the relevant provisions in international law and examples of implementation in other countries provide guidance for Australian Governments as to the meaning and scope of ‘cultural rights’ for Indigenous peoples, and how those rights can be protected.

Indigenous Australians’ use of international mechanisms

To date, Australian Governments have paid erratic attention to the obligations which flow from international human rights treaties. They have often failed to understand the significance of, and thus give effect to in domestic law and policy, the provisions of treaties.

Nor have Indigenous Australians maximised the potential of Australia’s international human rights obligations to agitate for full enjoyment of our rights. While we occasionally pull out relevant provisions to strengthen our criticisms of Australia’s human rights violations, we have not made practical use of the international system for the protection of human rights. We have yet to explore the scope of existing provisions to protect our collective cultural rights.

This will not continue. In my view, there are already potentially powerful but unexplored treaty provisions and mechanisms. They provide guidelines for Australian Governments and opportunities for Indigenous Australians to take action when Governments fail to follow those guidelines and violate our rights.

I would be the first to agree that the existing instruments and mechanisms fall well short of providing adequate protection. They are particularly wanting when it comes to the collective aspects of the rights of Indigenous peoples. However, while we have focussed on developing new instruments and mechanisms the old system has changed and developed. Our response has not changed and developed in tandem.

The main shifts and opportunities lie in opening up mechanisms for individuals to directly petition the United Nations (UN) when a state violates their rights, and in the improved effectiveness of Committees responsible for monitoring treaty implementation.

⁹⁷ The *Draft Declaration on the Rights of Indigenous Peoples* is discussed on page xx.

In recent years, Australia has recognised the competence of United Nations Committees to receive communications from individual Australians claiming that their rights under the *International Covenant on Civil and Political Rights (ICCPR)*, the *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* or the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT)* have been violated and that all domestic remedies have been exhausted. It did so by ratifying the Optional Protocol to the *ICCPR*,⁹⁸ and making equivalent declarations under article 14 of *CERD* and article 21 of *CAT*.⁹⁹

To date, Indigenous Australians have failed to make effective use of these procedures. Mechanisms similar to the Optional Protocol are currently being considered for the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *Convention on the Rights of the Child (CROC)*. I consider the pro-active use of communications under the Optional Protocol, below, in the context of article 27 of the *ICCPR*.

The Committees, or treaty bodies, also receive compulsory periodic reports from state parties as to their performance of obligations under each treaty. In the initial years of their work, Committees' examination of periodic country reports tended to be somewhat formalistic and uncritical. The demise of the Cold War and active work by individual Committee members has led to increasingly rigorous and serious scrutiny. A process which started as little more than a polite exchange of documents now offers scope for critical dialogue between the Committees and governments. Increasingly, non-state actors, including international organisations, other bodies in the UN and Non-Governmental Organisations are playing a role in the work of the treaty bodies.

The Committees have opened up avenues for domestic Non-Governmental Organisations to participate in the scrutiny of country reports. Non-Governmental Organisations from a number of countries have maximised this opportunity by preparing and distributing their own written reports to the Committee, by directly lobbying Committee members and by going to Geneva or New York to meet with members while their country reports are being considered. They attend meetings when the Committee is examining the report and questioning the government representative. They suggest probing and difficult questions to Committee members. Finally, after the Committee has examined the country report and drafted its concluding observations, they have used the questions asked, the answers given and the Committee's comments for effective lobbying at home.

Yet again, when Australia provides periodic reports on its six core human rights treaties (the *ICCPR*, *CERD* and *CAT* plus the *Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination Against Women*) Australian Non-Governmental Organisations have been all but absent.

As the international system for human rights protection matures, so must our response to it. The best outcome for both Indigenous Australians and the Australian Government would certainly be for the Australian Government to look to the requirements of its international obligations and fulfil them of its own accord.

We will not wait forever while it promises to do so. I have no doubt that as Aboriginal and Torres Strait Islander peoples become more aware of the practical benefits we can gain through international mechanisms, they will increasingly become part of our toolbox.

⁹⁸ The *Optional Protocol* was ratified in 1991, competency of the *CAT* and *CERD* Committees was recognised in 1993.

⁹⁹ For a detailed discussion on these mechanisms see, Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report, 1993*, AGPS, pp. 100-109.

Issues of vital concern to Indigenous Australians, such as the inadequate protection of our land rights and health status, may well be successfully agitated through international mechanisms.

I would thus recommend to both Indigenous organisations and to the Australian Government that they carefully examine the terms of human rights treaties.

International law and collective rights

Despite the general tendency in all international human rights instruments to focus on the rights of the individual, the provisions of a number of treaties, to which Australia is a party are either collective in nature or have a collective dimension.

The key articles are:

- articles 1 and 27 of the *International Covenant on Civil and Political Rights*;
- article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; and,
- article 30 of the *International Convention on the Rights of the Child*.

In this report I will focus on Article 27 of the *International Covenant on Civil and Political Rights*. Along with article 30 of the *Convention on the Rights of the Child*, article 27 is one of only two provisions of treaties to which Australia is a party which require protection of the rights of minorities. In my view, article 27 provides significant scope for Aboriginal and Torres Strait Islander peoples to pursue our claims and agitate our grievances. Indigenous peoples from other parts of the world have proven its capacity to address our particular concerns.

Article 27 provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

In invoking article 27, I recognise that Indigenous peoples are claiming the rights of minorities.

It must be understood that this does not infer that governments can subsume Indigenous peoples within the general category of *minorities*—many groups that qualify as ‘minorities’ are not Indigenous peoples, although Indigenous peoples satisfy the criteria for minorities. Our status as First peoples and the history of colonisation, which led to our becoming a minority in our own country, clearly distinguish us from people who have arrived in a country where they do not belong to the majority ethnic group. We have rights as Indigenous peoples which derive from a distinct source of law.

It is a strange irony that in 1961, when the Third Committee of the United Nations General-Assembly was debating the articles of the draft of the International Covenants, the Australian representative made a point of distinguishing Australia’s Indigenous peoples from immigrant groups. She stated that Australia had “*a small group of aborigines [sic] whose way of life was still very primitive but who could not be considered a “minority” within the meaning given to the term by the*

Commission on Human Rights".¹⁰⁰ Thirty-four years later we are trying to stop non-Indigenous Australia thinking of us as an 'ethnic minority'—but hardly for the same reasons.

Nevertheless, it is now broadly accepted that Indigenous peoples are equally entitled to legal protection afforded to minorities under article 27. Further, the scant protection of our rights as Indigenous peoples means that we have little option but to assert what rights we can under minority provisions. When international and domestic laws eventually articulate our Indigenous rights, there will no longer be any need to invoke minority provisions.

*International law is a vehicle by which the standards and goals of leading states, in an area like the rights of indigenous peoples, can become formalised and generalised. In this way international law can confirm progressive developments in States like Norway and Canada and can also contribute to progressive developments in other states, where domestic conditions are more difficult.*¹⁰¹

At first glance, article 27 appears to provide minimal protection, requiring that States *refrain from violating* the rights of minorities. The authoritative interpretation provided by the United Nations Human Rights Committee, however, requires states to take *positive measures* to ensure that minority rights can be enjoyed.

The minimalist interpretation would make a nonsense of the article.

'Leaving Indigenous peoples be' in the context of industrialisation or the free market means leaving us free to be overwhelmed and destroyed by social and economic forces which are incompatible with our way of life. Faint memories are all that remain of the many Indigenous peoples for whom 'natural market attrition' meant extinction. Capotorti, in his authoritative study for the UN on article 27 stated that:

*In order to give effect to the rights set forth in article 27 of the Covenant, active and sustained measures are required from States. A purely passive attitude on their part would render those rights ineffective.*¹⁰²

The positive interpretation of article 27 was endorsed by the Australian Law Reform Commission (ALRC) in its report "*Recognition of Aboriginal Customary Laws*". The ALRC rejected a minimalist interpretation of the article and agreed that article 27 imposes substantive obligations.¹⁰³ In its second report to the Human Rights Committee, the Australian Government quoted this section of the ALRC Report on the implementation of the *Covenant*—I conclude, therefore, that it is Australia's position.

The importance of article 27 is intensified by the paucity of other provisions in international law dealing with collective rights, which are integral to Indigenous peoples and our cultures.

Article 1 of the *Covenant*, which provides that all peoples have the right to self-determination, is certainly of a collective character. Because Indigenous peoples are unquestionably peoples, the article should already guarantee us our right to self-determination. There are, however, competing

¹⁰⁰ A/C.3/SR1103; General-Assembly, 16th Session, Official records, 3rd Committee, 1103rd meeting, 14 November 1961, agenda item 35, paras 25-6.

¹⁰¹ Sanders, D., "State Practice and the Draft Declaration on the Rights of Indigenous Peoples", in *Becoming Visible*, Proceedings of the Conference on Indigenous Politics and Self-Government, Brantenberg, T., Hansen, J., and Minde, H. (eds), University of Tromso, 1995, p. 110.

¹⁰² Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Study Series No. 5, Centre for Human Rights, UN Doc E/CN4 Sub.2/384/Rev.1. (1979), pp. 98-99, para 588.

¹⁰³ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No. 31, para 175.

interpretations about whether Indigenous peoples qualify as ‘peoples’ for the purpose of article 1. For these reasons, opportunities to agitate for Indigenous peoples’ rights under article 1 have not proved fertile.

The theoretical squabbles are, however, redundant when it comes to using the Optional Protocol to the *ICCPR* to pursue questions of self-determination. The Human Rights Committee has held that it is not possible to use the Optional Protocol procedures to pursue alleged violations of article 1 or even to consider whether a particular Indigenous group is a ‘people’ for the purposes of the article.

In a number of cases Indigenous peoples have lodged communications alleging violations under article 1, with similar results.

For example in the *Mikmaq* case, the authors, members of the Mikmaq tribal society, alleged the Government of Canada had violated article 1 of the *Covenant*. In making its decision on admissibility, the Human Rights Committee stated:

While article 1 of the Covenant recognises and protects in most resolute terms a people’s right of self-determination...as an essential condition for the effective guarantee and observance of individual rights and for the promotion and strengthening of those rights, this provision can neither be invoked by individuals, nor by peoples under the Optional Protocol. Firstly,...this provision cannot be invoked by individuals claiming to be victims of a violation of the right of self-determination, which is a right conferred on peoples, as such. Secondly,...the Optional Protocol does not constitute machinery through which peoples can assert their rights. It provides a procedure under which individuals can claim that their individual rights, as set out in Part III of the Covenant (articles 6 to 27 inclusive) have been violated.¹⁰⁴

In an earlier decision on *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, the Committee similarly declared the communication inadmissible under article 1 but automatically accepted it as an article 27 communication:

The Committee noted, however, that the facts submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were effected by the events the author described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.¹⁰⁵

Indigenous peoples should seize the connection. The advantage of article 27 is that it is expressed in terms of the rights of an individual, and thus meets the technical requirements of the Optional Protocol, while it provides that the individual must enjoy their cultural rights “*in community with others*”, and thus may be used to pick up the collective dimension of Indigenous peoples’ rights.

The Human Rights Committee has affirmed this use of article 27 in general comment and in decisions on Optional Protocol communications. Indigenous peoples have already tested, and are continuing to test the capacity of article 27 to protect their distinct rights as Indigenous peoples, including rights with respect to land. The Human Rights Committee has indicated that the article should be applied to such situations, although Indigenous peoples have yet to explore the limits of the article.

¹⁰⁴ *Grand Chief Donald Marshall et al. as Officers of the Grand Council of the Mikmaq tribal society v Canada*, Communication No. 205/1986, CCPR/C/39/D/205/1986, 21 August 1990, para 14.2.

¹⁰⁵ *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984, CCPR/C/38/D/167/1984, 28 March 1990, 13.4.

General comment

At its fiftieth session, after several earlier unsuccessful attempts, the Human Rights Committee adopted a General Comment on article 27.¹⁰⁶

The General Comment made a number of important points:

- It reaffirmed the distinction between articles 1 and 27 and that self-determination is not a right justiciable under the *Optional Protocol* whereas Article 27 is.
- It drew a clear distinction between article 27 and articles 2(1) and 26 which are concerned with ensuring that all peoples enjoy the rights guaranteed under the *Covenant* without discrimination, and that all people enjoy equality before the law. Thus, merely asserting that a state does not discriminate on the grounds of ethnicity, language or religion is not sufficient to the requirements of article 27.
- Although the article is expressed in negative terms (“*shall not be denied the right*”), it is not sufficient for state parties to refrain from active violations of the right. State parties are obliged to take positive measures to ensure that the right is neither denied nor violated by the state itself, or by other persons within the state.
- Although the right under article 27 is an individual right, its enjoyment may not be possible unless the minority group can maintain its culture, religion or language. As such the article may require state parties to **take positive measures to protect the culture of the group**.
- The committee observes that culture for Indigenous peoples **may involve a particular way of life associated with the use of land resources**. Thus, cultural rights may include traditional activities such as hunting and fishing and the right to live on reserves protected by law.
- Enjoyment of these rights may require positive legal measures to ensure that members of a minority can **effectively participate in decisions which effect them**.

The general comment clarified important issues which had previously been contested.

It affirmed that the article requires state parties to take positive action to ensure that individuals belonging to a group, and consequently the group, can, in a practical sense, enjoy their culture, profess their religion and speak their language.

The comment implicitly addressed the ‘negative’ interpretation, that a state meets its obligations under article 27 simply by applying the principle of non-discrimination. Although there has been decreasing support for this negative interpretation, including from states themselves, such an explicit statement from the Committee is useful. In fact, the Committee may be indicating that the failure to take positive measures places a state party in breach of the *Covenant* and open to an Optional Protocol procedure.

The comment also clarified the relationship between the rights of minorities and the principle of non-discrimination. The two principles must be read together. When the *Covenant* requires non-discrimination, it does not require a simplistic ‘sameness of treatment’. Sameness of treatment may, in fact, constitute a breach of the *Covenant* given the obligation to positively protect the rights of peoples with distinct cultures.

¹⁰⁶ Adopted by the Committee at its 1314th meeting (50th session) on 6 April 1994, General Comment No. 23(5), CCPR/C/21/Rev.1/Add.5, 26 April 1994.

The Committee was also mindful of the need to distinguish Indigenous peoples from minorities in general. It stated that, although Indigenous peoples may fall within the broad category of minorities for the purposes of the article, their rights under the article differ somewhat from those of other minorities, particularly in relation to land and resources. Thus, states cannot subsume their obligations to Indigenous peoples within their obligations to minorities in general.

Indigenous peoples have submitted a number of communications under article 27. Although these communications have not always resulted in protection of the rights in question, in the process of considering these communications the Committee has further elucidated the nature of article 27.

Communications

In *Lovelace v Canada*,¹⁰⁷ Sandra Lovelace, a Maliseet Indian complained that she had been deprived of her status as an Indian under the *Indian Act* when she married a non-Indian. This meant that she was not allowed to live on the Indian reserve where she was raised, and so was separated from her community. Her communication to the Committee alleged that the Canadian government was thus in breach of article 27.

The case was particularly interesting because it was argued that the restriction on an individual (in this case Lovelace) was necessary to protect the group and to prevent its culture being ‘watered-down’ and overrun through intermarriage. The Committee had to balance the rights of the individual to enjoy their culture against restrictions which may be “*reasonably and objectively required*” to preserve the culture of the group.

The Committee found that Lovelace’s rights under article 27 had been violated because depriving her of her Indian status was unreasonable or unnecessary to preserve the identity of the tribe.¹⁰⁸

In the wake of the Committee’s decision, the Canadian Government made many unsuccessful attempts to amend the offending provisions of the *Indian Act* and in so doing faced significant opposition from some Indigenous groups. When they finally passed an amendment in 1985, Chief LeBourdais, on behalf of the Whispering Pines Band, lodged another Optional Protocol communication with the Human Rights Committee alleging that the Bill “*violates article 27 by imposing restrictions on who can reside in, or share in the economic and political life of the community*”.¹⁰⁹ The Committee found the communication inadmissible.

The original arrangement, and the subsequent fall out illustrate the complex interaction between issues of race and culture and issues of sex discrimination. I cannot do justice to this highly complex and contentious debate in the present context. However, my general position is that, while Indigenous peoples have the right to retain our culture, this is not an absolute ‘context-free’ right, irrespective of other factors. Cultural rights cannot be asserted without taking into account other fundamental human rights, including the rights of women. The notion that ‘universal human rights’ provide a clear resolution for every situation is overly simplistic. There are different sets of rights at play and they will, at times, conflict. This debate has particular significance in Australia in relation to the recognition of customary law.

No general rule provides a guide for which right has primacy. The competing considerations need to be balanced, *by all peoples concerned*, in respect of each site of conflict.

¹⁰⁷ *Lovelace v Canada*, Communication No.24/1977, UN Doc CCPR/C/OP/1(1988), 86-90.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Richard LeBourdais, Chief of the Whispering Pines Indian Band, et al. v Canada*, UN Doc CCPR/C/43/D/358/1989.

In *Kitok v Sweden*¹¹⁰ the Committee was again required to weigh a restriction on an individual, which interferes with his or her right to enjoy their culture, against the need to take measures to protect the culture of the group.

In this case the complainant (technically known as the *author*) Ivan Kitok, a Sami, was prevented from breeding reindeer, a traditional Sami activity and one in which his family had been involved for more than a century. Under the *Reindeer Husbandry Act 1971* only members of a Sami village are permitted to breed reindeer, but membership of a village is determined by the members of the Sami village. An individual may appeal to Swedish authorities against the decision, but may only be granted membership if there are special reasons.

In evidence put to the Committee, the Swedish Government argued that restrictions on the number of Sami permitted to breed reindeer were required for ecological reasons, to protect Sami whose primary activity was reindeer husbandry and so ensure they are not deprived of their livelihood, and to protect reindeer husbandry for the future.

The Committee found the balance fell in the opposite direction to that in *Lovelace*. It found that although there was a restriction on an individual, which deprived him of his right to practice his culture, the restriction was a reasonable and necessary measure. The restriction was, at least partially, justified by the right of the group, the Sami, to preserve its culture.

In its decision the Committee made some comments that may be important for Indigenous peoples seeking to use article 27. In particular it noted the connection drawn between culture and economic activity:

*The regulation of economic activity is normally a matter for the State alone. However, where activity is an essential element in the culture of the ethnic community, its application to an individual may fall under article 27 of the covenant.*¹¹¹

The Committee indicated a broad understanding of culture and rejected the notion of culture as a discrete portion of life which can be abstracted out. Culture, in this case, was closely associated with territory and the use of resources, including traditional activities such as breeding and hunting.

This interpretation is particularly important in light of the reductive attitude which non-Indigenous society frequently takes with respect to Indigenous culture. It likes to reduce culture to something found in a marked box synonymous with the western concept of ‘the arts’, containing painting, dancing, ceremony, stories and perhaps language. But clearly marked off from economic or political activity. Culture is integrated with the full processes of living. By failing to see that hunting is both cultural and economic, or that ceremony cannot take place without access to land, this view makes a nonsense of Indigenous culture and will necessarily lead to a denial of our cultural rights.

The case of *Ominayak, Chief of the Lubicon Lake Band v Canada* is particularly pertinent for Aboriginal and Torres Strait Islanders peoples because it concerned the action of a provincial (equivalent to state or territory) government in appropriating Indigenous (Cree) land for resource development. The complaint was taken against the Canadian government as the state party to the *ICCPR*.

¹¹⁰ *Ivan Kitok v Sweden*, UN Doc CCPR/C/33/D/197/1985.

¹¹¹ *Ibid.*, para. 9.2.

Where a country ratifies an international instrument, it is responsible for violations by all levels of government. The difficulties created by federalism or limited jurisdiction are not an acceptable defence against violations.¹¹²

In addition, Ominayak contended that the Canadian Government had constitutional responsibilities, treaty obligations and a fiduciary duty with respect to Indian peoples, which it was obliged to exercise where a provincial government was violating their rights.

I will not attempt to cover the extreme detail or complexity of the case for the purposes of this discussion. However, the actions of Canadian Federal and Provincial Governments which led to the communication, and the way in which they responded to the allegations cannot pass without comment. The case serves to illustrate how governments take advantage of legal technicalities, jurisdictional complexities and the relatively powerless position of Indigenous peoples to thwart attempts to seek redress for abuses of human rights. I would recommend the decision to any person involved with government as an example of the ways in which governments play legal ping-pong without any regard to the demise of Indigenous peoples and cultures.

The Lubicon Cree have occupied approximately 4,000 square miles in north central Alberta since time immemorial, and with relatively little interference until 1979. In that year an all-weather road was built into their territory and over one hundred companies began oil exploration and drilling. The companies were soon earning C\$1.3 million per day on Lubicon land, while the Lubicon hunting grounds, livelihood, health and culture were literally going up in smoke.

The grievances of the Lubicon Lake Band would be familiar to Indigenous Australians: the expropriation of and irreparable damage to the Band's traditional land, deprivation of its economic base and means of survival and destruction of its culture. By the time Chief Ominayak lodged his communication with the Committee he and his people had already initiated a string of domestic legal, political and civil disobedience actions seeking redress.

During the Committee's investigations they continued to use every possible strategy, including calling for a boycott of the Winter Olympics in Calgary in 1988, proclaiming themselves to be an independent nation, and blockading routes to the oil fields. As Chief Ominayak said:

*Our situation is desperate...if we give up now, we're lost for good.*¹¹³

The Lubicon Lake Band clearly did not expect that the Committee would solve the problem. They simply looked to it for leverage.

One submission set out what the Lubicon Lake Band was seeking in this action:

*...that the Human Rights Committee assist it in convincing the Government of Canada that the Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional grounds and in complete disregard for the community inhabiting the area.*¹¹⁴

The greater part of the dispute between the parties in the case considered by the Human Rights Committee concerned the question of whether they should render the communication inadmissible

¹¹² Vienna Convention on the Law of Treaties, adopted by the United Nations 22/5/69, entered into force 1980. Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

¹¹³ Goddard, J., "Saturday Night", in *The Lubicon Lake Cree Nation: Closer to Extinction?*, Bos, B. and Knudsen, A., IWGIA Indigenous Affairs, No. 2, April/May 1995, pp. 46-51.

¹¹⁴ *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, op. cit., para 12.

because the authors had not exhausted all domestic remedies. This is a condition of admissibility for Optional Protocol communications. When the Band wrote the original communication in 1984, the matter had already been subject to extensive court action for almost ten years and some five years later, when they were putting further submissions to the Committee, there had been no positive outcome for the Band and three court actions remained outstanding. The Band contended that it had been pursuing its claims through domestic political and legal avenues in good faith, while the state had taken advantage of the web of possible domestic remedies:

*...to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.*¹¹⁵

The Canadian Government argued that the Lubicon Lake Band had not exhausted all domestic remedies with reams of technical explanations of further legal avenues which they could theoretically pursue. Over the years of the investigation, the cynicism of these defences became more and more apparent. For example, Ominayak wrote that at this stage, even a positive finding in the pending decisions:

*...will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to protection of the Band's economy as well as its unique, valuable, and deeply cherished way of life.*¹¹⁶

Despite Canada's extensive attempts to have the communication deemed inadmissible, the Committee ruled the communication admissible under article 27 (and inadmissible under article 1).

On consideration of the merits, the Committee found that the historical inequities suffered by the Band and current developments threatened its way of life and culture. It thus found a violation of article 27. However, by the time the Committee had made a decision, the Canadian Government had offered a settlement package. This comprised a grant of a 95 square mile reserve, of which the Band would have mineral rights over 79 square miles, and financial support of approximately C\$45 million for a range of programs (including community development projects, federal support programs, special assistance in establishing a viable economy and a trust to assist elders wishing to pursue a traditional way of life). While the Band continued to assert that this was not an adequate or just settlement, the Committee found that it was an appropriate remedy within the meaning of article 2 of the *Covenant* which requires state parties to provide effective remedies where rights under the *Covenant* are violated.

Unfortunately, the dispute has not been settled, not least because of continued and expanded activity on Lubicon land and the failure of the Provincial and Federal Governments to implement the agreement in good faith. This illustrates a major weakness in the Optional Protocol process, that is, the lack of follow-up or strong sanction for non-compliance with the Committee's finding.

Today, the Lubicon Cree continue to seek a just settlement from the Canadian Government. In 1992 the Lubicon Settlement Commission of Review was established to prepare a fresh round of fair negotiations. In February 1995 the Minister of Indian Affairs and Northern Development announced the appointment of a new negotiator. Whether this round of negotiations will provide the

¹¹⁵ *Ibid.*, para 3.2.

¹¹⁶ *Ibid.*, para 11.2.

opportunity for a just settlement, and whether the Lubicon Cree can survive another round, is far from certain. It may be that international pressure, not just from the Human Rights Committee, but from other countries, will be their only hope.

The key point to be drawn from the decision is that it establishes that exploiting Indigenous peoples' land and resources falls within the ambit of article 27. In addition, the decision makes it clear that article 27 commits state parties to actively provide protection where a minority culture is under threat. Where it fails to do so, it must provide compensation and assistance to the group so that it can enjoy its culture to the maximum extent possible.

Many issues raised by the author echo thematic problems faced by Indigenous peoples in all parts of the world.

For example, the case illustrates the indivisible nature of rights and the pivotal place that cultural rights occupy for Indigenous peoples. During the six years that the Committee was investigating the communication, the author tried to convey to the Committee the far-reaching consequences and the devastating impact of depriving the Band of its land, its economic base and its ability to carry on its traditional activities. In fact the author alleged violations under various other articles of the *Covenant*.

Ominayak alleged violations of the right to life in the deterioration in members' health, including a significant increase in miscarriages and abnormal and still-births, an outbreak of tuberculosis, and the introduction of alcohol which is now devastating the community. He alleged violations of rights to practice one's religion and referred to the way in which destruction of traditional lands has robbed the people of the physical realm in which their religion and spiritual belief system exist. He alleged violations of the right of families to be protected and explained that because family systems are organised around traditional activities, destruction of the latter has led to irreparable damage to family structures and family and community breakdown. Again, these connections, and the destruction of a people in the unmitigated pursuit of economic gain, is the story of Aboriginal and Torres Strait Islander peoples throughout this country.

The dispute between the Canadian Government and the author concerning the impact of developments is also familiar. For example, the Government leased land to Daishowa, a Japanese owned timber company, including in the deal access to 100 000 square kilometres of forest, setting aside a reserve where no logging would be permitted. It argued that this action was totally legal as the leased land was not part of the proposed settlement. The Band, on the other hand, pointed out that logging 4 million trees annually (with a planned 100 percent increase in ten years) would necessarily interfere with a 95 square mile enclave within the 100 000 square miles.

Recently, members of the Bunitj, traditional owners, unsuccessfully disputed the release of uranium waste-products from the Ranger mine in the Northern Territory. Meanwhile Australians were, without compunction, asserting that French nuclear testing in the South Pacific will impact on the whole region. As industrial and mining developments increasingly encroach on Indigenous territories it will be important for Indigenous peoples to gain recognition of the impact such developments are having on our lands. Extensive air and water pollution and the destruction of ecosystems makes a mockery of the notion that small parcels of Indigenous lands can provide 'safe spaces' where Indigenous peoples can live without interference or violation.

The most recent article 27 decision was in 1994 in *Länsman v Finland*.¹¹⁷ It again raised the issue of resource extraction from the traditional territories of Indigenous peoples (as in *Ominayak*), and its impact on the Sami's culture as exercised in reindeer breeding (as in *Kitok*).

¹¹⁷ *Ilmari Länsman, et al. v Finland*, CCPR/C/52/D/511/192.

Ilmari Länsman and forty-seven other members of the Muotkatunturi Herdsmen's committee and Angeli community contended that a contract given by the Finnish Government to a private company for quarrying and transporting stone would disturb reindeer herding activities on their traditional territories. The quarry itself only covered a small area, however, they contended that transportation of the stone would disturb the herding system. They also argued that the impact of the quarry and the transportation should not be narrowly interpreted. That is, it was not limited to the ten hectares of the quarry itself or the physical space occupied by the road. They referred to the adverse effects of the "*disturbed environment*".

While the communication was directly concerned with this mining contract, the authors clearly felt that the quarry was 'the thin edge of the wedge', and that they are facing the first step in increased interference in their traditional lands. Specifically, the entry into force of the European Economic Agreement made it easier for multinational mining companies to gain access to Finnish land, which was already happening.

The authors also provided evidence that Mount Etela-Riutusvaara, where the quarry is located, is a sacred place for the Sami, where previously reindeer were slaughtered, although this practice has not taken place for several decades.

There was no dispute about whether the Sami authors belonged to a minority, nor whether reindeer breeding formed part of their culture. In fact the Finnish Government in its submission conceded that the concept of culture in article 27 covers reindeer herding as an "*essential component in Sami culture*".

What was at issue was whether the impact of the quarry and transportation were so substantial as to interfere with reindeer herding activities and thus effectively deny the Sami authors their cultural rights.

In coming to its decision the Committee referred to its general comment, and back to *Kitok*, where it recognised the right of Indigenous groups to carry on traditional activities such as hunting, fishing, or reindeer herding. It also referred to the requirement set out in the general comment that state parties must take measures to "*ensure the effective participation of members of minority communities in decisions which affect them*".¹¹⁸

The Committee concluded that the quarrying, in the amount that had taken place, did not constitute a denial of the authors' right to enjoy their own culture. Nevertheless, in coming to this decision, the Committee made several comments which may be important for future actions.

First, the Committee rejected the notion that the state could use the doctrine of the 'margin of appreciation' as justification for encouraging economic development where this would violate article 27. According to this doctrine national authorities have the discretion to determine whether the rights under article 27 are being violated within their country. In effect therefore, the Committee will make its decisions in terms of whether the rights of a cultural minority are being violated and will not defer to the discretion of national authorities in interpreting the requirements of article 27.

The Committee found that the quarry did not violate the Sami's cultural rights because of the *degree* of the impact. However, it commented that expansion of the mining activities may constitute a violation of the authors' cultural rights. The Committee noted that governments should bear this in mind when extending or issuing permits.

¹¹⁸ *Ibid*, para 9.6.

The Committee also clarified its understanding of the relationship between cultural rights and economic activities. It had earlier established that economic activities may come within the ambit of article 27 when they are an essential element of the group's culture. In *Länsman*, the Committee established that this protection is not limited to 'traditional' activities in a narrow sense. The fact that a group has adapted their traditional practices over the years and employs the assistance of modern technology does not prevent them from invoking article 27.

I consider this an extremely important comment, and not only in terms of the broader protection which article 27 may now be held to require. It is a strong statement on the meaning of culture and provides an authoritative negation of the insistence that a culture is only a distinct culture if it remains frozen. Evolution of a culture should not deprive it of its particular status. In Australia this issue is being vigorously debated in the context of native title.

A further notable aspect of the Committee's decision was its acknowledgment of the author's concern that the disturbed environment could adversely affect the quality of the slaughtered reindeer. That is, as noted above, the authors were seeking to convey the manner in which what appears to be a narrow or limited interference can and does have a broader impact. In the authors' words:

*Finnish Samis live in a situation that is very sensitive and vulnerable in relation to any measures threatening their traditional economic activities.*¹¹⁹

Although the Committee did not make further comment on this line of reasoning, it indicated that it did recognise that developments can have a broader environmental and cultural impact than may be immediately visible. We can take the Committee's comments, therefore, as indicating that in assessing cultural impact, the cultural perspective of the minority culture—in this case their understanding of the effect of the road on the reindeer—is an integral factor.

This is an important comment in light of the difficulties Indigenous peoples experience when dominant cultures reject our understandings of the complex and subtle ways in which intervention affects our cultures and environments. What is presented as an objective or scientific analysis of impact does more than simply reject our perspective. In dismissing the subjectivity of our cultural experience our cultural rights are violated. I would recommend that the debates about Hindmarsh Island and the permissible acts provisions of the *Native Title Act* 1993 (Cth) be revisited in view of this observation.

In coming to its decision, the Committee also referred to its General Comment and the requirement that measures must be taken "*to ensure effective participation of members of minority communities in decisions which affect them*". The Finnish Government, in this case, presented extensive evidence on the procedures it followed to ensure that Sami participated in the decision-making processes, which the Committee accepted. Nevertheless, lack of adequate participation may lead to a finding of an article 27 violation.

A further important aspect of *Länsman* is that Sami did not have 'recognised' title to the land. While the Sami assert that this is their traditional territory, regardless of state recognition, it is officially state-owned land. However, this did not in any way diminish the state's obligation to protect the cultural rights of Sami as they pertain to that land.

For Aboriginal and Torres Strait Islander peoples, this means that the rights flowing from article 27 with respect to land and resources extend beyond what may be recognised under the *Native Title Act* or other domestic land rights laws.

¹¹⁹ *Ibid*, para 8.6.

In 1992 a communication was lodged by Maori members of a number of Iwi alleging violations by the New Zealand Government in relation to the “Sealord” Agreement of 1992. The Committee has not yet assessed the communication for admissibility, the first stage it must pass before being assessed on the merits. Accordingly, until the Committee has made a finding the substance of the communication is confidential. Nevertheless, some details have been made public.

The substantial issues arising out of the case were canvassed before the New Zealand Court of Appeal in an unsuccessful challenge to the fisheries settlement and implementing legislation. The authors allege that the Agreement and legislation violate their cultural rights. Specifically, they complain that all affected Iwi did not enter the Agreement and that some Maori parties did not enter the Agreement in a free and informed manner. Particular concerns are the extinguishment provisions of the Agreement and the effect they have on traditional fishing rights.

The claim is being made under a number of articles of the *Covenant*, including article 27. At this stage the Government is disputing the admissibility of the communication. The Committee has received the initial communication, a response from the New Zealand Government (filed September 1993) and a further response from the authors (June 1995).

Clearly, this claim raises important issues of concern to Aboriginal people and Torres Strait Islanders, in relation to both sea rights and extinguishment of native title. It is one which we will follow carefully.

In Australia, article 27 has played a peripheral role in the development of law and policy regarding Aboriginal and Torres Strait Islander peoples. However, the requirements of international human rights law, and specifically article 27, have played an important role in formulating Norwegian law with respect to Sami.

In 1980 the Norwegian Government established the Sami Rights Committee with a mandate to develop and submit proposals concerning legal recognition of Sami rights. As part of its mandate, the Government explicitly asked the Committee to consider and assess the significance of international law for Sami and the obligations it entailed for the Norwegian Government.

The Committee’s Report, released in 1984, provides a comprehensive exploration of international law pertaining to minorities and Indigenous peoples.¹²⁰ It examines in detail the right to self-determination, article 27 of the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, international customary and treaty law concerning Indigenous peoples, and laws and policy regarding Indigenous peoples in other countries. It then analyses the implications of this body of law for Sami.

The report is surely unique, in its use of international law as Norway’s primary *basis* for domestic Indigenous policy reform. Other countries, and international agencies, have found Norway’s Report and its arguments persuasive. The Report’s study and analysis underscore my contention that Australian Governments have often failed to understand treaty provisions and to recognise them in domestic law and policy.

Some of the Report’s key conclusions were that:

¹²⁰ *Chapter 6 of the Report by the Sami Rights Committee*, Norwegian Official Reports (NOU) No. 1984:18, translated by G. Nyquist and R. Craig, 1990.

- Article 27 demands positive discrimination and places an obligation on states “*to contribute a certain amount of economic support to enable minority groups to in fact be able to cultivate their language, culture etc*”.¹²¹
- Culture must be interpreted to include “*not only the forms of expression—the manifestations of culture, but also its preconditions*”.¹²² For article 27 to be effective when applied as law, states must ensure that minorities enjoy the conditions which are necessary for them to be able to practice their culture.
- The material basis of culture is of decisive importance for Indigenous peoples. Indigenous peoples are “*in special need of protection of the subsistence aspects of the foundation of their culture, because their culture is largely connected to the traditional exploitation of natural resources*”.¹²³
- “*The term culture should be interpreted so that the material sides of the culture of ethnic populations are encompassed by article 27. Trade and other economic factors thus should be covered to the extent they are decisive for the group’s maintenance and development of its own culture.*”¹²⁴
- Fishing and other coastal livelihoods, as well as traditional occupations like reindeer herding, and the extensive use of a variety of seasonal resources by Sami, are validated as deserving fundamental legal and policy recognition and guarantees. (This may be of immediate interest in the development of an Australian coastal policy, for instance, and in many other Indigenous contexts on this continent).
- Just as minority cultures vary, so will the conditions necessary for the practice of their cultures. Consequently, article 27 may produce varying practical results for different minorities.¹²⁵
- If an ethnic minority loses the foundation necessary to support its particular culture, it loses the real possibility of practising its culture. “*In such a case it would be a right without substance*”.¹²⁶

The Committee found that article 27 “*is a strong sense of law for Sami rights, both political, cultural and economic rights, including rights to natural resources in the traditional Sami areas*”.¹²⁷

It also concluded that:

*The object should never be to “freeze” Sami culture at a particular point in its development. On the contrary, the task of the authorities must be to pave the way for the maintenance and further development of the Sami cultural community, adapted to the demands of modern society.*¹²⁸

¹²¹ Chapter 6 of the Report by the Sami Rights Committee, *op. cit.*, Section 8.5.1, p. 240.

¹²² *Ibid.*, section 8.5.3, p. 252.

¹²³ *Ibid.*, section 8.5.5, pp. 266-7.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, section 8.5.4, p. 254.

¹²⁶ *Ibid.*

¹²⁷ Smith, C. “The Development of Sami Rights since 1980” in *Becoming Visible*, *op.cit.*, p. 68.

¹²⁸ Smith, C. “The Sami Rights Committee: An Exposition”, *Self determination and Indigenous Peoples: Sami Rights and Northern Perspectives*, IWGIA 58, Copenhagen 1987, p. 29.

The Norwegian Government largely accepted the recommendations of the Committee's Report, and based its reform measures on article 27.

In 1987 it adopted the *Sami Act*, which requires that the state contribute positively toward enabling the Sami people to enjoy their own culture. This obligation includes protection of the material conditions for Sami culture. The Act also provides Sami in Norway with the right to constitute a representative assembly, the Sami Parliament.

The Committee's Report looked in detail at the contribution which constitutional reform could play in recognition of the cultural rights of Sami. One of the key recommendations was that a constitutional provision be inserted which explicitly recognises Sami as a separate people, alongside Norwegians. In 1988 the Norwegian Parliament ratified a constitutional amendment, providing that:

*It is the responsibility of the State to create conditions enabling the Sami people to preserve and develop their language, culture and way of life.*¹²⁹

As I discuss in detail in relation to constitutional reform in Canada and in my submission on the Social Justice Package,¹³⁰ constitutional reform or recognition is certainly not sufficient to ensure enjoyment of Indigenous peoples' rights. However, as described by the Chief Justice of Norway:

*The amendment to the constitution...lays down a political, moral and legal responsibility on the part of the Norwegian state in relation to the Sami people of Norway. The Storting [parliament] ...in the most mandatory form for a state founded on the rule of law has issued a binding guideline for future Sami policy. This will stand as a fundamental principle, independent of changing governments and parliamentary majorities. Sami interests have thereby been given a more prominent place in public life, and, provided the guideline serves its intended purpose, it will act as a driving force in further development.*¹³¹

The Chief Justice's qualification "provided the guidelines serve their intended purpose" is crucial, particularly in the Norwegian context. The *Sami Act* 1987 and constitutional amendment provided the foundation for proper recognition of the material basis of culture. However, eleven years after the Committee's Report and seven years after the amendment, the Norwegian Government still does not officially recognise Sami land rights or legal rights concerning natural resources.

Since 1980 the Sami Rights Committee has considered the question of Sami territorial rights and management of natural resources. In 1993 the Committee released a background report which found that there was no basis for Sami territorial rights, either in Norwegian or international law. While its final report and recommendations are not due till 1996, this interim report has been widely criticised.¹³² It is not only a major back-peddalling on earlier measures, such as the *Sami Act*; it is now well out of line with developments in Australia, New Zealand, the USA and Canada.

The discrepancy between earlier reform and constitutional guidelines and current developments illustrates the fragility and fluidity of developments in the protection and promotion of Indigenous rights. Compared with Australia, Canada and the United States, Norway has made remarkable achievements since World War II in living standards for Sami. Not only are Sami on a par with all residents of northern Norway, in the harshest of environmental conditions, their living standards are

¹²⁹ *Ibid.*, p. 31.

¹³⁰ See, Chapter 4, Social Justice Strategies and Recommendations.

¹³¹ Section 110(a); see, Helander E., *The Sami of Norway*, Information Article, Ministry of Foreign Affairs, Oslo, 1992.

¹³² See, for example, Brantenberg, T., "Murky Agenda in the Morketid: Norwegian Policy, Sami Politics and the Tromsø Conference" in *Becoming Visible*, *op. cit.*, pp. 26-38.

among the highest in the world. Yet, incredibly, the Norwegian land rights policy in 1995 is the same one defeated in *Mabo* in Australia, and in similar cases in Canada, New Zealand and the USA,

What is clear is that Indigenous peoples cannot rest after an apparent victory, but must ensure that mechanisms are in place at every level to ensure that we can actually enjoy our rights.

Perhaps the most important message of the Sami Rights Committee's report is that the Sami, as the Indigenous people of Norway, are unique to and dependant on their part of the world. Sami culture will not and cannot survive outside the context of their traditional lands, which are now within the jurisdiction of the Norwegian Government. Therefore, the Norwegian Government has an obligation, to the world and to the Sami, to actively contribute to securing the future of the Sami through legislative and other measures.

This analysis applies equally to the Australian Government and Indigenous Australians.

Aboriginal and Torres Strait Islander cultures do not, and cannot, exist without their material foundations which are quite literally grounded in Australia. If the Australian Government fails to actively protect those material foundations, there can be no Aboriginal and Torres Strait Islander cultures.

Periodic reports

Under article 40 of the *ICCPR* state parties undertake to submit periodic reports to the Human Rights Committee on measures they have adopted which give effect to the rights in the *Covenant*, and progress they have made in the enjoyment of those rights. Reports are submitted every five years after the initial report. Australia has submitted two reports, its initial report in November 1981 and its second report in February 1987. Its third report, due in 1991, has still not been submitted, making it now four years late.

I will comment briefly on the relevant sections of Australia's first two reports and draft third report. It is highly unfortunate that Aboriginal and Torres Strait Islander organisations had only minimal communication with the Committee when it was considering the first two reports, as the information provided on article 27 was not only misleading, but in some respects it was clearly inaccurate.

The first report glossed over the entire question of Indigenous cultural, linguistic and religious rights in two paragraphs. It informed the Committee:

*...policy in all jurisdiction recognises that Aboriginals [sic] have the right to retain, modify, or develop their languages, cultures, customs, traditions and lifestyles in their own way. Support is given for attempts to promote, manage and develop special interests arising from their culture in such areas as the preservation of sacred sites, encouragement for the maintenance and development of Aboriginal artistic and musical expression, and the provision of early education in Aboriginal language, where this is the mother tongue of the children.*¹³³

The first report asserted that the approach in all jurisdictions was to assist Aboriginal communities to determine their own objectives. By way of proof it lists the legislation enacted in each State. A quick review of the volumes of legislation enacted in this country to deal with Indigenous peoples would reveal that, with few exceptions, this is simply not the case. The existence of legislation is certainly not sufficient to ensure that as Indigenous peoples we control our own lives; it can, in fact achieve the opposite.

¹³³ Australia's initial report under article 40 of the Covenant, UN Doc CCPR/C/14/Add.1, 11 December 1981, para 438.

Even in 1981 the Government was well aware of the problems of sacred site protection, access to land, hunting, fishing, cultural rights, intellectual property and language policy. Yet no mention is made of these significant deficiencies.

The Committee did not overlook this attempt to gloss over the enormous barriers which Indigenous Australians face. Members expressed concern about obligations under article 27 in relation to Indigenous peoples and were clearly alive to the omissions.¹³⁴ They asked pointed questions about Aboriginal political organisation, the forced removal and return of land (including a specific reference to Queensland's illegal transfer of land), attempts to assimilate Indigenous peoples, the degree of control Aboriginal people have over their own affairs, and protection of Aboriginal languages. One member commented that the section of the report which reads "*Aboriginal tribal marriages... may offend against Australian codes of conduct*" should read "may offend against **other** Australian codes of conduct".¹³⁵

The Government's response under questioning was as facile as the report itself. The representative acknowledged that the Government realised that there were still a number of problems to overcome, but assured the Committee that "*Aboriginals had been given the means of exercising real power in all matters affecting their lives*".¹³⁶ He also stated that in recognition of Indigenous peoples' fundamental affinity with the land the Government had guaranteed them "*enjoyment of their rights to traditional lands, controlled all mineral prospecting and development in a manner which protected sacred sites, and encouraged states to make land available to Aboriginals*". If Indigenous organisations had been present at the meeting or had an opportunity to provide information to the Committee members, such misinformation would not have gone unchecked. At the very least, the Government's attempts to dodge the Committee's questions would have been fed back into the domestic debate.

The second periodic report provided a little more detail, referring to pieces of legislation and policy initiatives for the protection of sites, cultural property, cultural activities, Aboriginal studies and education. However, the information carefully exposes only those occasional patches of the landscape which legislation and policy initiatives cover, making no mention of the gross oversights.

Again, some information in the second report falls just short of misrepresentation. For example: "*...policies in Aboriginal education seek to ensure that full educational opportunities are available to all persons of Aboriginal and Torres Strait Islander descent and that they receive an education in harmony with their cultural values and chosen lifestyle which enables them to acquire the skills they desire*".¹³⁷

Children in remote or rural communities who have no access to post-primary education, and in some cases to any education at all, and Indigenous children throughout Australia who still have no access to Aboriginal language or study courses would certainly have told the Committee a different story.

The Committee sought additional information concerning:

- affirmative action measures in economic and cultural spheres in relation to Aboriginal people;
- clarification of the constitutional sections concerning race;

¹³⁴ Human Rights Committee 17th session, summary records of the 401st to 403rd meetings, 25-26 October 1982; UN docs. CCPR/C/SR. 401-403.

¹³⁵ Summary record of the 403rd meeting, UN Doc. CCPR/C/SR. 403, para 55.

¹³⁶ Summary record of the 407th meeting, Un doc. CCPR/C/SR. 407, para 16.

¹³⁷ Australia's second periodic report, UN doc. CCPR/C/42/Add.2, 6 October 1987, para 673.

- plans for the establishment of an elected Aboriginal Commission and for addressing the issue of Aboriginal land rights;
- the percentage of funds allocated to the Ministry of Aboriginal Affairs;
- the protection and promotion of Aboriginal languages; and,
- policies of removing Aboriginal children from their families.

They also asked for the Government's views on the question of including Indigenous peoples in the category of 'minorities' and the need for a separate convention for the rights of autochthonous (Indigenous) peoples.¹³⁸

In response, the Australian Government representative listed a range of fine sounding initiatives which it was taking in relation to health, education, employment, housing, enterprises, language policy and land rights. No comparative figures were provided, however, to make the figures meaningful, nor was there any assessment of the degree to which Indigenous peoples are actually enjoying those rights. For example, his statement that Aboriginal people owned 12 percent of the land mass says nothing about the quality of the land, the rejection of claims for land where there are other interests, or the conditions experienced by peoples who do have land.

The simple reality is that eighteen part-time members have perhaps two days to consider one of many country reports, from a country of which they may have no detailed knowledge. It is unrealistic to expect that they can, by themselves, adequately probe the Australian Government about the issues which it chooses not to disclose. With the assistance of Aboriginal organisations they would, however, have been able to cut through the nonsense and insist on accurate information.

As my Office did not exist when the first two reports were considered, and there was very little information in Aboriginal organisations about international procedures, this lack of involvement in the process was understandable. However, in future reports this will certainly not be the case. As well as providing information to the Committee we will use the Committee's questions and concerns in the domestic arena and seek to ensure that the Government honours the statements of its representatives in international forums.

As Aboriginal and Torres Strait Islander Social Justice Commissioner, I have had access to an early draft of Australia's third report to the Human Rights Committee. That draft suffers from many of the problems I noted in my second report in relation to the Commonwealth's first report on the implementation of the recommendations of the Royal Commission into Aboriginal Deaths In Custody. It is a litany of legislative and bureaucratic action with no evaluation as to effectiveness.

For example, the Government's draft third report describes at length the Royal Commission into Aboriginal Deaths In Custody, but says nothing of the reality of implementation of the recommendations. The report outlines in some detail the National Aboriginal Health Strategy, but does not even mention the Government's own evaluation, which found it did not implement the strategy. Although it is mentioned elsewhere in the draft report, there is no mention under article 27 of the Australian Law Reform Commission's reference into Aboriginal Customary Law, nor needless to say, of the Government's total failure to implement its recommendations. In relation to the protection of cultural and intellectual property the report has virtually copied the second report, *including its omissions*. Whole sections, which were misleading in the second report have been copied, word for word into the third report.

Should the final report submitted to the Committee not be a significant improvement, the omissions and misleading statements will certainly be drawn to the Committee's attention.

¹³⁸ Human Rights Committee 32nd session, summary record of the 809th meeting, 6 April 1988, UN doc. CCPR/C/SR.809, paras 24-47.

Possible Optional Protocol communications under Article 27 from Indigenous Australians

Despite the paucity of information that has been provided on UN procedures and complaints mechanisms, Indigenous Australians are increasingly aware of the mechanisms available under the Optional Protocol and the possibilities they may offer. In coming years Australia will be subject to communications from Aboriginal and Torres Strait Islander peoples. In my view there are a number of issues which may be pursued under article 27. When considering the possibility of an article 27 communication, Indigenous peoples should be aware of the following requirements:¹³⁹

- The communication must address a specific violation. So, for example, a person could not complain in general about the inadequacy of legislation covering protection of sacred sites. They would have to complain that a particular site had not been protected, and that this had interfered with their right to practice their culture.
- The communication has to be lodged by an individual or individuals who are actual victims of the alleged violation.
- The victim of the alleged violation must have tried to have the violation redressed in Australia. This would include taking action under any relevant legislation and pursuing any other available avenues. However, if in pursuing those avenues they have faced inordinate delays, or if those avenues have already been unsuccessfully pursued in sufficiently similar circumstances, the communication will be admissible.
- The matter raised will have to constitute a denial of *the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*, as defined by the Human Rights Committee.

From my analysis of the cases already considered by the Human Rights Committee, the General Comment and its consideration of country reports, and my knowledge of the problems Indigenous Australians face in enjoying our cultures, I can suggest a number of likely areas of complaint:

- Interference with, or lack of access to sacred sites;
- Laws which prohibit people fishing, hunting or gathering in their traditional country;
- Removal or non-return of sacred objects or objects of cultural value;
- Infringement of intellectual property, for example, songs or designs;
- Legal interference with Aboriginal or Torres Strait Islander customary law, for example, non-recognition of traditional marriages or interference with family arrangements and kinship obligations through the social security or welfare system, or in employment conditions;
- Non-provision of Indigenous language education for Indigenous children or communities;
- Desecration of sites which interferes with the ability to practice religion;

¹³⁹ See also, *First Report 1993, op. cit.*, pp. 91-100.

- Failure to provide pro-active programmes or take special measures in areas such as education which result in the denial to Indigenous peoples of the ability to practice their culture, profess or practice their religion or use their language;
- Failure to recognise traditional land or sea ownership or control over resources.

I would particularly observe the opportunity for Indigenous peoples to pursue the last two points. That is, the absence of affirmative action and the non-recognition of land ownership and control over resources.

I do not think the full possibilities of article 27 have been explored through Optional Protocol communications by Indigenous peoples from any part of the world. The article will have limits which fall short of protecting our full cultural rights. However, it may be that it places weightier obligations on states in terms of recognition and protection of territorial rights than has yet been shown to be the case.

I noted with interest questions from the Committee when examining Australia's second periodic report concerning the political dimensions of cultural rights. For example, one member asked about the existence of Indigenous political parties which could represent us where our interests were contrary to those of dominant interests. It may be that Indigenous political organisation is a matter which can also be pursued under article 27.

Finally, I would remind the Commonwealth that it is responsible for article 27 violations by all levels of government and for failing to prevent particularly egregious violation against Indigenous peoples by corporations. This means that if it does not prevent a multinational mining company from pursuing a wanton policy of desecrating sacred sites, does not prevent a state government selling-off traditional lands or outlawing hunting and fishing rights, or does not stop a local council from establishing a rubbish dump on Indigenous land, it will be the subject of complaint.

It goes without saying that it would not be in the Commonwealth's interests to find itself answering complaints in the international arena. This would hardly be in keeping with its posture as a good international citizen which upholds human rights.

Of course there is an option. The Optional Protocol procedure is designed to be an option of last resort. The whole point of the requirement that people lodging communications have pursued all domestic remedies is to give states the opportunity to clean up their own back yards before the international community gets involved. The Commonwealth could look carefully at the areas I have indicated and at the numerous reports it has on file which catalogue the violations of Indigenous cultural rights.

Were the Commonwealth to address those violations it would avoid the prospect of being judged by the international community to be a country in breach of fundamental human rights.

Reconciliation requires mutual respect. Non-Indigenous Australia must now have the confidence and maturity to recognise that Indigenous cultures are our country's first cultures, and that, Indigenous culture occurs every day and everywhere. Acceptance of Indigenous understandings of culture is gaining international currency. Australia's own commitment to respect Indigenous cultures commands more than spasmodic funding of 'dance troupes'.

Draft Declaration on the Rights of Indigenous Peoples

The *Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)* recognises, among other rights, the fundamental importance of protecting the cultural rights of Indigenous peoples. This document has been developed by Indigenous representatives from all over the world participating in the deliberations of the Working Group on Indigenous Populations over approximately eight years. This year the *Draft Declaration* began its passage from the Working Group on Indigenous Populations, up through the UN system, towards the General-Assembly.

The significance of this draft cannot be underestimated. It is the concrete assertion of Indigenous peoples' inherent rights and an important product of their struggle for international and domestic recognition that began in many countries centuries ago.

In 1887 an Indigenous representative from the Lax Kw'alaams First Nation stated:

*You have the power to very easily settle what we want, which is to be free as well as whites. You know, if they catch a little bird they put it in a cage. Probably the cage will be very fine; but still the bird will not be free. It will be in bondage and that is the way it is with us... I ask that you...make it right with us by what in English you call a treaty...the Indian's hearts are troubled. It is not right for a man to be troubled, when a law is standing to settle his trouble and make peace...this is all I have to say, and hope that it will be settled. If it is not settled now, in what other way can we help ourselves?*¹⁴⁰

The General-Assembly,¹⁴¹ the Commission on Human Rights,¹⁴² and the World Conference on Human Rights¹⁴³ all requested that the Working Group on Indigenous Populations make its best efforts to complete its substantive work on the *Draft Declaration* at its eleventh session, which it did. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) requested the Secretary-General to submit the *Draft Declaration* to the Centre for Human Rights for a so-called technical review.¹⁴⁴ Such a review is not intended to elaborate, explain, evaluate or alter a draft declaration in any way. Rather, it is a standard procedure intended to check the draft in terms of:

- whether it is consistent with existing international human rights law;
- whether it is of a fundamental character deriving from the inherent worth of the human being;
- whether it is sufficiently precise to give rise to identifiable rights and obligations; and,
- whether it is likely to attract broad international support.¹⁴⁵

The *Draft Declaration* was an agenda item at the twelfth session of the Working Group on Indigenous Populations, but was not opened up for substantive changes. Nevertheless, the participants commented on the final content, focussing on contentious issues of self-determination and the reference to the term 'peoples' and its implications in international law. The *Draft Declaration*, as passed to the Sub-Commission, provides that Indigenous peoples have the right to self-determination, and uses the same language as is employed in article 1 of both the *International*

¹⁴⁰ Richard Wilson, The Lax Kw'alaams First Nation, 3 February 1887, quoted in Cassidy, F., "Trouble Hearts: Indigenous Peoples and the Crown in Canada", in *Becoming Visible, op.cit.*, p. 145.

¹⁴¹ Resolution 47/75, 14 December 1992.

¹⁴² Resolution 1993/30, 5 March 1993.

¹⁴³ Vienna Declaration and Programme of Action, June 1993, UN Department of Public Information, 1995, para 28.

¹⁴⁴ Resolution 1993/46, 26 August 1993.

¹⁴⁵ As articulated in General-Assembly resolution 41/120, 4 December 1986, "Setting international standards in the field of human rights."

Covenant on Economic, Social and Cultural Rights and the *International Covenant on Civil and Political Rights*. It also refers throughout to Indigenous 'peoples' not 'people'.

The more important area of debate was the question of what would happen to the *Draft Declaration* once it left the Working Group on Indigenous Populations. In her opening remarks, the Chairperson-Rapporteur, Madam Daes emphasised that the Working Group must direct its attention to ensuring Indigenous participation at the meetings of higher bodies when they consider the Draft.

According to UN procedures, it must pass through the Sub-Commission on the Protection of Minorities, then to the Commission on Human Rights and to the Economic and Social Council before it is put to the General Assembly for adoption.

Participants recognised that the first major barrier would be the Commission on Human Rights, which unlike the Working Group on Indigenous Populations or the Sub-Commission, is a body comprising governments. Already at the Working Group on Indigenous Populations the comments of certain observer governments have indicated that they will oppose substantial portions of the *Draft Declaration* when it reaches the Commission on Human Rights. It can confidently be anticipated the references to self-determination and 'peoples' will be particularly problematic, as will the definition of 'Indigenous' and criteria for which peoples qualify as Indigenous.

For many Indigenous peoples, asking them to trust their governments to take over the drafting is asking them to trust the very people who have murdered their people, sold-off their land and destroyed their environment. The notion that the government of a state represents the Indigenous peoples of that state is ludicrous. It is of paramount importance, just as it was during the years when the *Draft Declaration* was being debated at the Working Group on Indigenous Populations, that we are present to represent ourselves and advocate our rights.

The broad participation of Indigenous peoples at the Working Group on Indigenous Populations has been exceptional in terms of UN practice. Standard procedure is that only Non-Government Organisations which have been granted 'Consultative Status' by the Economic and Social Council (ECOSOC) can be present as observers. Only thirteen Indigenous organisations world-wide have ECOSOC status, ten from North America, two from Australia (NAILSS and ATSIC) and one from the Nordic countries. Should the standard rule be followed, Indigenous involvement in the debate from here on in will be significantly diminished.

Indigenous representatives at the Working Group on Indigenous Populations strongly argued for the establishment of mechanisms which would maximise Indigenous participation at the Commission on Human Rights. This position was supported by a number of governments, including Australia, Canada, Chile, Denmark, New Zealand, Norway and Sweden.

In August 1994, Madam Daes presented the *Draft Declaration* to the Sub-Commission, which, after brief debate, voted unanimously to convey it to its parent body, the Commission on Human Rights. While such easy passage had not been anticipated, it is important not to take this as an indication of what will happen at the Commission.

The Commission on Human Rights, being comprised of governments, and the Sub-Commission, being comprised of independent experts, are of very different character.

The Chairperson of the Sub-Commission transmitted the *Draft Declaration* to the Commission on Human Rights at its fifty-first session. She put a strong case for Indigenous peoples without formal consultative status with the Economic and Social Council being permitted to participate in discussions about the *Draft Declaration* in the Commission.

Subsequent discussions at the Commission on Human Rights dealt only peripherally with substantive aspects of the *Draft Declaration*. Governments which were expected to raise in-principle objections to the most contentious parts of the *Draft Declaration* (for example, self-determination) did not do so, no doubt reserving substantive discussion and objections to the meeting of the Working Group set up by the Commission on Human Rights to consider the Draft. Nevertheless, even at this stage in their interventions several governments were careful to stress that any provisions concerning the rights of Indigenous peoples must respect the principles of the territorial integrity and the national sovereignty of existing states. For example, the Nicaraguan representative noted:

*...care should be taken to ensure that the final version was acceptable to the international community, and that its provisions did not undermine the sovereignty and territorial integrity of states.*¹⁴⁶

Although positions were not articulated in the interventions, reports of Non-Government Organisations who attended the Commission on Human Rights give some indication of the tenor of informal discussions, and the position which states can be expected to take. As was expected, the majority of states, including Australia, will allow no derogation, or perceived derogation, from the principles of territorial and sovereign integrity of existing states. They will only support self-determination within these parameters.

The other major substantive issue raised by governments was the definition of 'Indigenous'. For example, both India and China definitively assert that there are no Indigenous peoples in either country. It can be anticipated that the inclusion of Indigenous peoples from the Asian region within the scope of the *Declaration* will be problematic and opposed by several governments. States have indicated that they will not debate substantive provisions until they have settled a clear definition of who qualifies as 'Indigenous'.

Governments' comments concerning the proposed open-ended Working Group to consider the *Draft Declaration* provide a less direct, though more telling litmus test of their positions and opposition.

As this procedural question was the only one on which a conclusive decision was to be made, states were far more forthright with their positions.

To its credit, the Australian Government was a leading proponent for maximising Indigenous participation at the Working Group. The Australian delegation stated that it:

*...strongly supported the establishment of an open-ended working group with maximum participation of indigenous representatives, including those non-governmental organisations which did not have consultative status with the Economic and Social Council. Such broad participation was essential for the credibility of the drafting process and of the final product.*¹⁴⁷

It also proposed that the meetings of the Commission on Human Rights working group should take place either immediately before or after the meeting of the Sub-Commission in July-August so as to maximise the opportunity for Indigenous organisations already represented at the Working Group on Indigenous Populations to attend.

¹⁴⁶ Commission on Human Rights, 51st session, summary record of the 25th meeting, 15 February 1995, E/CN.4/1995/SR.25, para 44.

¹⁴⁷ *Ibid.*, para 24.

Although there was some support for this position, a number of governments vehemently opposed any derogation from normal rules. Particularly strong opposition came from China, Malaysia, Bangladesh and Brazil. For example, the Brazilian delegation stated that:

*...following the wide consultations carried out by the Sub-Commission...most of the views of indigenous observers had been reflected in the draft. The time had come, however, to engage in an effective negotiating effort to strike a balance between what was expected by some, and what was acceptable to the international community...the inter-sessional working group of the Commission should thus hold public hearings with the participation of indigenous observers. His Government would, however, deem it inappropriate to overrule the directives of the Economic and Social Council on the participation of non-governmental organisations in its subsidiary bodies.*¹⁴⁸

While it is distressing that even this threshold question provokes such a defensive stance from certain governments, it is not out of keeping with their habitual position of excluding and marginalising Indigenous voices from processes which directly concern us. Significant debate and lobbying took place leading to the actual vote on a resolution, with the Australian Government putting forward a non-official draft early in the piece, and then a draft which was subsequently modified.

After some debate, the Commission on Human Rights adopted a resolution which sets up the inter-sessional open-ended working group with the sole purpose of:

*...elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled draft “United Nations declaration on the rights of indigenous peoples” for consideration and adoption by the General-Assembly within the International Decade of the World’s Indigenous People.*¹⁴⁹

On the question of participation, the resolution sets up mechanisms for Indigenous organisations which do not have Economic and Social Council status to apply for special status for the purposes of the Commission on Human Rights working group. Prospective participants have to apply to the Coordinator of the International Decade, providing the following information:

- a. The name, headquarters or address and contact person of the organisation;
- b. The aims and purposes of the organisation (these should be in conformity with the spirit, purposes, and principles of the Charter of the United Nations);
- c. Information on the program of activities of the organisation and the country or countries in which they are carried out or to which they apply;
- d. A description of the membership of the organisation, indicating the total number of members.¹⁵⁰

The Coordinator is then to consult with the state concerned and forward applications together with the views of the state to the ‘Council Committee on Non-Governmental Organisations’. This body will consider all relevant material, including the views of states, and recommend to the Economic and

¹⁴⁸ *Ibid.*, paras 54-57.

¹⁴⁹ Resolutions and decisions adopted by the Commission at its 51st session, resolution 1995/32, E/CN.4/1995/L.11/Add.2, 3 March 1995. The “draft declaration” referred for consideration is the draft as prepared by the Working Group on Indigenous Populations.

¹⁵⁰ *Ibid.*, annex.

Social Council which organisations of Indigenous peoples should be authorised to participate. Should the state veto the application, it will be rejected.

The resolution was a compromise position, falling somewhat short of Indigenous peoples' aspirations in two principle ways. First, the original draft as put forward by the Australian delegation called for "*the establishment of a working group of the Commission to consider the draft "United Nations declaration on the rights of indigenous peoples" as submitted by the Working Group on Indigenous Populations"*. The final resolution authorises the Commission on Human Rights working group to *elaborate* a new draft declaration, considering the existing draft.

Although this may appear to be but a minor shift in language, Indigenous peoples fear that it indicates an intention to look at the existing draft, which is the product of twelve years of intensive discussion with and among Indigenous peoples, say thank you very much, put it to the side, and then proceed to elaborate a new declaration. Such a process would be all too reminiscent of the well-worn models of 'consultation', where seeking our views is little more than a polite derogation to departmental guidelines, and where there is no intention of allowing what we say to shape the outcome.

The second deficiency lies with the mechanisms set up to allow for the participation of Indigenous organisations. Given the stiff opposition from some governments, any shift from strict rules of participation was a major achievement. This is the first time in the history of the Commission on Human Rights that the rules of participation have been altered. However, there are problems in the procedures set out in the resolution, and they will impact most severely on those Indigenous peoples whose need for self-representation is the greatest. Those peoples from the most repressive or hostile states, who are likely to contradict the picture the state wishes to portray of the views of people in their country, are those whose applications are most likely to be vetoed by those same states. Some of the cases I am thinking of involve states which deny the very existence of Indigenous peoples. In this resolution they have a convenient method for 'disappearing' them once again.

The Australian Government has advised that Aboriginal and Torres Strait Islander organisations need have no such fear, as it will not raise objections to any applications. However, as members of the World's Indigenous peoples, we cannot simply proceed, heads down, satisfied with our own position: sympathetic, but ultimately tolerating the loss of our brothers and sisters. At this time, it is more important than ever that those of us who will be able to participate approach the exercise with the broadest vision, also taking in what is at the periphery. Recognising our responsibility to all the World's Indigenous peoples, and seeking to include the voices of those who are marginalised in this context is vital.

In all this, the overall message that needs to be conveyed is that, in terms of the *Draft Declaration*, we have come to a new, and far more difficult chapter. Our objectives have not changed, but our strategies and methods will have to. First, we must direct our energies to ensuring that the Australian Government maintains a strong position with respect to the existing draft. Second, we must continue to contribute directly to the process.

We must now acknowledge the realities of the new forum—it is a forum of governments. No longer will we outnumber governments and have the sympathetic ears of human rights experts as we did in the Working Group on Indigenous Populations. As such, the position which the Australian Government takes, and its willingness to lobby other governments is of the utmost importance. There is significant work to be done at home to ensure that the Australian Government accurately and adequately represents our views. This will not be an easy process, and I am certainly not calling on Aboriginal and Torres Strait Islander peoples to subsume our voices within the Australian Government line. Nor am I suggesting that we should water-down the rights which we assert. There

remain significant discrepancies between the positions of many Aboriginal and Torres Strait Islander peoples and those of the Government, and no doubt this will continue to be the case. However, the Australian Government will have access, opportunity and influence which even those of us who are present will not have.

The Department of Foreign Affairs and Trade has begun seeking views on the *Draft Declaration* from Commonwealth Government departments (through an Inter-Departmental Committee), States and Territories, Indigenous organisations and business and industry groups. Early indications are that outside the Department of Foreign Affairs and Trade, there is a vast gap in understanding of the most basic issues raised. If Aboriginal and Torres Strait Islander organisations are not adequately involved in, and do not use all available means to feed into, this consultative process, the Australian Government's position will be significantly diminished.

The Australian Government must not weaken its current position on the *Draft Declaration*. Any move to do so will be seen by Indigenous Australians as an act of hypocrisy and betrayal—to be an apparent ally when there was nothing to lose and a great deal of kudos to be gained, only to sell out when it comes to the crunch. It would also undermine any moves towards reconciliation, and signal to Aboriginal and Torres Strait Islander peoples that its 'good-guy' international stance is all but disingenuous.

With respect to our own participation, the presence of our direct voices is going to be more important than ever. I recognise that many of our organisations feel that they have priorities far more pressing than attending UN forums, and that they have already put a great deal of energy and significant resources into attending the Working Group on Indigenous Populations. However, now is the time that we need our well-honed skills and determination. To date, apart from myself, only ATSIC has applied to attend the working group. I certainly hope that more Aboriginal and Torres Strait Islander organisations will see the value of applying to attend in the future and actively participating in and shaping the developments of this fundamental Declaration.

Chapter 4: Social Justice Strategies and Recommendations

The *Mabo* decision recognised the violation of Indigenous land rights since colonisation and the continuing legal obligation to recognise such rights. The deepest significance of this decision on native title lies, not in its implications for property law, but in the moral and social challenge that it has issued.

After more than two centuries of non-Indigenous presence, the High Court has told the Australian community that the old assumptions of non-Indigenous superiority and a right of dominance are misplaced. The officially sanctioned methods in which the modern Australian nation established itself on our territories were simply wrong.

This is a historic repudiation of major elements of national history and tradition and would be a jolt for any nation-state. More than the centenary of the federal Constitution or the threshold of a new millennium, *Mabo* demands that Australia redefine and renew itself as a society and a political culture.

This chapter is an extract from my submission to the Parliament of Australia on the Social Justice Package—the Government's final stage of its threefold response to the *Mabo* decision.

Indigenous social justice is not just a parcel of goods to be delivered by government. It entails accepting the rights of Indigenous peoples and establishing processes which translate abstract principles into the actual enjoyment and exercise of rights. The practical enjoyment of rights is

dependant on the processes and systems which shape the interaction between people, communities and governments.

The forthcoming negotiations between government and Indigenous representatives over the content of social justice initiatives represent the most important opportunity for significant reform in Indigenous policy in this country.

What we must establish from the outset of the process are the foundations for **any** social justice initiatives and their broad objectives. I believe the translation of the notion of Indigenous rights into reality can only be achieved through the exercise of self-determination.

While the High Court specifically addressed Indigenous land title and rights, it acknowledged the ongoing legal validity of Indigenous law and custom and the need for broader recognition that as distinct peoples, Aboriginal and Torres Strait Islander peoples are entitled to enjoy our distinct and unique rights. In this sense, the decision dealt with what we can label the ‘distinct rights’ of Aboriginal and Torres Strait Islander peoples. Such rights arise from our status as the First peoples of this country, peoples whose rights pre-dated colonisation and the imposition of non-Indigenous law and social structures. Our distinct rights include, but are not limited to, the right to practice and enjoy our distinct cultures, the right to control our natural resources, and environment and the right to self-determination.

It is not only our distinct Indigenous rights that we do not enjoy. The wholesale violation of our basic ‘citizenship rights’ is hardly news. Such citizenship rights include the right to a decent standard of health, the right to education, rights to housing and essential services, and the right to equality before the law.

According to virtually every socio-economic indicator, including health, education, income and employment, Aboriginal and Torres Strait Islander peoples suffer significant disadvantage when compared to all other Australians. I trust I do not need to again cite the studies, surveys, Royal Commissions and parliamentary inquiries which confirm this fact. Their unanimous conclusion is that the basic citizenship rights all Australians enjoy are consistently and often profoundly violated in the case of Indigenous Australians.

If it is the aim of the proposed social justice initiatives to reverse the historical violation of the rights of Indigenous peoples, then they must address both our distinct rights and the rights which we are entitled to enjoy along with all other Australians.

A Framework for Social Justice

The time has come for a fundamental shift in public policy in respect of Australia’s Indigenous peoples. The call for Indigenous social justice initiatives challenges us to articulate and, where necessary, to re-write national policy. This means examining the underlying assumptions, operating principles and direction of policies and programs designed for, or significantly affecting, Indigenous peoples.

A fixation on the nuts and bolts of implementing and manipulating existing approaches and administrative structures has prevented policy-makers stepping back sufficiently to look at the entire approach. In a policy area like Indigenous affairs, matters of philosophy are central. Policies flowing from a basic assumption that Indigenous individuals simply need to be allowed to compete equally in a predominantly European-derived society will differ markedly to policies based on valuing cultural difference.

After 207 years of the failure of official non-Indigenous policies and programs to solve Indigenous needs, to satisfy Indigenous aspirations, or to win Indigenous hearts, the fault obviously lies in underlying assumptions and it is here where change must occur.

The basis of this fundamental shift must be the transition, too little understood, from the *administration of Indigenous welfare* to the *recognition of Indigenous rights*. Although government officials now mouth the rhetoric of the rights of Indigenous peoples, the rights-based approach has all too easily been assimilated into established practices. Even ‘self-determination’ has come to mean little more than informing Indigenous peoples of a program or policy before they launch it. This is an absurd mockery of a term which has a clear meaning in international law. Policy makers must accept that Indigenous peoples are not a special category of disadvantaged souls who require attention or even caring and gentleness. We are peoples with rights and imperatives of our own. Our principal right is to make the decisions which direct our present and future.

My concern, however, is not to reiterate past injustices. It is to address social justice in our time and in the future. This is the moment to build a sense of shared community between the peoples and regions of this continent.

Aboriginal and Torres Strait Islander social justice is not simply the concern of Aboriginal peoples and Torres Strait Islanders ourselves, and those specific offices designated to deal with us. It is a fundamental problem of the relationship between different cultures and peoples involving the whole of Australian society.

Social justice for Indigenous Australians is about renewing Australia. It is about allowing us the benefits, opportunities, and living standards that this country’s natural resources have created.

It means making us welcome in the contemporary Australia built by the White Man (sometimes with black labour and always on black land). It means bringing the non-Indigenous peoples—who have too often in the past simply policed or mined or grazed the land while dreaming of a cultural home far away—to care for this land and feel at home with its ancient inhabitants. Those people may be 19th century British and Irish families or mid-20th century and newer arrivals from Greece and Lebanon, Chile and Viet Nam. Nevertheless, we all share obligations for our housekeeping. The national task of Indigenous social justice means nothing less than constructing and cultivating a new sense of nationhood which provides not just shelter but a home for all our peoples.

Failure here has many outcomes. In relation to Aboriginal health, for instance, researchers have recently stressed that even by the depressing measure of statistics for disadvantage among Indigenous peoples in countries like New Zealand, Canada, and USA with similar histories to our own, Australia has failed as a country. For instance, we see many Australian business people and professionals adopting a suitable international sophistication in treating immigrant non-Europeans as equals at work and leisure but continuing to maintain a disdain for Indigenous Australians. Trumpeting insistence on ‘a fair go’ or a united continental nation is pointless while we maintain such divisions by race.

We must establish a framework for community which includes Indigenous no less than non-Indigenous Australians. While non-Indigenous Australians debate aspects of the Constitution—argue whether to replace or strengthen the federal system, dispute the size, shape and powers of local and regional government, and consider new economic and political relationships with Asian countries—it should be no surprise that we Indigenous Australians also have questions of our own about the reform of political and legal arrangements.

The cornerstone of Indigenous policy and politics in Australia is identity and the maintenance of that identity by individuals in company with others who share it. We are not simply isolated individuals, but peoples, with a homeland and traditional cultures. Unlike other cultural minorities, our cultural homeland is Australia. Its maintenance is not the responsibility of peoples in distant lands but rests entirely in the hands of Australians. If the identity of Australians as a whole means anything, it must include our unique Indigenous cultures. All Australians are responsible for the well-being of Indigenous cultures.

Maintaining Indigenous identity and culture, however, is not simply an end in itself. Unless and until our identity is recognised we cannot, and will not, participate as full Australian citizens. It is one of the paradoxes of Indigenous policy in nation states that only through recognition of distinct communities, and rights pertaining to such communities, are Indigenous peoples willing—and, for the most part, able—to accept the majority society as other than a threat and an alien world.

From the outset, however, understanding the primacy of the role of the Commonwealth Government is important. Although Australia only enshrined a national government role in Indigenous affairs through a 1967 constitutional referendum, it was common practice in Britain's colonies that central government—first London and then national capitals—held powers to safeguard Indigenous peoples from local and regional land and resource development. The United States and Canadian constitutions followed this pattern and Britain, at various times, had similar intentions in respect of Australia.¹⁵¹

Indian and Inuit peoples in both the United States of America and Canada today regard this federal guarantor role, despite the many instances of neglect or maladministration over the years, as their irreducible constitutional protection. There may be arguments for state and territory roles in Indigenous affairs. Perhaps this or that State has a fine policy in some matter or, for the moment, a Premier and cabinet sensitive to Indigenous issues. With greater Indigenous self-government there will no doubt be many pragmatic and mutually beneficial arrangements made between Indigenous communities and state and territory governments.

Nevertheless, the fact remains that those who argue for states power in Indigenous affairs usually do so because they do not wish to accept the higher standards for Indigenous-government relations set by national governments. This is true not only in Australia but in all other countries. National governments are, *in principle*, essential overseers, guarantors and facilitators in relations between a nation's Indigenous and non-Indigenous peoples.

The processes by which Aboriginal and Torres Strait Islander peoples negotiate a new framework for community with our fellow Australians may be as important as the actual outcome. By joining as equals in the work of building the Australian nation and having genuine opportunities to design our future within Australia, Indigenous peoples can begin to solve endemic socio-economic problems and commit ourselves to a shared Australian community.

Those who fear full recognition of our unique place in modern Australia will be divisive or violate Australian principles of social equality, are dead wrong. Australia is already divided.

There is a black, oppressed, imprisoned Australia dispossessed from its home and increasingly unwilling to tolerate injustice. There is an Australia that believes it is the first and only Australia, and insists our ancient cultures are only, if anything, decorative curiosities.

It is an Australia denying part of itself.

¹⁵¹ For example, *The Law of the Land*, by Henry Reynolds, Penguin, 1987.

Wholeness and equality are fine national values but Australians will only attain them when we honestly recognise and embrace our Indigenous reality.

Constitutional Reform

The failure of current Australian policy regarding Indigenous peoples to meet contemporary international standards begins with our most fundamental document, the Australian Constitution. Although, since 1967, the Commonwealth Government has had constitutional power and responsibility with respect to Australia's Indigenous peoples, in deference to state and territory governments, it has exercised them modestly and reluctantly.

In 1901, the 'founding fathers', white, male and bearded, saw no reason to place the rights of Indigenous peoples on the Constitutional agenda. They totally excluded Indigenous peoples from the process of forming the Constitution. As Australians approach the Centenary of Federation, not only must we be mindful of the principles and powers we wish to lay down in our foundational document, we must ensure the constitutional reform agenda actively involves Indigenous peoples in the reform process.

Indigenous peoples and constitutions

A national constitution is the supreme cultural statement of a society. This is true of both the single document labelled, *The Constitution*, and the wider constitutional arrangements which provide the country's governing framework. In the 1960s the Australian public voted overwhelmingly to remove a blot from the Australian Constitution in a discriminatory clause on Indigenous peoples. That vote was an important statement of the change of sentiment among Australians and was recognised as such at the time.

In the 1990s there is more understanding of Indigenous society, needs, and history in the wider Australian community. Both Indigenous peoples and many influential non-Indigenous individuals now see a more positive affirmation of Indigenous rights and the Indigenous place in Australia as a requirement of any authentic constitutional reform. In June 1993 the Council for Aboriginal Reconciliation and Constitutional Centenary Foundation held a conference.¹⁵² A group of invited Indigenous and non-Indigenous people heard various Australian views plus presentations by Indigenous leaders and experts from New Zealand, USA and Canada. A large degree of consensus was reached on two related points:

- Indigenous peoples are unique communities who should have participated in the design of modern Australian political arrangements and negotiated our place in relation to these, but were excluded.
- Processes and the resources necessary for Indigenous peoples to express our views and negotiate our status are required today as an urgent priority of social justice.

It is important to realise that in constitutional work, *process* is as important as *product*. That is, the legitimacy of the process by which we negotiate and agree to change is essential to both sides accepting the results. This is particularly true if the settlement of historical grievances is a principal factor. If the weaker side does not see that the process was fair, the whole exercise will seem unjust or will become a new grievance.

¹⁵² The proceedings are available free of charge in two small volumes: *The Position of Indigenous Peoples in National Constitutions: Conference Report*, and *The Position of Indigenous Peoples in National Constitutions: Speeches from the Conference*, June 4-5, 1993, Council for Aboriginal Reconciliation, Canberra, and Constitutional Centenary Foundation, Melbourne.

In my opinion, constitutional reform has three main potential uses for Aboriginal and Torres Strait Islander peoples. It may provide:

- *recognition* as unique peoples with a special place in Australian history and society;
- *secure protection of rights* which are now recognised, for example, native title, or rights which may be recognised or negotiated in coming years; and,
- *processes or frameworks* by which we may strengthen or develop our societies or define our rights in the future.

Recognition will have great benefits over time in changing non-Indigenous social attitudes towards Aboriginal peoples and Torres Strait Islanders. The elaboration and protection of *rights* is the major objective of Indigenous peoples in constitutional reform. Nothing else will protect Indigenous land, sea, resource and other rights from hostile politicians and interest groups who may take control of legislatures and political agendas.

Importantly, the *Constitution Act* established processes or frameworks for ongoing negotiation. Section 37 of the Act specified that conferences of the Prime Minister, premiers, and Indigenous leaders were to be held to discuss Aboriginal rights. Between 1983 and 1987 four such First Ministers Conferences on Aboriginal constitutional matters were held. For the first time Aboriginal leaders became part of a national forum which would concentrate exclusively on the legal recognition of the rights and objectives of Aboriginal peoples.

Of course, *recognition* could be on a grand scale and involve something like a national covenant or reconciliation accord which contained a negotiated statement of purposes, objectives and principles for relations between the Commonwealth and Aboriginal and Torres Islander peoples. We could recognise such a document in some form in the Constitution, or it could become the framework for a special institution created to honour and implement its provisions. There are many examples of such documents advancing Indigenous rights around the world — the 1751 Lappecodicilen applying to the Sami of Norway and Sweden, the Royal Proclamation of 1763 and Jay Treaty of 1794 for Indians of both Canada and the USA, the 1840 Treaty of Waitangi, the 1948 Faroese home rule, the 1971 Alaska Native Claims Settlement Act, the 1975 James Bay and Northern Quebec Agreement, the 1987 Iqaluit Agreement between Inuit, Dene, and Métis of Canada's Northwest Territories.

Processes of constitutional change

Australia is, by world standards, a relative newcomer to processes of national constitutional reform. Canada, in particular, has for many years been debating and reforming the role of its Constitution in promoting Indigenous rights.

Simmering Canadian Indigenous discontent in the 1960s was fuelled in 1969 by the federal Government white paper on Indian policy which urged the phasing out of Indian rights, status, and programs. Rather than ignoring these grievances federal Government responded in a constructive way by funding regional and national Indigenous associations to press their grievances and viewpoints. It recognised that Indigenous peoples had concerns which needed to be heard and which would not be heard unless they had their own adequately resourced institutions and processes. Federal funding was provided on a multi-year and formula basis so that no group could be singled out and punished or undermined when governments did not like what was being said. The associations were free to hire their own staff and set their own agendas. They had enormous impact, both on federal policy-making and in some provinces, as well as on public opinion.

At the end of the 1970s the federal Government invited the national Indigenous associations (in which the regional groupings were represented or federated) to join in the work of national constitutional reform. This initiative quickly resolved itself into a particular sub-process within the overall and ongoing national constitutional reform. The national and regional Indigenous bodies were specially funded by Ottawa to prepare their constitutional case, hold consultations, and engage experts. After experiencing two years of Canada's constitutional conflicts *West vs. East*, *Quebec vs. the rest*, *federal vs. provincial governments* the Indigenous groups managed to convince governments, with the help of public opinion, to amend the Constitution in 1982 to recognise 'aboriginal rights'. High Court decisions since, notably *Sparrow* in 1990, have provided a firm legal basis for such rights, for example, in relation to sea fisheries. The Canadian Government now recognises those 'aboriginal rights' to include Indigenous self-government.

A strong Indigenous package was agreed in 1992 as part of an overall national constitutional reform, only to be voted down in a referendum which saw Canadians revolt against their political leaders for a variety of reasons. However, much else has changed. The negotiation process has brought leading politicians and central agencies of governments into contact with Indigenous peoples and Indigenous issues, bringing new priority and fresh thinking to what had long been a backwater of welfare-style programs. Bargaining between equals replaced hand-out patronage. Indigenous peoples were seen to be emerging political communities in various stages of readiness for wider responsibilities, of course, but all on the same road and going in the same direction.

However, high-level attention and new relationships, confirmed for the public by all-day nationally televised conferences of the Prime Minister and premiers with the country's Indigenous leaders, were only the tip of the iceberg. While discussions of national constitutional issues were going on, Indigenous communities in various regions were uniting to negotiate detailed new territorial and political arrangements for whole areas of the country. Furthermore, in Indian communities situated on land held in perpetual trust for Indigenous peoples by the federal Government and provided for by the national Constitution of 1867, local people were taking over more and more of the service delivery and local governance from Ottawa. They were seeking wider powers and slowly gaining them.

The Canadians also saw environmental and development disputes across the country involving Indigenous peoples, their lands, resources and fundamental concerns. This occurred particularly in relation to mining, logging, oil and gas exploration, road building, and especially hydro-electric power projects. Also, the need for Indigenous public services in urban areas was a perennial unresolved issue. Indigenous peoples were insisting that their intellectual and cultural property rights be recognised and legally protected. Essentially the place of Indigenous peoples in Canada was under negotiation, from top to bottom. The good news was that this shake up provided an opportunity, not only to air grievances, but to negotiate substantive resolution of past and continuing injustices; the bad news for governments was that this meant that Indigenous peoples were insisting on full rights and high-quality services, and on being substantively compensated for their lands, waters, and seas which provided the national wealth.

Other countries are also facing this issue. Despite the earlier history of American Indian conflict, Alaska today is a situation like Northern and Central Australia: recent statehood, Indigenous claims settlements, and federal protection of environmental and other lands have created a new arena for conflict and negotiation as the Inuit, Aleut, and Indian peoples seek to rebuild their autonomy and economic base around village and regional self-government.

The three Scandinavian countries have had substantial difficulties coming to terms with Sami rights, although Norway has recently passed a constitutional amendment essentially recognising the country

as bi-cultural, Sami and Norwegian, and insisting that the Government guarantee to Sami the means (which is accepted as including natural resources, land, and sea) to maintain their distinct culture. Greenland, an Inuit territory, gained virtual autonomy in relation to Denmark, an outcome negotiated during the 1970s.¹⁵³

With the benefit of hindsight, several things have clearly been happening. Indigenous peoples have been *negotiating*, whether explicitly or implicitly, a new relationship with national majorities. The negotiation process itself, and the emerging Indigenous political power, have facilitated Indigenous peoples joining the nation-state and its society. Georges Erasmus, now Co-Chair of Canada's Royal Commission on Aboriginal Peoples, put the proposition to the Prime Minister in 1979 that Inuit and Dene Indians negotiate the entry of their homelands into Canada, like the other colonies which became Canadian provinces. They too had a right to secure particular economic, legal, cultural and other arrangements to suit their heritage and circumstances. This is essentially what the Inuit have done in creating their region, Nunavut, as a full Northern territory within the Canadian federation.¹⁵⁴ It may be what Torres Strait Islanders and many Aboriginal peoples will do in Australia.

In all First world countries we see the same thing. Indigenous peoples reject the notion that they are merely individuals who have failed to 'fit in' or are in need of more caring social workers. They seek to restore their sense of peoplehood and their community life under their own control. This is a constitutional challenge. Indeed, one of the principal roles of constitutions is to accommodate differing regions and differing cultural, religious and linguistic traditions. Federal constitutions, like the Australian Constitution, are specifically designed for such a purpose. Constitutions are also arrangements designed to secure a social contract between people and government, and between peoples and regions. Maintaining diversity through constitutional structure is what they are all about.

There are several points to note in this national healing or negotiation process—this *reconciliation* in action. It takes time and is not limited to a single process. It involves give and take and much discussion. It requires some high-level and symbolic actions no less than the nuts and bolts work. It involves the change from a national view of Indigenous peoples as unfortunates needing help to assimilate on the majority's terms to recognition of Indigenous cultural communities as actual or emerging political entities. It does *not* involve threats to national unity, although it requires some ingenuity and flexibility in adapting the majority's political culture and institutions. Positive outcomes are best assured by the provision of special processes to facilitate negotiation.

There is not much understanding in Australia of 'popular' constitution-making—that is, *by the people*. In the past we tended to leave the matter to a few political enthusiasts and legal experts. The wider public has participated by occasional, and mostly negative, referendum votes. This has hardly been a recipe for a dynamic national constitutional culture.

Such an archaic and negative approach to the constitution is ill-adapted to the mood and aspirations of Aboriginal peoples and Torres Strait Islanders today. It seems that many non-Indigenous commentators and politicians feel the same way. They are looking for positive affirmation of the values, culture, and rights of a confident and expansive continental society. In such a context Indigenous peoples have much to offer as well as much to gain.

¹⁵³ A useful and up to date survey of the Indigenous situation in Scandinavia, Greenland, Alaska, Northern Canada and Russia is *Polar Peoples: Self-determination and Development*, edited by Minority Rights Group, Minority Rights Publications, London, 1994.

¹⁵⁴ Jull, P., *An Aboriginal Northern Territory: Creating Canada's Nunavut*, Discussion Paper No. 9, Australian National University North Australia Research Unit, Darwin, September 1992.

Possibilities for Australian constitutional change

In 1901 the colonies of Australia joined to create a new country. In 2001 the Indigenous peoples may be able to join the Federation, too. There is a wide range of specific possibilities for change to the national Constitution which Australian Indigenous peoples may consider.

It is not always easy for people to visualise what constitutional reform would mean. An excellent publication by Father Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia*,¹⁵⁵ is recommended as an introduction.

The following are broad-ranging examples of possible constitutional change. I want to make it abundantly clear that I am not advocating the inclusion of all these options. I list them solely to illustrate the potential range of constitutional change that could be considered:

1. *educate* the public and governments and *improve race relations* by stating that Indigenous peoples are unique, with unique status and history quite unlike more recent immigrants;
2. *commit Commonwealth, State and Territory Governments to equalise public services and facilities* within their borders to remove regional or racial disparities;
3. *provide a legal and/or moral framework* for public policy towards Indigenous peoples, perhaps through a preamble to an Indigenous peoples section of the Constitution, with Indigenous peoples and governments to negotiate the detailed contents of the section later;
4. *guarantee legal protection* for treaties, land claims settlements or other agreements negotiated between Indigenous peoples and governments;
5. *specify certain rights* of Indigenous peoples;
6. *alter the system of political representation* to better reflect the diversity of community perspectives and the make up of the Australian population (for example, through multiple seats in one electorate);
7. *create Indigenous Parliaments* for Torres Strait Islanders and Aboriginal peoples through which, as in Norway, we can decide matters, govern areas or advise the national Parliament;
8. *provide for customary law courts* and dispute resolution;
9. *establish responsibility of different levels of government*, including Indigenous governing bodies, for services or other matters pertaining to Indigenous peoples after a full review of the adequacy and relevance of current spending;
10. *establish or recognise Indigenous self-government* in principle or in specific geographic areas (like Torres Strait or the Tiwi islands or the Pitjantjatjara lands), or for certain categories of subjects such as sacred sites;
11. *establish Torres Strait Island and Aboriginal grants commissions* to fund Indigenous self-government;

¹⁵⁵ This 1994 publication is available free of charge from its publisher, the Constitutional Centenary Foundation in Melbourne.

12. *establish ecologically sustainable development planning commissions* to develop integrated self-government, economic and environmental plans and structures for lands and seas under Indigenous management;
13. *establish national Indigenous land rights and sea rights* or processes to define such rights nationally;
14. *commit governments to constitutional conferences or other processes* with Indigenous peoples to discuss specified subjects like land and marine rights, self-government, funding and delivery of services (as did Section 37 of the Canadian *Constitution Act* 1982, and further formal political accords); or,
15. *add one or more Indigenous treaty or statement to the Constitution* as an appendix or schedule, together with provisions for interpretation and application.

Of course, many proposals among those listed above could be enshrined in special legislation by the Australian Parliament, or achieved in a variety of other ways. No less important will be ensuring that well-intended amendments proposed by others do not have unforeseen negative effects.

Strategic Options for Indigenous constitutional changes

Constitutional reform involving Indigenous peoples can take three main forms:

1. the amendment of the national Constitution which came into force in 1901 (or creation of a parallel document or process of reconciliation);
2. change in the general structures of Australian political life of which the national Constitution remains the summit, but which can include re-organisation of responsibilities and relations among governments whether by constitutional amendment, other laws, or other politico-administrative arrangements; and,
3. the creation of local ‘constitutions’ providing for the powers and procedures whereby Indigenous communities or regions manage their own affairs to a greater or lesser degree.

These three processes are hardly mutually exclusive. In Canada during the 1980s they pursued all three simultaneously.

In the first case, a major national debate would inevitably occur. Many of the most controversial items in that debate will apply to *any* movement for constitutional rights—rights of the disabled, of women, of prisoners, of refugees and migrants, of ethnic minorities, etc. Constitutional change has been difficult to achieve in the past but one can well imagine a contemporary ‘first world’ country with a very well informed and aroused public supporting and respecting these rights. The failure of the 1988 Canadian Constitutional Referendum questions was hardly a good example as the *Yes* position was too lightly defended during the campaign, left to ever wilder attack and misrepresentation, and opposed by the Opposition in Parliament.¹⁵⁶

Whether or not a national process takes place or succeeds, the second and third types of constitutional reform listed above may bear more fruit. Reforms here will be less dependent on a general spirit of constitutional reform and more on current needs.

¹⁵⁶ A useful Canadian Government study foresaw just such outcomes: *Understanding referenda: six histories*, Federal-Provincial Relations Office and Canadian Unity Information Office, Ottawa, 1978.

For this reason, I would encourage the Commonwealth Government to guard against taking an exclusive view of constitutional reform and focussing on nothing but the document itself. We should also explore those constitutional questions which may not directly or immediately involve the national constitution but which are no less fundamental to the constitutional place of Indigenous peoples in Australia. In these I would include the future of Northern Territory Aboriginal peoples and lands, particularly with respect to the Northern Territory Government's campaign for statehood; the future of the Torres Strait; service delivery issues between Commonwealth, State and Territory and local governments; recognition and management of Indigenous marine rights; and, provision for comprehensive or multi-functional regional agreements.

If Indigenous peoples are to feel included in Australia's 2001 centenary, we must have some structures or processes established to ease specific reforms. Torres Strait Islanders have been seeking a commitment to such a process for their region.

In establishing a process whereby Indigenous Australians can participate in constitutional reform, the Commonwealth could look at the Canadian example where the federal government provided specific funds for Indigenous organisations to participate in the debate, or to the United Nations Working Group on Indigenous Populations and the 'Voluntary Fund for Indigenous Populations'.

The background to the UN Working Group in fact mirrors the very situation we are talking about. At its first meeting in 1982 the Working Group adopted rules of procedure which permitted any interested party, including Indigenous peoples, to attend its meetings and put submissions. In addition, in recognition of the financial impediments, which would prevent many Indigenous groups from attending meetings, and the desirability of broad representation, in 1985 the UN General-Assembly created a 'Voluntary Fund for Indigenous Populations' which Indigenous peoples and organisations can access to send representatives to the meetings of the Working Group.

In the national political culture of the majority, constitutional issues are seen as a small specialty of law assigned to a few experts. However, for Indigenous peoples, what is 'constitutional' is our whole relationship with the society which has dispossessed or disadvantaged us. Furthermore, within the Indigenous community constitutional work may become a process of general awakening and one which is not easily wrapped up in a meeting or two. We must understand that these matters are fundamental processes and they take time. Government commitment to a single event or a moment in time is utterly futile. What we need is a process which has time enough and room enough to work through our differences.

Recommendations

1. That recognition of the unique place of Indigenous peoples in contemporary Australia be a fundamental principle in any national constitutional review and revision, and that this include recognising the right of Indigenous peoples to represent ourselves in negotiation of constitutional change with governments.
2. That the Commonwealth Government, in consultation with the Council for Aboriginal Reconciliation, ATSIC, the Constitutional Centenary Foundation and the Aboriginal and Torres Strait Islander Social Justice Commissioner establish structures and processes of constitutional reform and national renewal which are building towards the new millennium and the centenary of the Constitution in 2001.
3. That Indigenous constitutional structures and processes provide for access by all sections of the Indigenous community through consultations and public forums to the development of positions of negotiations with governments. This will require sufficient resources for the preparation of

information and consultation materials, as well as the equitable funding of forums or groups for the expression of diverse views.

4. That structures and processes for Indigenous constitutional recognition and reform be directed not only to achieving specific rights but to continuing processes for the renewal of relations between Indigenous and non-Indigenous Australians.

Regional Agreements

The term *regional agreement* is increasingly used in Australia, although seemingly with much confusion and controversy. It denotes the concept of equitable and direct negotiations between Indigenous peoples, governments and other stakeholders in a region to recognise the rights of Indigenous peoples and to protect them under a contemporary legal system. A regional agreement should not take any pre-ordained form. Rather, it is a means for Indigenous peoples to define our own solutions and obtain legal, administrative and political recognition for such definitions. A working definition might be:

A regional agreement is a way to organise policies, politics, administration, and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).

Australian Indigenous peoples have extensive experience in negotiating in a range of contexts, for example: resource agreements, such as the agreement between the Jawoyn people and the Zappopan mining company in the Northern Territory; specific land claims; the joint management of national parks and land and resource management, for example, catchment management by Kowanyana community in Cape York Peninsula; and, management of service delivery. What we require is the active support of the Commonwealth Government so that Indigenous organisations and communities can develop more comprehensive and equitable regional strategies which extend beyond these ad hoc arrangements.

Why regional agreements?

A basic flaw in much past policy regarding Indigenous peoples is that it has been based on the idea that bureaucracies can solve Indigenous peoples' problems as if they were merely individual personal needs. It has failed to recognise that the social and economic problems which beset Indigenous peoples cannot be solved outside the context of Indigenous cultural identity, and specifically local or regional identity.

The non-Indigenous majority is rarely aware of Indigenous realities. Nor is the non-Indigenous majority aware that for anyone from a minority it is not merely 'culture' as a distinct sphere that is alien. It is culture as it is embodied in all aspects of social, economic, civil and political life. For us, there is no doubt culture and identity are learned and practiced in a social and geographic context. It is in the family or town or homeland that we share laws, customs, moral values and language. Each has stories of its origins and a sense of its own history. Reinforcing and strengthening this identity must be the first step to solving any other problems. It cannot be avoided.

Contemporary regional agreements offer an approach whereby Indigenous peoples are re-grouping, or grouping together in new units, to solve their own problems in the context of this cultural identity. They are an old concept for solving new problems. A regional agreement creates or renews a social and cultural context in which Indigenous society can live, build and flourish. Sometimes they are traditional historical associations of peoples, such as the Torres Strait or the Kimberley, even if they are now looking to new forms of organisation and new functions to help them deal with new realities and especially with other public authorities. Sometimes they are dispersed and dispossessed people in

a large city who are finding in each other a society for the exchange and enrichment of cultural values while working together to solve particular social ills. Or contemporary regional agreements may be something between the two, like the Tangentyere Council which provides local government services and a wide range of culturally important functions to the town camps of several peoples grouped around Alice Springs. In each case they are evolving or negotiating new forms of organisation to deal with contemporary challenges of self-determination, social well-being, environmental protection, economic development, and cultural survival.

Approached from a 'rights-based' perspective, regional agreements offer a vehicle to transform vague rights into a clear form of organisation and law so Indigenous peoples achieve some real benefit from them. A person may have the right to food, but unless that person can hunt or buy or otherwise obtain food, an abstract right will not save them from starvation. Even where the courts recognise native title rights, as in Australia since *Mabo*, making such rights mean anything in practice, without further expensive court actions or without new laws and political and administrative structures, is not possible.

Thinking property title on its own is sufficient to allow Indigenous peoples to determine our economic and social development is unrealistic. In reality, the recognition of property title does not even protect our land and sea rights. How can we conduct proper environmental management and protect our environmental rights without control over the forces that govern, and can otherwise undermine, the natural resource base. Economic and social development and recognition of our rights can only be achieved where Indigenous peoples are involved in decision-making in all forums which impact on the region.

Regional agreements can provide a legal framework and procedures for linking Indigenous interests in a region with social justice, economic development and environmental protection by establishing an ongoing policy framework whereby Indigenous and non-Indigenous interests can co-operate and coexist through bicultural institutions for management and planning.

Drawing on international experience

The development of a uniquely Australian concept of regional agreements will benefit from analysis of case histories overseas. This is modern Indigenous policy-making at its best—checking the experience of others for its strengths and weaknesses, analysing why and how it works, and then building the knowledge into our own designs to strengthen them.

There are now half a dozen major regional agreements across Northern Canada, and many more under negotiation. Up to 75 percent of the country may soon be under some form of joint Indigenous-government management. Some are regional groupings of small communities which work together better than on their own, while others are large regions of one people such as Nunavut.

The regional treaty-making process underway in British Columbia is important for Australians. British Columbia is a resource-rich region with social and political history similar to that of Queensland and Western Australia. After defeats in landmark court cases on native title, the new provincial government is apparently entering into negotiations in a cooperative spirit with Indian leaders and the federal government:

The Province of British Columbia is committed to negotiating modern-day treaties with [the Indian] First Nations treaties which clarify aboriginal rights to land and resources and

*address issues like self-government and the social, economic and environmental concerns of all parties.*¹⁵⁷

The recent experience of Indigenous peoples with respect to regional agreements illustrates the general point that different solutions work for different peoples.

In every overseas case an active role by a national government has been required to prevent Indigenous dispossession and to break the stalemate brought by regional, territorial, state, or provincial authorities.

The establishment of appropriate and just negotiating processes, with adequate resources and expertise available to the Indigenous side, is an obvious lesson. However, the most fundamental issue is that governments recognise Indigenous peoples as distinct and equal communities with whom they engage in political negotiation, not groups of disadvantaged persons who are patronised by welfare-type administration. The terrible bureaucratic instinct for control must be modified by the politicians' higher aspiration to negotiate with equals.

Another important lesson from both overseas and local agreements is that the regional agreements should provide the basis for ongoing negotiation of management arrangements, rather than being locked into an unworkable rigid framework.

It appears the following factors have facilitated effective negotiation from an Indigenous perspective:

Willingness: negotiation involves compromise. Negotiations must be *bona fide*, with the participating parties genuinely committed to settling outstanding grievances and claims.

Timing: comprehensive regional agreements cannot be negotiated quickly. They must allow for Indigenous timeframes. The negotiating parties must be patient and adopt a long-term policy focus.

Communication: the cultural differences between Indigenous and non-Indigenous society can make it very difficult for the parties to understand each others' values and needs. Consequently, negotiation must be buttressed by a program of education and information to bridge different negotiating positions.

Information and research: disagreements over use of Indigenous peoples' land are more likely to be resolved where there is a good information base on the issues in contention. Environmental, social and economic studies can help to identify the major issues and allow participants to evaluate the merits of the various options under negotiation.

Bargaining power: to ensure a fair settlement, Indigenous peoples must be able to speak from a position of strength. Indigenous peoples need access to expert advice and financial resources to enhance their capacity to negotiate fair settlements.

Unity: parties to negotiations must be legitimate and effective representatives of their constituencies. Indigenous representation must always be determined by Indigenous communities and their organisations. Negotiations are frustrated where a party is factionalised and does not speak with one voice, and there will be difficulties in implementing any final settlement where a sub-group feels that it was marginalised in negotiations.

¹⁵⁷ *Treaty Negotiations in BC*, Information hand-out from Ministry of Aboriginal Affairs, Victoria, BC, 1994.

Geopolitical realities: claimants are less likely to receive a favourable settlement where provincial (state) governments are involved or there are competing non-Indigenous developmental interests at stake.

Experience with settlement and development: the degree of existing poverty and despair among the claimants and the relative urgency of development pressures will shape what compromises are necessary or acceptable to them.

Knowledge of existing models and precedents: the demonstration effect of other agreements can influence negotiating positions.

Public attitudes: public support for claims, either locally or nationally, can lead to significant strategic alliances.

Regional agreements in Australia

Regional agreements in Australia will have their own character and, if they are to grow out of community needs, will necessarily take diverse forms.

In the Canadian experience, the trigger for regional agreements has been the existence of native title. Similarly, in Australia, a native title claim or the formal recognition of the existence of native title, may act as triggers for negotiation. In fact regional agreements are provided for in the *Native Title Act 1993* (Cth). Native title holders may, under an agreement with Commonwealth, State or Territory Governments, surrender their native title rights and interests in relation to land [s21(12)(a)], or authorise any future act that will affect their native title [s21(1)(b)]. Such agreements may be made on a regional or local basis [s21(4)].

A trigger for regional agreements may therefore be the legal and political uncertainty remaining as to whether native title exists in a given area of land or sea, or how its existence will effect other stakeholders. The effectiveness of the National Native Title Tribunal remains to be seen. Not all native title issues have been resolved by the *Mabo* case and the *Native Title Act*. Resource and tourist developments, for example, cannot proceed without an efficient legal approval system. Costly and time consuming challenges could be avoided by the processes established under regional agreements.

However, there does not appear to be any good reason why Australian regional agreements should be based only on settling native title claims. There are a number of triggers that should be the basis for agreements. For example, Indigenous peoples and communities throughout Australia could use regional agreements to consolidate existing programs and resources. The bargaining trigger would be efficiency, better Aboriginal economy and skills.

Another trigger for regional agreements in relation to management of land, sea, resources and conservation areas is that Indigenous peoples who live in these areas bring unique skills and knowledge. The success of land-care groups illustrates the effectiveness of local involvement and control. Australia could be a world leader in this process.

What is to be negotiated will depend on the specific needs and choices of Indigenous peoples and communities in a region. Regional agreements could include any, or all, of the following topics:

Settlement of Native Title Claims. Individual claims under the *Native Title Act* can be negotiated through the processes under the Act. However, this could be costly and time-consuming for Aboriginal and Torres Strait Islander claimants. There will be ‘winners’ and ‘losers’ and there may

be arguments between Aboriginal people over who belongs to what land. Once native title is determined, the native title holders could negotiate regional agreements under Section 21(1)(a) (relinquishing native title), or Section 21(1)(b) (not relinquishing native title) of the *Native Title Act*.

Alternatively, regional agreements could result in specific legislation which overrides inconsistent State and Commonwealth laws. Native title claimants could seek to negotiate regional settlement of claims to land and sea outside the *Native Title Act*. In Canada, the ‘exchange’ of native title (for fee simple title and other legal rights) through federal legislation is backed up by constitutional guarantees. This guarantee is not essential for a settlement but it is preferable, given the significance of native title to Aboriginal peoples. The more recent Canadian agreements did not require a surrender of all native title rights. Specific legislation could provide that Native Title rights continue for land which is successfully claimed by Aboriginal peoples and granted in fee simple.

I believe the giving up of rights to country in negotiations is too high a price to pay. I am deeply troubled by the inclusion of a ground in the *Native Title Act* which gives Indigenous peoples the capacity to relinquish native title.¹⁵⁸ An option Indigenous peoples will all too easily be pushed into in the absence of other bargaining chips. People should never have to give up native title to enjoy what are their basic rights.

Extending Aboriginal Control Over Land and Sea Use and Resource Decisions. Regional Agreements can be negotiated to provide for Aboriginal control of land-use and development on land that they own. Resource royalty may also be granted for development on this land. This can provide a financial base for further Indigenous economic initiatives in a region. There is a precedent for this under the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth). Policies and decisions relating to areas and resources outside the ownership and control of Indigenous peoples, however, may affect their resources and land and sea rights. Regional agreements can, therefore, create new institutions and processes that give Indigenous peoples a legal and practical right to participate in planning, development control, environmental and social impact assessment, resource allocation policies and decisions for an area considerably larger than that which is owned. This provides the opportunity for Aboriginal peoples, who cannot establish native title, to regain some control along with native title holders.

Management of Land, Sea, Natural Resources and Wildlife. Regional agreements can be negotiated to provide for Aboriginal control or co-management over their lands and the wider region. Regional agreements extend co-management from conservation (e.g. joint management of national parks) to the management of land, resources and wildlife which is to be sustainably utilised by Indigenous and non-Indigenous people.

Pastoral Properties—Settling Use and Access Rights of Aboriginal Peoples. Regional agreements can be negotiated to resolve legal disputes over the co-existence of native title rights with pastoral leases. Pastoralists and the Cape York Land Council have recently issued statements that they believe a negotiated settlement of these issues is achievable for Cape York and beneficial to all parties.

National Parks, Conservation and World Heritage Issues. Regional agreements ensuring Aboriginal control and co-management of national parks, World Heritage areas and environmental management processes is a recognition of Indigenous rights and of benefit to all Australians.

Participation in Resource Development and other Economic Initiatives. Regional agreements can provide the framework for Indigenous enterprises and joint ventures.

¹⁵⁸ See, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report*, AGPS, April 1995.

Provision of Services to Indigenous Peoples by Indigenous Organisations. Existing funding and service delivery arrangements do not meet the basic needs of Aboriginal peoples who are often denied the normal citizenship rights of other Australians to services such as water, housing, health and education. Direct funding to Aboriginal organisations to provide these services could be negotiated through regional agreements.

Strengthening Aboriginal Local Government. Regional agreements provide an important opportunity to negotiate new powers and resources for Aboriginal local government, policing and community justice.

Whatever its form, what is crucial is that the process be driven from the local level through regional organisations and involve a high level of Indigenous participation outside normal bureaucratic and political channels.

The role of the Commonwealth Government in facilitating regional agreements

At this point, we need to establish what rights and political strategies could instigate negotiation between Indigenous peoples and governments in Australia. While the process must be initiated by Indigenous peoples ourselves, the Commonwealth Government now has a crucial role in facilitating such processes and can undertake specific action. Action in terms of policy, financial arrangements and, in some cases, specific legislation.

Regional agreements which are settlements of native title and other legal claims of Indigenous peoples should be enacted through Commonwealth legislation. Regional agreements could also be enacted through similar State or Territory legislation. Constitutional amendment may, however, be appropriate, given that both Commonwealth and State/Territory legislation can be overridden by subsequent legislation.

In the case of agreements involving only a smaller range of areas, for example, specific service provision by Indigenous organisations, they may be implemented through contracts. Indigenous communities and organisations could contract with Commonwealth, State and Territory governments and any other affected parties.

Finally, in order to constitute Indigenous regional bodies so that they can attract funding and undertake the responsibilities for negotiating and implementing agreements, it may be necessary to amend existing legislation or enact new legislation, such as local government legislation, under which such bodies can incorporate.

The benefits of regional agreements are great and they are practically achievable in Australia:

- Regional agreements reflect the needs and identity of Indigenous peoples as whole communities and provide better means for focussing and coordinating efforts to meet needs and ensure responsibility of leaders to the people they represent. Regional agreements come closer than other approaches to recognising and restoring Indigenous peoples as political entities in the modern world.
- They give Indigenous peoples the opportunity to achieve a comprehensive approach to and responsibility for solving socio-economic problems, which governments have tried and expensively failed to solve with piecemeal programs and 'solutions' offered by non-Indigenous experts.

- They substantially remove Indigenous/regional grievances that otherwise provide fuel for political dissidence and conflict.
- Regional agreements can extend Indigenous control over lands and resources that they do not ‘own’ but have substantial interest in, and can provide an enduring economic base which goes beyond welfare payments.
- They provide better management and more fine-grained knowledge of territory and environment through Indigenous control or cooperative management (or co-management) by Indigenous peoples and governments.
- Although regional agreements may be a substitute for a more firmly entrenched arrangement such as the status of an Australian State like Queensland, they are more easily improved to meet changing needs and there is no reason why their status cannot be upgraded or constitutionally entrenched at some later time.

English-speaking countries find it much easier in their constitutions to recognise already proven arrangements than to promise or create unproven new ones.

Ultimately, a regional agreement can be anything which its authors wish it to be. After its application in a diverse range of contexts in other countries it remains a most promising policy concept. They can be negotiated in Australia on the basis of native title, the needs of Indigenous peoples and existing legislative provisions without constitutional amendment. Constitutional amendment is not precluded by regional agreements and can be pursued by Indigenous peoples as an important future priority.

Recommendations

1. That the Australian Government endorses the option of regional agreements, where initiated by Australian Indigenous peoples, as a process for their greater recognition and empowerment through recognising land ownership and citizenship rights. Indigenous management, rights to lands, resources, seas and wildlife should be institutionally recognised in regional agreements—even where ‘ownership’ is not established.
2. That extinguishment of native title should **not** be a pre-requisite for government negotiation and approval of a regional agreement. Regional agreements should be negotiated under section 21 of the *Native Title Act* or independently of that Act, at the option of the Indigenous regional negotiators.
3. That the Australian Government funds trial projects in at least four regions—in northern and southern Australia—where communities resolve to pursue negotiated settlements on a regional basis.
4. That the Australian Government funds a ‘Research and Resource Centre for Negotiating Indigenous Claims’ which monitors the trial projects and provides resource and research assistance to Australian Indigenous communities and organisations. This should include facilitation and training in negotiation and conflict resolution, encompassing conflict resolution with regions and organisations, cross-cultural conflicts and inter-governmental conflict.
5. That the Australian Government report on political, financial and legal measures which can be used to facilitate State, Territory and local government involvement in regional agreements.

6. That Commonwealth legislation be amended or enacted to allow and promote regional Indigenous corporations with the following functions:
 - represent regional organisations and communities in negotiating regional agreements;
 - raise finances and hold government grants;
 - hold communal title to land, assets and resources;
 - hold non-communal title to land, assets and resources;
 - engage in enterprises;
 - participate in planning, environmental and resource management processes and land claims;
 - participate in sustainable development strategies;
 - provide regional services; and,
 - engage in negotiating and providing self-government functions.
7. That regional agreements must proceed on the basis that negotiations do not violate relevant international standards such as those articulated in the *Draft Declaration on the Rights of Indigenous Peoples*, *International Labour Organisation Convention 169* and the Biodiversity Convention and other human rights conventions. The Commonwealth Government should implement ‘bottom line’ conditions for negotiation based on such international standards.
8. That, following trial projects, Indigenous organisations be funded for the negotiation of Agreements-in-Principle, and provided with interest free loans for the finalisation of agreements.
9. That the Commonwealth Government and Aboriginal organisations investigate the expedited regional agreement processes being developed in British Columbia, Canada.
10. That regional agreements be recognised through Commonwealth legislation. Constitutional reform proposals should provide constitutional recognition subject to clearly defined amendment processes.
11. That the Commonwealth—and any involved State and Territory Governments—enter into implementation contracts, timetables and resource allocation to implement regional agreements.

Reform of the Funding of Citizenship Services for Indigenous Peoples

I believe that we need to focus on improved ways to fund the provision of citizenship services to Aboriginal and Torres Strait Islander peoples. These are services to which all citizens have equal rights. The structural reform proposed would ensure that the required increased capital expenditure is delivered in ways which enhance the capacity of Indigenous peoples to exercise their right to self-determination. It would also have the very practical result of ensuring Commonwealth-sourced funds end up providing the services for which they are intended. It will not be a simple exercise to transform funding arrangements in such a fundamental way. It will take time and it will necessarily require advanced negotiations along the route. What is proposed here—a wide-ranging review by the Commonwealth Grants Commission—is but a first step to ensuring a solid foundation for reform.

Citizenship rights

All Australian citizens can expect a relatively high standard of health care, educational opportunities, nutrition levels, appropriate housing, employment opportunities, and access to high quality community infrastructure including good roads, reliable and efficient public transportation, electricity and water. For the majority of Australians, governments have been able to provide a wide range, and relatively high quality, of such services and infrastructure. More recently there has been an increasing

involvement of the private sector in the provision of services and infrastructure construction, previously the primary domain of governments.

The infrastructure and services existing today in many parts of Australia, including the capital cities, was put in place over a considerable period of time. Governments committed large resources over many decades to construct roads, railway networks and airports, educational institutions, power and water delivery systems, health care facilities and communication systems. Public funding has supported the ongoing costs of the delivery of services to Australian citizens.

Governments have recognised that matters such as poor quality water or poor quality housing and overcrowding are public health issues that require some form of government involvement. The eradication of many diseases that were quite common a century ago did not happen by accident. The increased longevity of most Australians has come about as a result of increasing living standards, better health care, improved diets, and public works programmes designed to improve living conditions.

The Commonwealth, State/Territory and local governments have all played their part in improving the provision of citizenship services to Australians. It did not happen quickly and it required the commitment of financial and human resources on a scale that was beyond the resources of each individual or even many groups of individuals. The scale of the problems often required governments, of different political persuasions and with different responsibilities, to co-operate.

At times, it was only the Commonwealth that could contemplate the commitments of expenditure that were necessary to meet the expectations of Australian citizens for improvements in their standard of living.

Indigenous peoples

Many Aboriginal and Torres Strait Islander peoples have not benefited in any substantive way from government efforts to improve basic community infrastructure and the delivery of citizenship services. Infrastructure and services that are taken for granted in the capital cities or regional centres simply do not yet exist in many of the areas where relatively large numbers of Aboriginal and Torres Strait Islander people live.

Aboriginal and Torres Strait Islander people are experiencing a range of social and economic difficulties that cannot wait for two or three more decades for governments to act. The demographic characteristics¹⁵⁹ of the Aboriginal and Torres Strait Islander population will ensure the problems will worsen considerably in the next few decades unless something is done now. If the housing and community infrastructure situation in many Indigenous communities is appalling now, what will it be like when there are twice as many people living in these communities in only a few years time?

Some of the problems with the existing arrangements

Many Aboriginal and Torres Strait Islander people have expressed considerable concern about the role of State, Territory and local governments in the delivery of a range of government services and programs. Current funding arrangements for the delivery of programs and services by these governments:

- are inadequate and inequitable;
- are far too complex;

¹⁵⁹ See, 'Age Structures of the Aboriginal and total Australian population, 1991', Chapter 1, p. 14.

- impose unnecessary administrative burdens on communities and organisations; and, most importantly,
- restrict the opportunities for greater control at the local level.

My second report¹⁶⁰ provided a lengthy discussion of these problems, particularly in relation to health matters. Many of these concerns were also highlighted by the Royal Commission Into Aboriginal Deaths in Custody. In Chapter 27, *'The Path to Self-Determination'*,¹⁶¹ Commissioner Johnston was also critical of some of the mainstreaming policies of the State and Territory Governments and emphasised the important role of Aboriginal and Torres Strait Islander service delivery organisations.

The Royal Commission referred to *"the confusing and complex funding arrangements which already bedevil Aboriginal communities"*, and noted there *"is a very great need for governments to get together to examine the whole complex picture of funding in the Aboriginal affairs area"*.

Two recommendations were made with respect to these issues:

Recommendation 190:

That the Commonwealth Government, in conjunction with the State and Territory Governments, develop proposals for implementing a system of block grant funding of Aboriginal communities and funding of Aboriginal organisations and also implement a system whereby Aboriginal communities and organisations are provided with a minimal level of funding on a triennial basis.

Recommendation 191:

*That the Commonwealth Government, in conjunction with the State and Territory Governments, develop a means by which all sources of funds provided for or identified as being available to Aboriginal communities or organisations wherever possible be allocated through a single source with one set of audit and financial requirements but with the maximum devolution of power to the communities and organisations to determine the priorities for the allocation of such funds.*¹⁶²

While both recommendations were supported by the Commonwealth, State and Territory Governments, in practice very little has actually been done to simplify the funding arrangements for communities and organisations. In many cases communities and organisations are being inadequately funded, often through ATSIC's Community Development Employment Projects scheme, to provide services that would normally be the responsibility of another level of government.

The 'National Commitment' process

In its initial response to Recommendation 191, the Commonwealth noted that because different levels of government have different responsibilities, it is inevitable that multiple sources of funding will continue to exist. It is highly unlikely all of the funding for the provision of services to Aboriginal and Torres Strait Islander people will come from one single level of government or one government agency. At times there is an expectation on the part of some governments that ATSIC will take on all of this responsibility. But as ATSIC has itself pointed out on numerous occasions, it is not presently funded to take on the responsibilities of other levels of government. In asserting this,

¹⁶⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994*, AGPS.

¹⁶¹ Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS.

¹⁶² *Ibid.*, Vol. 4., p. 121.

ATSIC has the support of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs.¹⁶³

ATSIC has worked to ensure that all levels of government accept that they have a responsibility for the provision of services to Aboriginal and Torres Strait Islander people. At the Council of Australian Governments meeting in December 1992, all governments agreed to the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders*.

The National Commitment provides for the negotiation of formal agreements which outline the roles and responsibilities of each level of government in the provision of services to Indigenous Australians. It is based on the position that Aboriginal and Torres Strait Islander affairs is a *shared responsibility* of each level of government. ATSIC has been attempting for some time to finalise the negotiation of bilateral agreements with a number of State and Territory Governments. It is telling that more than two years later, and despite recognition of the urgency of the need, no agreements have been formalised, nor are close to being formalised.

Even if some bilateral agreements are formalised, it is still questionable whether they will represent a fundamental improvement in the existing financial arrangements and the nature of service delivery. In particular, it is not clear that the bilateral agreements will result in:

- more simplified funding arrangements at the community or organisation level;
- greater Aboriginal and Torres Strait Islander control over all aspects of service delivery at the community or organisation level (the fact that there is no local input into the negotiations works against this); and,
- any significant additional financial commitments by the State, Territory and local governments to the provision of services for Aboriginal and Torres Strait Islander people.

To the extent that there will be provision for greater Aboriginal and Torres Strait Islander control over the delivery of citizenship services in the bilateral agreements, it is likely only to be at ATSIC Commissioner level with some policy input from the ATSIC Regional Councils. To date there is little evidence that government agencies take much notice of the regional plans already prepared by Regional Councils, and ATSIC itself has identified this as a significant weakness of the regional planning processes.

The exercise in shared responsibility by way of the *National Commitment* shows all the signs of failure. There is no evidence that State, Territory and local governments are willing—now or in the future—to actually accept and deliver on their claimed commitment.

The Commonwealth Government has the ultimate national and international responsibility for ensuring citizenship services are available to its Indigenous citizens. The Commonwealth Government is the only government with the power and resources to ensure such a result. It must now seize the initiative and take up its responsibilities.

¹⁶³ For example, see House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Review of Auditor-General's Audit Report No. 36, 1992-93: Aboriginal and Torres Strait Islander Commission: Community Infrastructure and Audit Report No. 1, 1993-94: Volume 3, Sections 1.13-1.39, Report on Ministerial Portfolios, Budget Sitting 1993: Aboriginal and Torres Strait Islander Commission: Community Development Employment Projects and Other Matters and Audit Report No. 27, 1993-94, Sections 16.19-16.24, Report on Ministerial Portfolios, Autumn Sittings 1994, Aboriginal and Torres Strait Islander Commission: Community Development Employment Projects, AGPS, 1994, p. 3.*

The need to move away from a grants based system

Many Aboriginal and Torres Strait Islander organisations currently receive funding from ATSIC and a range of other government bodies based on submissions prepared by these Indigenous organisations. Many of these organisations receive a wide range of grants, often for only small amounts of money, and with no certainty that the funding will continue in future years. Many organisations need at least one staff member, often more, whose only job is to prepare funding submissions, negotiate the funding arrangements and acquit the grants. Many of these organisations have taken on de facto responsibility for a relatively wide range of citizenship services. Most of these organisations are required to operate with a funding horizon of no longer than one year, making it impossible for them to plan.

As the Royal Commission into Aboriginal Deaths in Custody found, there is a need to move from this grants based approach. An alternative method of funding Aboriginal service organisations could be something like that which exists for State, Territory and local governments in their relations with the Commonwealth Government. The Commonwealth Grants Commission is well placed to provide advice on structuring an alternative system of funding. I propose that it be requested to undertake such an inquiry.

Direct funding and the Commonwealth Grants Commission

The Commonwealth Grants Commission makes recommendations to the Commonwealth Government regarding the distribution of untied general revenue assistance between the States and Territories. As part of its 'fiscal equalisation' operating principle, the Grants Commission take account of the special needs or disadvantages faced by Aboriginal and Torres Strait Islander peoples. However, the expenditure of these general purpose funds by the State and Territory governments does not necessarily meet the needs or reduce the disadvantages faced by Aboriginal and Torres Strait Islander peoples.

Local government is assessed in a similar way by the Local Government Grants Commissions in each State and the Northern Territory. In determining their funding recommendations for the distribution of funds between local governing bodies in each State and the Northern Territory, some of the Local Government Grants Commissions take account of certain characteristics of the Aboriginal and Torres Strait Islander population in each area.

While the Commonwealth Grants Commission's primary role is to assess a significant part of the funding requirements of the State and Territory governments, at certain times it has been requested by the Commonwealth to explore other intergovernmental funding arrangements. For example, it has examined and made recommendations with respect to:

- local government (*Report on the Interstate Distribution of General Purpose Grants for Local Government 1991*); and,
- the Cocos (Keeling) Islands (the most recent review resulted in the publication of the *Third Report on Cocos (Keeling) Islands Inquiry 1993*). Reviews were published in 1986 and 1989.

In relation to the Cocos (Keeling) Islands, the terms of reference of the first inquiry in 1986 were to identify and report on the principles, methodology and procedures for a review to be undertaken in 1989 of (i) the relationship to Australian levels of the services and standard of living enjoyed by the residents of the Cocos (Keeling) Islands; (ii) the measures then necessary to ensure that the services and standard of living meet Australian levels by 1994; and, noting that the Government has in mind

that the standard of a comparable community in another remote Australian location might be appropriate, report at an early date on a suitable standard, having regard to the Government's broad commitment to achieve, within ten years, the raising of services and standard of living to Australian levels.

If the Commonwealth Government can make a commitment to one group of Australian citizens living in a very remote area—in this case thousands of kilometres from the Australian mainland in the Indian Ocean—to significantly raise their living standards within ten years, why can it not do the same for its Indigenous citizens?

Proposals for a comprehensive review of the funding arrangements

The proposal for a Grants Commission review of funding arrangements in regard to Aboriginal communities and organisations is not new. During the Commonwealth Grants Commission's 1993 review of the relativities for the distribution of funds between the States and Territories, the Commission received submissions from a number of Aboriginal organisations. A number of Aboriginal people appeared before the Commission in Darwin in December 1992. The Commission summarised the proposals suggested by these people and the organisations as follows:

- the Commonwealth Grants Commission should recommend to the Commonwealth Government that fiscal equalisation be applied to Aboriginal communities, Aboriginal local governing bodies and other Aboriginal service organisations; and,
- the Commonwealth Grants Commission should establish an inquiry to investigate:
- how fiscal equalisation could be applied to Aboriginal communities, Aboriginal local governing bodies and Aboriginal service organisations;
- how a system of block funding could be introduced in the context of the current multiplicity of funding sources which involve different levels of government;
- how the relevant needs of communities could be assessed;
- the extent to which block funding should be extended to cover the range of services provided to communities;
- what should be done about funding for regionally provided services such as health, legal aid and resource agencies; and,
- what financial, administrative and accounting practices would need to be implemented as part of any move to block funding.¹⁶⁴

Essentially, the Aboriginal organisations in the Northern Territory were suggesting that the objective of Commonwealth funding for Aboriginal and Torres Strait Islander programs and services should be to provide Aboriginal and Torres Strait Islander organisations with the financial capacity to provide an equitable level of services to Aboriginal and Torres Strait Islander peoples rather than providing this financial capacity to the State and Territory governments. That is, the Commonwealth should apply the principle of fiscal equalisation in its funding relationships with Indigenous communities and organisations.

¹⁶⁴ Commonwealth Grants Commission, Report on General Revenue Grant Relativities, 1993.

The organisations that could be funded under such arrangements may be existing Indigenous organisations, or new organisations with the authority to provide services directly, or contract for the provision of services, on a regional basis.¹⁶⁵ The role of the existing ATSIC Regional Councils would also need to be determined.

These matters are factors of local and regional political dynamics and, as such, the ability of the Commonwealth to influence events is very limited. The most that can be said is that the Commonwealth should look to the issues of functionalism and flexibility as the prime criteria for organisations funded to deliver citizenship services.

It is possible that an alternative system of Commonwealth funding could encompass:

- the existing ATSIC and other Commonwealth agency funding; and,
- the funds that would have been channelled to the State, Territory and local governments for the provision of citizenship services to Aboriginal and Torres Strait Islander people.

Given the complexities of the present Commonwealth, State/Territory and local government financial relationships, and the differing circumstances of Aboriginal and Torres Strait Islander peoples, there is no one simple solution to the present complexities and funding inadequacies experienced by many Indigenous people. In some areas, Indigenous organisations are already responsible for the delivery of a range of citizenship services, to the extent that such services are provided at all.

In other areas, particularly the larger urban areas, the mainstream government agencies are responsible for service delivery. Any changes in the existing financial arrangements will need to take account of these differences. It can be anticipated that this review will propose arrangements which are regionally-based rather than uniformly national.

A review of the type suggested above would only be the first step towards the implementation of significant reforms to the Commonwealth funding relationship with Aboriginal and Torres Strait Islander communities and organisations.

It would be important for the review to encompass all payments to the States and Territories, not just the untied general revenue assistance normally assessed by the Commonwealth Grants Commission. It would need to examine existing local government funding arrangements. In determining the level of funding that would be necessary to ensure equitable access to citizenship services, funding for infrastructure would also need to be examined by the review.

In order for such a review to be undertaken, it would require a reference from the Minister for Administrative Services, and possibly an amendment to the Commonwealth Grants Commission's legislation.¹⁶⁶

The terms of reference to the Commonwealth Grants Commission, the nature of the inquiry and the timing, would need to be negotiated with relevant Aboriginal and Torres Strait Islander representatives.

¹⁶⁵ The issue of appropriate organisations is well-discussed in Anangu Pitjantjatjara, *Mayatja Manta Nyangaku Kutju: Local Government for Aboriginal Communities*, Pitjantjatjara Council, 1994.

¹⁶⁶ Commonwealth Grants Commission, *op. cit.*, Vol. 1, pp. 63-68.

Recommendations

1. That the Commonwealth Government affirm its commitment to establishing a direct fiscal relationship with Indigenous communities and organisations.
2. That the Commonwealth Government initiate:
 - A comprehensive study by the Commonwealth Grants Commission of the potential application of the fiscal equalisation principle among Indigenous communities in Australia. Such a study to be undertaken in a manner which allows for the outcomes to be broken down into both States/Territories and regions; and,
 - A specific reference to the Commonwealth Grants Commission to explore solutions to the enormous and inequitable capital infrastructure needs of Indigenous communities.

International Connections

The notion of 'human rights' is beginning to gain currency in Australia. We have yet, however, to establish a firm tradition of social policy grounded in human rights. It remains the case that for all Australians it is in international instruments that our human rights have been most clearly articulated.

The *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of All Forms of Racial Discrimination* form the most comprehensive statements of the basic citizenship rights which Indigenous peoples seek to enjoy along with all Australians. They have been widely ratified and are generally accepted in international law, and by the international community, as statements of the fundamental human rights to which all peoples are entitled.

The distinct rights of Indigenous peoples are rapidly gaining status in international law. They have been partially articulated in the *International Labour Organisation Convention 169*, and extensively articulated in the *Draft Declaration on the Rights of Indigenous Peoples*. While the *Draft Declaration* has not yet gained formal status, it is recognised as an international standard for the recognition of the integrated rights of Indigenous peoples. When it is approved by the United Nations, it will have the same status as the Universal Declaration of Human Rights. Both Aboriginal and Torres Strait Islander organisations and the Australian Government have made significant contributions to its development. Throughout the life of the United Nations Working Group on Indigenous Populations, where the *Draft Declaration* has been developed, the Australian Government has been consistently supportive of the principles it articulates.

We can confidently anticipate that in the future international law will require the recognition of Australian Indigenous claims to lands, seas, wildlife and resources. This can encompass ownership and/or management of lands, seas, wildlife and resources and intellectual and cultural property associated with them.

If the Commonwealth of Australia is to achieve its objective of social justice for Aboriginal and Torres Strait Islander peoples, it must acknowledge that Indigenous social justice does not end at the seashore around Australia. Aboriginal and Torres Strait Islander peoples belong to the international community of Indigenous peoples. We are entitled to enjoy the rights of Indigenous peoples now being articulated in international forums.

The benchmarks set by the international community in the form of international human rights instruments, together with policy reforms in countries that provide better recognition for Indigenous

rights, form the world's formal and informal standards for policy in relation to Indigenous peoples. Observing these benchmarks and practices is not simply a matter of ensuring that we fulfil our international obligations and avoid international criticism, it is also an effective means of improving our own policy approaches and making Australian policy 'best practice'.

International Indigenous work, in the form of standard-setting and networking, has been progressing for several years. Yet until recently Australia has not been as active as other 'first world' countries. Aboriginal and Torres Strait Islander peoples have undoubtedly been the main losers from this relative isolation, but governments too have lost the opportunity to gain valuable insights and examine other policy approaches. In saying this I acknowledge that Indigenous Australians have not always been sufficiently active in changing the situation. Indigenous individuals, communities, and organisations must also take the initiative to bring international experience and international standards home.

One pertinent example concerns the protection of intellectual and cultural property rights. As Aboriginal and Torres Strait Islander peoples struggle to find appropriate mechanisms to protect our knowledge about native plants in the face of pharmaceutical developments and the patenting of products, our Indigenous brothers and sisters confront the very same issue in South America, Africa, Asia and elsewhere. The United Nations Working Group on Indigenous Populations has commissioned a *Study on the Protection of the Intellectual and Cultural Property of Indigenous Peoples* which provides several examples of ways Indigenous peoples have found to protect their rights and to negotiate with non-Indigenous governments and companies to retain some control over the development of products based on their traditional knowledge, and to share in the profits derived.

Indigenous peoples throughout the world have contemporary grievances and all have suffered dispossession of territory, denigration of culture, marginalisation, assimilation, and social ills. In many countries the lives of Indigenous peoples are at risk from brutal governments and brutal colonisers. If we were to only dwell on the many problems remaining, we would be immobilised by despair. What we must do instead is build on positive measures which have begun to emerge in some countries. Nobody would suggest that any country has solved Indigenous problems, but at least there are examples of general policies, specific initiatives, or unforeseen outcomes which return self-worth and decision-making to peoples previously marginalised.

Plugging in – Indigenous peoples

International contact is perhaps the most under-used of the major resources of Indigenous peoples in the world today. It is also undervalued and, even when available, little used by officialdom. This double failure is a principal reason why Australia has had so much catching up to do in social attitudes and public policy in recent years.

Undoubtedly Australia's isolation from the rest of the first world, where these developments have been centred, has been a factor in our failure to participate more actively. Nonetheless, the world came to us in the early 1980s when the World Council of Indigenous Peoples held an assembly in Canberra. That single event generated much interest and many ongoing contacts.

The time has come for Australia to become a permanent member of the international Indigenous world. It is not good enough to remain passive when the health statistics of Australia's Indigenous peoples are appalling, while those of Indigenous peoples in other first world countries approach parity with national standards. We have everything to gain by sharing ideas and inspiration with Indigenous peoples abroad. The pressing priority is to gather inspiration, information, and precedents from overseas experience to help develop negotiating positions, options, and policy in Australia.

Plugging in – Australian policy-makers

International Indigenous networks are not only sharing their own problems. They are also, in effect, developing implicit world standards. Australia must be a part of that club. The larger question remains: How is Australia, as a nation, to plug into these overseas networks? I would suggest that the Commonwealth Government can initiate and support a number of processes to this end.

Parliamentary Committees One way to highlight this important subject for Australians would be to give the human rights sub-committee of the Joint Committee on Foreign Affairs, Defence and Trade the reference to explore it and report. In fact, with the increasing importance of human rights in Australian policy, Parliament should consider establishing a full parliamentary Human Rights Committee which could examine international Indigenous developments.

Until the international relations community in Australia is brought into the picture, Indigenous internationalism will remain marginal and ignored. It would be useful to draw on some Northern hemisphere practitioner-experts, as well, and to invite New Zealand involvement. The parliamentary committee could be asked to recommend a course of action to the Government, one which ensured full Indigenous participation and co-direction of future work.

An Indigenous international watch organisation There is no adequate body specifically charged with, or adequately resourced, to keep Australia in touch with overseas developments. The existence of 'international' units within government (such as exist in ATSIC or the Department of Foreign Affairs) is not sufficient. To be effective, and to maintain credibility amongst Indigenous Australians and overseas, Australian international Indigenous work must not only be independent, but must be seen to be independent.

What is needed is a body with the independence, mandate and resources to function as a genuine 'Australian Indigenous international watch organisation'. Its purposes would be to maintain overseas contacts, to regularly publish reports on Indigenous rights and conditions worldwide, to organise conferences in Australia and to assist Australian speakers to reach overseas events. My Office may be the appropriate body to take this on. However, to do so, it would have to receive official recognition as having this function, and be provided with an adequate level of resources specifically directed to its international activities. Alternatively, a specific international Indigenous watch organisation could be established with the functions I have outlined.

Research and documentation; an internationalist think tank Academic research has been the greatest source of information about international developments but has too often been obscure, timid, or late. What is needed is immediate material with practical political and public policy focus. This should be made widely available to Indigenous organisations, libraries and governments.

During the International Year of Indigenous People, one of the needs identified was more information about developments relating to Indigenous peoples in all countries. In fact, the General-Assembly of the United Nations recognised the need within the UN system to aggregate data specific to Indigenous peoples.¹⁶⁷ Accordingly, the development of an international research project is being proposed as a priority activity for the International Decade of the World's Indigenous People. This international recognition of the importance of conducting focussed research, and making such research available to the peoples and governments who need it, lends weight to the proposal that such a project be established in this country.

¹⁶⁷ General-Assembly resolution 48/133 of 21 December 1993.

There are some studies which need to be undertaken urgently and their results published. For instance, the concerns expressed by politicians of all parties for Aboriginal and Torres Strait Islander health and community conditions encourage us to look at Norway. Since World War II the Norwegian Government has brought all Northerners, including impoverished Sami settlements, a level of public services and personal conditions on its isolated and mountainous Arctic coast equal to the best in the world.

Another example concerns Indigenous coastal and sea matters. In the past two years Torres Strait Islander leaders have forged links with Canadian and Greenland Inuit, Norwegian Sami and Pacific Island nation leaders and found much common interest in marine and sea resource management issues. The *Torres Strait Marine Strategy* has attracted considerable interest in other countries.

The Australian Government and Non-Government Organisations have actively participated in international agreements on coastal peoples' needs, for example at the Rio Earth Summit, and there have been a host of Australian reports on coastal matters, without much practical effect to date. A pilot project in international Indigenous cooperation among marine peoples would be a very fruitful exercise.

Institutions like the Australian National University North Australia Research Unit which have developed valuable experience with international visitor programs, comparative work, and accessible publications in Indigenous policy and politics should be encouraged to enlarge and continue such work. Home rule structures for the Inuit island of Greenland, Canadian Indigenous negotiation of regional agreements and national constitutional proposals, American Indian tribal courts, and high-quality Scandinavian socio-economic outcomes in remote areas for Sami and non-Sami are significant precedents. Worldwide Indigenous policy is a market for optimism—one which deserves our attention. A priority list is needed of urgently required studies, and a project established for getting them done.

In the late 20th century, it is simply nonsensical for Australia not to be fully abreast of international developments in relation to human rights. It is astonishing, given that we take it as said, that we should have access to, if not be leaders in, whatever are the world's latest technological and market developments. Why then do we close our doors to the world on Indigenous policy developments?

While it is important to stress the positive aspects of international connections, Australian governments are not blind to their negative possibilities. International standards may well offer far more than 'the big stick', but by continuing to turn our back on international developments, we increase the likelihood that this is how they will be used. Australian governments should be fully aware that the world is watching their actions in relation to Indigenous peoples. The indulgence afforded by the world at the 1982 Commonwealth Games when it turned a blind eye to Indigenous protest will not be repeated at the 2000 Olympics. In the past fifteen years human rights, and in particular Indigenous rights have received unprecedented attention, and been subject to documentary, literary and public discussion, both official and unofficial throughout the world.

In addition, since Australia has ratified key international human rights instruments such as the *International Covenant on Civil and Political Rights*, and notably, the *First Optional Protocol* to that *Covenant*, complaint mechanisms are now available for Indigenous peoples to approach the United Nations directly where they believe violations of such instruments are occurring. Australia must furnish regular reports to the relevant UN Committees on its implementation of treaty obligations and these Committees can both investigate and report on our performance.

It is precisely *because* Australia is an affluent, progressive, Western country in the first world club that so much is expected. As a country created by European imperialism, settlement, and

dispossession of non-European peoples, we, like South Africa, Canada, USA, and the Latin American republics, will always be under especially harsh scrutiny, not only by non-European countries but by the European heartland itself. We are expected to set the highest standards in company with other first world countries with Indigenous minorities—New Zealand, USA, Canada, Denmark, Norway, Sweden, and Finland. For that reason the comparable progress of those countries should be of particular concern to us.

In the main, however, Indigenous internationalism could be and should be a good news story for Indigenous and non-Indigenous Australians. Confident and outward-looking, it can bring practical benefits while also signalling to the world that Australia's racist past is, truly, past. Our main objective must be to move from an Indigenous internationalism which is episodic and events-centred, a now-and-then gala function, to one which is a continuous process and which is both a habit of mind and context for policy.

Recommendations

1. The Parliament should establish a Human Rights Committee of members with relevant expertise and such a committee should conduct a public inquiry into the benefits to Aboriginal and Torres Strait Islander peoples and the wider Australian community of international Indigenous awareness and co-operation; and how to involve Australia and its citizens, especially Aboriginal and Torres Strait Islander peoples, in this burgeoning field of international relations. Subject to the establishment of a Human Rights Committee, the Joint Standing Committee on Foreign Affairs, Defence and Trade should conduct such an inquiry.
2. That the Commonwealth Government provide the mandate and resources for an independent Aboriginal international Indigenous watch organisation. This could either take place through an expansion of the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, or could be established as an independent specialist Non-Government Organisation.
3. A workshop on Indigenous marine policy issues and needs bringing Torres Strait Islander and Aboriginal representatives together with Coastal Sami, Inuit, Indian First Nations of Canada's Pacific coast, and South Pacific peoples, should be held. The workshop would also consider the usefulness and feasibility of an ongoing international Indigenous marine network of peoples and organisations.
4. The Aboriginal and Torres Strait Islander Commission, the Council for Aboriginal Reconciliation, and the Aboriginal and Torres Strait Islander Social Justice Commissioner should consult with Indigenous organisations to develop a priority list of urgently required international comparative studies on issues identified in this report and elsewhere including macro- and micro-constitutional reform; regional agreements; inter-governmental relations internal to nation-states in respect of Indigenous policy and programs; self-government; land and sea rights; and Indigenous management of territory and resources.
5. In respect of recommendation number 4 above, a fund should be established under the joint management of ATSIC, the Council for Aboriginal Reconciliation, and the Aboriginal and Torres Strait Islander Social Justice Commissioner to carry out international comparative research on these and other urgent Indigenous policy issues.

Chapter 5: The Royal Commission into Aboriginal Deaths in Custody

211: *National Community Education Project*

The National Aboriginal and Torres Strait Islander Community Education Project (NCEP), coordinated by my Office, is a project designed to encourage Indigenous peoples to confidently know their rights and utilise effective problem solving mechanisms to resolve conflict.

It is structured to implement Royal Commission into Aboriginal Deaths in Custody Recommendation 211 which states:

That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it.

The NCEP is an education package that will produce strategies for achieving the best resolution of conflict involving human rights. It aims to transfer information on anti-discrimination laws to people so they will know their legal rights and can thereby facilitate the successful resolution of community and individual conflicts. It is designed to have primary impact on the ground, at the community level. By understanding how the ‘system works’ we can make the system work for us.

The National Community Education Project aims to ensure that community education responds to the social justice issues Indigenous peoples experience in their daily lives. The NCEP team has been consulting with Indigenous peoples throughout Australia to identify issues of local concern. By sitting down, speaking with people and hearing their experiences I am convinced we will be successful in producing an education package which responds to peoples’ needs. The advice and experience of Indigenous community members—Elders, community workers, legal field officers and young people—have guided this project to date.

The NCEP recognises the importance of consulting with as many people as possible to produce educative resources which are about Indigenous peoples’ needs. One Aboriginal commentator states that the most effective means of consultation is through, ‘...*bringing Aboriginal and Islander people together to discuss a common problem*’. This allows for a ‘...*greater emphasis on the act of reflection which, in turn, creates a basis for a collective analysis*’.¹⁶⁸

This inclusive and collaborative approach to Indigenous community education recognises the integral position of community organisations and community members as the repositories of local knowledge and experience. Increasingly, we need to move away from the notion of the institution as the source of knowledge and look to the community and listen to what people are saying for an understanding of the issues Indigenous peoples confront.

Recommendation 188 of the Royal Commission emphasises the importance of governments developing a close connection with:

...appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the

¹⁶⁸ Watson, L., *The Aboriginal and Islander Child and Welfare System*, 51st ANZAAS Congress, Brisbane, 1981, p. 6.

*substantial modification of any policy or program which will particularly affect Aboriginal people.*¹⁶⁹

The NCEP will produce a range of educative resources, such as a video, poster, manual and/or 'action sheets' which will present a series of case studies illustrating a conflict involving human rights. Depending on the feedback my staff and I receive from the communities, these case studies may focus on peoples' rights in relation to the police, the courts, housing, employment, health, intra-community disputes and prisons. The NCEP will not only provide information about rights and laws. A variety of strategies to deal with each problem will be detailed which may, for example, include information about how to lodge a formal complaint with the Human Rights and Equal Opportunity Commission (HREOC) or how to organise a community group to lobby the local authorities for improved housing.

These case studies will outline a range of strategies that can primarily be used at the local level. The emphasis of the NCEP is to empower Indigenous peoples by informing them of their rights and offering them a choice of practical solutions which they can pursue.

Key objectives of the NCEP

As stated, the NCEP is a direct response to Recommendation 211 of the Royal Commission into Aboriginal Deaths in Custody. The aims of the Commonwealth Government in adopting Recommendation 211 were:

- To inform Aboriginal and Torres Strait Islander peoples about their rights and the protection available under anti-discrimination and other legislation, including State/Territory and Commonwealth human rights and anti-discrimination legislation, relevant sections of criminal and civil law, government and non-government agencies, and other strategies and mechanisms for achieving the resolution of human rights and other community relations problems;
- To divert Aboriginal and Torres Strait Islander peoples from custody;
- To enable Aboriginal and Torres Strait Islander communities to establish and protect community standards for their human rights; and,
- To empower Aboriginal and Torres Strait Islander peoples to solve community relations problems at the local level through an understanding and assertion of their rights.

I am convinced Indigenous peoples are not interested in conflict resolution strategies that only make them dependant on large, bureaucratic institutions which 'fix the problem' for them while eroding their own capacity to control the outcome. People are interested in understanding the legal system and knowing when deferring a problem into this system is appropriate. Indigenous peoples are equally interested in being able to competently manage the problems they experience in their day-to-day lives using 'homemade' measures they can employ at the grass roots level. By developing community-based solutions to conflict, Aboriginal and Torres Strait Islander peoples can identify the 'core' of the conflict, organise a conflict resolution strategy and take action according to their own needs.

To be successful, the NCEP has to translate the key general concepts of 'human rights', 'rights' and 'social justice', as formulated by legislation and international instruments, into language and imagery people can identify with.

¹⁶⁹ Royal Commission into Aboriginal Deaths in Custody, National Report, AGPS, 1991, Vol. 4, p. 7.

The NCEP will identify case studies based on the stories we have been told and will use this research for the development of educative resources which people relate to. Lending the law street credibility is as much an artistic feat as it is an educative one.

In discussions to date, my staff and I have repeatedly heard Indigenous peoples assert that identifying racism is very difficult because they've experienced it all their lives. In developing the NCEP we face the challenge of identifying all the different ugly expressions of racism, the subtle and the gross, and translating those examples into language and images that resonate through peoples' lives.

Other people have commented that they've felt a sense of resignation when they've experienced discrimination. They want to tackle the problem but they lack the confidence to do so. The core of this sentiment, the powerlessness people express, I believe is grounded in a legacy of brutal injustice which Indigenous peoples have experienced over the past 200 years. The NCEP acknowledges that providing people with the information on the relevant legislation is simply not enough. Encouraging people to *not* 'cop it sweet', to have the self-confidence to fight racism is a fundamental component of this project.

Although the NCEP will provide people with legal information, we need to ensure people understand that complex legal solutions are not the only way to tackle a problem. According to the situation a variety of remedies could be applied. Some people may decide to lodge a formal complaint with the HREOC. Others may decide to organise a community meeting to attempt to resolve a problem. Legal remedies will be held in reserve for a 'when all else fails' measure. In addition, we need to ensure the whole legal process is demystified so that if people decide to deal with a problem in this way, they can enter the legal web with confidence, understanding the terminology and what may be demanded of them along the way. The NCEP approach is based on communities being able to identify and assess the core of a conflict involving human rights and being able to choose and implement an appropriate strategy.

Format of the NCEP

We are developing three NCEP educative resources to implement Recommendation 211. The following will be produced:

- a video which will be used as a training tool in conjunction with the other NCEP components;
- educational resources for use in the States and Territories which detail the legislation and issues identified by Aboriginal and Torres Strait Islander peoples across Australia; and,
- a 'Train the Trainer' package will be used to train people working in the role of liaison workers, education officers, family and welfare workers, etc., who can then train other community members.

The NCEP will produce a series of community education resources with a specific focus on the issues pertaining to the Indigenous peoples of each State and Territory. The NCEP resources need to reflect the diversity of the issues and problems faced by Indigenous peoples across the nation. By producing resources with a local focus and identifying issues of vital local relevance, the NCEP will be successful in responding to the concerns expressed and identified by people during consultations. Ensuring that we are responsive to the issues identified in consultations will also enable us to produce an educational resource that receives local commitment.

The particular formats of the NCEP resources, for example, posters, booklets or audio cassettes will be decided on by communities, consultants and members of my Office.

Developments

Over the past year, my Office has assessed and appointed two teams of consultants to assist with our consultations. Mukina Management Services have been contracted to consult with communities in New South Wales, Victoria, Tasmania and the ACT. Higgins, Wood and Associates have been contracted to undertake community consultations in Western Australia.

A Project Manager, Liz de Rome and Associates, has been appointed to produce a video which will be used as a component of the NCEP package. My Office will appoint a production company in the coming year to develop this resource. The video will portray 'real life' situations based on people's experience and it will depict various different approaches to solving conflict, which can be used by either individuals or community workers holding training workshops.

The Faculty of Aboriginal and Torres Strait Islander Research, at the University of South Australia was selected to develop the NCEP in the Northern Territory and in South Australia. Unfortunately, insufficient project resources have forced a temporary 'freeze' on the development of the NCEP in both regions. Despite this setback my staff and I are committed to securing funding for the development of the NCEP in South Australia and the Northern Territory.

It is unfortunate and a source of enormous chagrin that the NCEP has not received sufficient funding to be developed nationally. Although I regard this lack of funding as a temporary obstacle, over the last year my staff and I have had to acquire new levels of resourcefulness in an attempt to find additional funding. In our quest to obtain further funding we have developed and submitted sponsorship proposals to Qantas, Telstra and UNESCO. I have also submitted a New Policy Proposal (NPP) for \$300,000 to various government departments. I submitted NPPs under a Social Justice Package bid. This was unsuccessful.

If all this fails, I will have no option but to divert funds away from the performance of my other statutory functions. If successful, the money will be used to develop the NCEP in the Northern Territory and South Australia. The task of securing extra funding will continue until we can fully implement our commitment to developing this project nationally.

National co-ordination

Currently several Indigenous community education programs with comparable objectives to the NCEP are being developed and implemented by various community organisations and government agencies. In developing the NCEP I have liaised with several agencies involved in the development of similar programs. I have met with State and Territory Anti-Discrimination Agencies or Equal Opportunity Commissions, the Council for Aboriginal Reconciliation, the Aboriginal and Torres Strait Islander Commission and the Department for Employment, Education and Training. Co-ordination is essential if I am not to waste money by tracking over the same ground.

It is my intention to ensure the NCEP develops into a permanent project. Yet I can only achieve this aim if each State and Territory commits to adequately fund the project. Recommendation 211 of the Royal Commission into Aboriginal Deaths in Custody succinctly states that State and Territory Equal Opportunity Commissions/Anti-Discrimination Boards share the responsibility of developing community education programs for Indigenous peoples.

It is essential State and Territory Equal Opportunity Commissions work together on this project so we can achieve a truly national community education program. I believe that national commitment and coordination between all relevant State and Territory bodies is extremely important to ensure the full implementation of Recommendation 211. In November 1994, I attended a meeting of the Standing Committee of State and Federal Attorneys-General. At that meeting I proposed that:

Each State and Territory to commit funds for the creation of two permanent full-time identified positions with each State and Territory anti-discrimination office or within regional offices of the Human Rights and Equal Opportunity Commission, at a level equivalent to an ASO6 in the Commonwealth Public Service, to implement the NCEP.¹⁷⁰

Despite my commitment to facilitating an inter-agency approach to the national coordination of the NCEP, I cannot assume the entire responsibility of implementing Recommendation 211. All States and Territories, except Tasmania, declared their support for this Recommendation. State and Territory Governments have to play their part in implementing Recommendation 211.

The responsibility for this Recommendation, therefore, cannot be left to the Human Rights and Equal Opportunity Commission alone—it is a national responsibility. It is therefore essential that State and Territory Governments follow up their attested support for the project with the provision of the necessary resources for its eventual dissemination.

The Reference Committee

I have invited numerous State and Territory agencies to meet with me to discuss the coordination of this project. I have formed a NCEP Reference Committee, which includes community people and representatives from the Department of Employment, Education and Training, the Aboriginal and Torres Strait Islander Commission, the National Federation of Aboriginal Education Consultative Groups, the National Aboriginal and Legal Services Secretariat, the Secretariat of the National Aboriginal and Islander Child Care, the Council for Aboriginal Reconciliation, the South Australian Legal Rights Movement, the Western Australian Aboriginal Legal Service as well as State and Territory Anti-Discrimination Agencies.

The role of the NCEP Reference Committee is to offer different perspectives on the Project's possible format and serve as a 'sounding board' for any potential project developments. The NCEP Reference Committee will also meet three times in the coming year.

A NCEP Project Steering Committee has also been formed to oversee the NCEP and evaluate the effectiveness of the development of the project. The Steering Committee comprises the NCEP Project Manager, a representative from the HREOC Education and Promotion unit and myself. The NCEP Steering Committee will also meet three times in the coming year.

What went wrong?

Inadequate project funding and a litany of bureaucratic constraints have stultified the development of the NCEP over the last two years and impeded the ability of this project to 'get off the ground'. It is important that I highlight the obstacles that have hindered the implementation of Recommendation 211:

- administrative costs, which were not accounted for in the original NCEP budget allocation, have stripped a significant amount from the project's funding. This complaint is by no means unique

¹⁷⁰ Briefing notes prepared for the Standing Committee of State and Federal Attorneys-General, 1994.

to my Office. Funds required for Indigenous affairs in general and for the Royal Commission into Aboriginal Deaths in Custody in particular, have been gobbled-up by unrelated administrative expenses;

- the appointment of consultants to develop the NCEP resources and training components was an arduous, time-consuming task. Our aim was to select the best people for the job amid the competition of many highly qualified and capable applicants. More than thirty-seven groups tendered for the consultancy positions. The selection process took place over twelve months;
- due to operating on a depleted budget, the NCEP was unable to finance the consultants from the University of South Australia who were selected to develop the project in South Australia and the Northern Territory;
- A long negotiating process ensued between my staff and the selected consultants over identifying the consultation itinerary. Although I am committed to ensuring we adequately consult with as many Indigenous peoples and organisations as possible, my staff and I obviously cannot visit each and every community across the nation.

The emphasis that I place on consultations as a forum for quality, in-depth human interaction is extremely time and resource intensive. The NCEP consultants have had to change their consultation itinerary several times to respond to various community requests. The resulting complex logistics have delayed the initial round of community consultations. But, it is essential that the NCEP team remains flexible in approach and responsive to communities. Great care must be taken to consult appropriately at a local level but with a view to the national character of the Project; and,

- further administrative delays occurred due to the negotiations over contract specifications between my staff and the selected consultants. Clarifying and finalising contractual arrangements was another onerous task that consumed several months of my staff's time.

Future challenges

The NCEP consultations with community people across New South Wales, Victoria, Western Australia, Tasmania and the ACT have to recognise and respond to the facts:

- Indigenous peoples are the most researched group in Australian society;
- accounts of Indigenous experience and ideas have been extracted and absorbed by others over a long period of time without due regard for their rights; and,
- no other group in Australia is expected to actively engage in the consultative process as much as Indigenous communities who are frequently visited by a large number of government officials.

It is vital the NCEP community consultations successfully redirect research away from this negative disempowering model to one where Indigenous peoples claim authority and receive direct benefit from the information they provide. As recognised by the House Of Representative Standing Committee on Aboriginal Affairs:

There is a need to change the emphasis in the consultative process from one of listening to and advising, communities to one where communities have a more direct say in deciding final outcomes. Instead of merely being involved, Aboriginal and Torres Strait Islander people must

*be integral to deciding policy and programs which directly affect their lives. This is the difference between consultation and negotiation...*¹⁷¹

I will ensure that all the communities that contribute to the development of the NCEP are well informed as to the progress of the project and are systematically and regularly provided with adequate feedback. I expect and encourage Indigenous peoples to be actively involved in shaping and evaluating this project. I am conscious and supportive of the fact that Aboriginal people should, and will, demand accountability and responsibility from researchers, because:

*If education is done badly it can do more harm than good. It does not matter what the intent or cultural slant is, if programs are designed and delivered without respecting and challenging the full creative potential and intelligence of (people) the programs will crush rather than liberate.*¹⁷²

It is essential that the NCEP community consultations are well planned and facilitate the development of creative and constructive interaction. The consultative process must be sensitive to Aboriginal criticisms of, and suspicion towards invasive, culturally inappropriate research. Allowing sufficient time to build up a degree of trust and understanding between the consultants and the community people we speak with is essential.

*Real consultations require a longer process of discussion allowing time for feedback and internal debate. In practise officers tend to not allow enough time for proper consultation and expect to have an answer provided to their requests in the course of a single visit. Officials have a tendency to rush through communities in short visits trying to cram in as much 'consultation' as possible on the day.*¹⁷³

The NCEP community consultations have commenced and will continue to take place throughout New South Wales, Victoria, ACT, Tasmania and Western Australia in July, August and September 1995 and in 1996. I expect to develop the NCEP resources for Western Australia and the eastern States in the next year.

Due to the frugality of the project's funding it will be an enormous challenge to produce educative material which is culturally appropriate *and* caters for the diversity of Indigenous Australians. I am interested in developing NCEP packages about the issues and concerns identified by Indigenous peoples in each region visited. The project's scant funding, however, may preclude the NCEP from producing regional packages for each of the five jurisdictions targeted. Developing educational material that can be utilised by communities with a high English language illiteracy rate is essential. Too often the results of quality research remain inaccessible to the people whose need for 'knowledge' is greatest. Therefore, the emphasis I place on quality interactive communication is paramount. The emphasis on oral communication and the use of visual and audio media will have an important role in the development of the NCEP resources.

There are many challenges ahead of us which we have the capacity to overcome. For thousands of years 'Aboriginal Community Education' has existed, creating forthright, independent people who knew how to survive, understand the law and handle everything they would face when living on the land. Life changed. Aboriginal Community Education is now a hybrid, which aims to combine the best of our own heritage and ways with the best of other cultures. For many decades Indigenous peoples have been subjected to institutionalised education which did not respect our cultures,

¹⁷¹ House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*, AGPS, 1990, p. 59.

¹⁷² Nunavik Education Task Force *Silatunirmut: The Pathway to Wisdom*, Makivik Corporation, Quebec, 1992, p. 16.

¹⁷³ House of Representatives Standing Committee on Aboriginal Affairs, *op.cit.*, pp. 55-56.

languages, laws and histories. Institutionalised education has attempted to rob Indigenous peoples of our pride and independence. Institutions can be spirit crushing. They can make our people dependant on being told what to do. The NCEP and many other Aboriginal community education initiatives share one powerful aim. This aim is to encourage skilled independence to inspire people to know that we are independently capable and confident of assessing a conflictive situation, judging what needs to be done and getting on with it. Aboriginal community education which promotes skilled independence is not simply an ideal. It is extremely practical.

*Autonomy as a goal of learning for individuals is the attainment of the capability to make judgments and decisions necessary to act with personal independence and freedom. An autonomous person need not wait for instructions...(and is able to take) the given circumstances and constraints into account. Autonomy allows the decision maker to account for these external constraints and to insert them into a clearer representation of reality as a basis for decision making. Autonomy provides both a key to not being overwhelmed and a basis for self fulfilment.*¹⁷⁴

To develop such autonomy in protecting and securing the legal and human rights of our peoples is the ultimate goal of the implementation of Recommendation 211.

212: National Indigenous Legal Curriculum Development

The Royal Commission into Aboriginal Deaths in Custody recommendations 211 and 212 specifically aim to inform Aboriginal and Torres Strait Islander peoples about anti-discrimination and human rights laws and to encourage them to utilise anti-discrimination mechanisms more effectively.

Recommendation 212 states:

That the Human Rights and Equal Opportunity Commission and State and Territory Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal 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.

The Human Rights and Equal Opportunity Commission is responsible for the implementation of this recommendation.

As a result, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner undertook the development of a National Legal Field Officer Training Program. With the aim of ensuring this recommendation is fully and comprehensively implemented, over the course of 1994/95 this program has been restructured and, to reflect its sharper focus, renamed the National Indigenous Legal Curriculum Development Project.

The refocussing of the program was achieved in close consultation with Aboriginal Legal Services and it is anticipated will better achieve the purposes of recommendation 212. The change of name reflects the more substantial educational component of the project.

The Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence both concluded that the extent of discrimination experienced by Aboriginal people and Torres Strait Islanders was not reflected in their use of anti-discrimination legislation or any of the

¹⁷⁴ Botkin, J., et al., *No Limits to Learning, Bridging the Human Gap*, A Report to the Club of Rome, Oxford, Pergamon Press, 1979.

other mechanisms available for the redress of human rights abuses. The ultimate purpose of the project is to empower Indigenous peoples to effectively assert and actively enjoy our human rights.

The National Indigenous Legal Curriculum Development Project is structured on the following:

- that there is no national accredited legal training course for Aboriginal and Torres Strait Islander peoples, which focuses on the legal and human rights of Indigenous peoples;
- the empowerment of Aboriginal and Torres Strait Islander peoples is substantially dependent on our ability to understand and access government services and mechanisms for the protection of our human rights and legal rights, both nationally and internationally; and,
- that Field Officers in Aboriginal and Torres Strait Islander Legal Services possess the skills and knowledge of their local community, vital to this type of work but are severely restricted by the lack of culturally appropriate training courses, as well as the expense and difficulty of accessing adequate advice.

The general objectives of the Project are to upgrade the level of professional assistance that Field Officers can provide, through the provision of higher quality education accessible to Field Officers throughout Australia.

Specifically, the dual aims of the National Indigenous Curriculum Development Project are:

1. to increase the level of legal and human rights education and training to Aboriginal and Torres Strait Islander peoples; and,
2. at a broader level, the project aims to increase access to information and resources, which address human and legal rights, for clientele of Aboriginal and Torres Strait Islander Legal Services,

It is proposed that the National Indigenous Para-legal and Legal Courses designed to educate Field Officers will be run on a continuing basis, from community controlled education and training centres, and/or Institutes of TAFE and/or through Indigenous Tertiary Centres and/or through mainstream universities.

These courses will provide para-professional legal training with options to pursue formal legal studies.

It is also proposed that the early skills based components of this education project will be delivered, in total or in part, by community-based Legal Services when delivering on the ground training for their Officers. This is in recognition of the express desire of Legal Field Officers to access as much of the proposed course as possible through workplace delivery formats.

In particular the project will provide:

- professional education and training to Aboriginal and Torres Strait Islander Field Officers and Para-legal workers in Commonwealth, State and Territory Law, including Commonwealth and State anti-discrimination law, customary and international law;
- an education forum for Aboriginal and Torres Strait Islander workers to discuss curriculum development in relation to Indigenous human rights issues in the international context and Australia's current obligations under international human rights instruments;

- a strategy to enable Aboriginal and Torres Strait Islander peoples to explore avenues for the recognition of their customary law and customary law dispute mechanisms by the Australian legal system; and,
- a career path for Aboriginal and Torres Strait Islander Field Officers, through providing advancement to legal and other tertiary options.

Aim of the Project

The project aims to provide an educational forum for Aboriginal and Torres Strait Islander legal workers in relation to Indigenous human rights issues and to establish a legal education curriculum which will inform Aboriginal and Torres Strait Islander communities of Australia's current obligations under international human rights instruments, their rights and responsibilities under domestic law and of the mechanisms available for their protection.

Background of the project

As early as 1991, with the release of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission commenced discussions with the National Aboriginal and Torres Strait Islander Legal Services Secretariat (NAILSS) to put together a submission for funding to establish this program, in response to Recommendation 212.

When the submission was successful and the responsibility for the administration of the funds and the implementation of recommendation 212 was given to the Human Rights and Equal Opportunity Commission, NAILSS withdrew their support citing the proposed content of the program as their chief concern and commenced an active, but to date ineffective, campaign to undermine the project. Due to this impasse with NAILSS and the Human Rights and Equal Opportunity Commission, it became difficult to make any significant progress during this period. In September 1994, I appointed an Indigenous National Coordinator and requested her to negotiate and consult directly with Aboriginal and Torres Strait Islander Legal Services and other relevant Indigenous community organisations.

With the appointment of an Indigenous Research and Development Officer in late April 1995, the National Indigenous Legal Curriculum Development Project (NILCDP) team began working vigorously to ensure Aboriginal and Torres Strait Islander Legal Services and Legal Field Officers are directly involved at all stages of course development. It is important to state here, for public record, that we have endeavoured to involve NAILSS at every stage of this project but to date have only been successful in involving individual Aboriginal and Torres Strait Islander Legal Services. We have sent to NAILSS, all updates, reports and invitations to participate but, unfortunately, they appear set on a course of deliberate dissemination of misinformation and to a policy of hindrance and undermining of the implementation of Recommendation 212. It is with great sadness, I must state that NAILSS appears to view the politics of funding placement as more important than the interests of Legal Field Officers and the clients of Aboriginal and Torres Strait Islander Legal Services.

To ensure that Indigenous Legal Field Officers and Legal Services are involved in the decision making and development of this project in an empowered way, the National Indigenous Legal Curriculum Development team has put in place the following structures and processes:

- Convening the National Steering Committee to consider planning, curriculum and funding parameters;

- Convening a meeting of National Aboriginal and Torres Strait Islander Legal Services—for the National Indigenous Legal Curriculum Development Project, held in Darwin, 19-21 April; and,
- developing a Working Group, now referred to as the National Aboriginal and Torres Strait Islander Legal Field Officer Curriculum Development Advisory Committee (CDAC). This committee is made up of nominees from Aboriginal Legal Services representing every State and Territory, the majority of whom are Aboriginal and Torres Strait Islander Field Officers. There are 32 nominated members of this Committee who have the ability to assist and inform decisions made by the National Steering Committee. The Committee will meet in September 1995 and will continue to meet regularly to inform and monitor the development, implementation and review of the course.

At the Darwin meeting Aboriginal and Torres Strait Islander Field Officers, Indigenous Para-legal workers and administrative personnel representing every State and Territory, met to identify and discuss issues of training and education needs and interests, in relation to the design of a national Indigenous legal curriculum. Darwin provided the ideal setting for the first stage of the Community Development Model, which was adopted as the correct process for National Indigenous Curriculum Development. This meeting provided a needs analysis survey for developing the National Indigenous Legal Curriculum. The meeting resulted in the production of The Darwin Report, a working document that will provide a foundation for the next stage of the project—strategies of curriculum design—to ensure that curriculum development is controlled by and meets the needs and interests of Indigenous Legal Field Officers and the clients of Aboriginal and Torres Strait Islander Legal Services.

It was recognised at the Darwin Conference, and I share this view, that the urgency of addressing women's issues and men's issues within the curriculum will require an inclusive approach in all facets of the course and the development of discrete Women's Units and Men's Units. The Curriculum Development Advisory Committee, of which 50 percent of members are Indigenous women, will guide this process.

Project structure

National Steering Committee

Aboriginal and Torres Strait Islander Social Justice Commissioner
 The Attorney-General's Department
 Department of Employment Education and Training
 Aboriginal and Torres Strait Islander Commission
 Aboriginal and Torres Strait Islander Legal Services' Representatives

Curriculum Development Advisory Committee

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
 Department of Employment Education and Training
 Aboriginal and Torres Strait Islander Commission
 The Attorney-General's Department
 Human Rights and Equal Opportunity Commission
 National Federation of Aboriginal and Torres Strait Islander Education Groups – including Torres Strait Islander Education Committee
 Indigenous Higher Education Committee

Project Coordination and Development

Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner:

Program Coordinator, Sonya Link
 Research and Development Officer, John Scott

Curriculum Development Consortia

University of Technology–Jumbunna CAISER and the Faculty of Law and Legal Practice
 University of Technology–Division of Community and Aboriginal Education
 Aboriginal and Torres Strait Islander Curriculum Consortium–Queensland TAFE
 Rowitta Designs–Aboriginal Consultancy

Stages of project development

Stage 1

Situational Needs Analysis: The Darwin Conference and The Darwin Report [April 1995]
 Nominations for Curriculum Development Advisory Committee and the National Steering Committee [May to August 1995]

Advertise for consultants to develop the National Indigenous Legal Curriculum. Shortlist and interview tenderers–recommendation for appointment to the Commissioner [July/August/September 1995]

First Curriculum Development Advisory Committee and National Steering Committee Conference [September 1995]

Appointment of Tenders for project development [October 1995]

Stage 2

Twelve month developmental period for content

- three CDAC and National Steering Committee Meetings to monitor process and outcomes [finalised end December 1996]

Possible second stage of project development focussing on delivery formats and resource development [six months, if funding allows, finalised by July 1997]

Stage 3

Trialing of Project Units/Modules [trialing to take place during late 1996]

Implementation of project–commencing 1997 and ongoing. Throughout this process the National Steering Committee and the Curriculum Development Advisory Committee will meet three times a year

Monitoring, evaluating and review of project–1997 and ongoing [as budget and staffing permits]

Co-ordination

The project design and review will involve, through the National Steering Committee and the Curriculum Development Advisory Committee:

- Aboriginal and Torres Strait Islander Legal Services,
- the Aboriginal and Torres Strait Islander Commission,
- the Department of Employment, Education and Training,
- the Attorney-General's Department,
- the National Federation of Aboriginal Education Consultative Groups,

- the Torres Strait Islander Regional Education Committee, and
- the Indigenous Higher Education Committee.

Activities will be coordinated by the National Indigenous Legal Curriculum Development Team.

The Future

Advertising for Consultants, short-listing and interviews for tenderers will take place in August 1995, followed by contracting of specialist consultants to develop the National Curriculum. It is envisaged that a TAFE component and Tertiary component will be fully developed in conjunction with each other, during 1996, for module trialing in late 1996, followed by course implementation and official commencement in early 1997.

In accordance with the views of Aboriginal and Torres Strait Islander Field Officers, through the CDAC, we envisage the course will develop in discrete module format to allow each Field Officer to plan the course as an Individual Education Program, accessing the most relevant modules early in the course, as dictated by their circumstances and communities.

We also envisage that the course will allow for multiple entry points in recognition of prior learnings and experience and for multiple exit levels, including:

- Certificate 3 in Indigenous Legal Studies
- Certificate 4 in Indigenous Legal Studies
- Diploma of Indigenous Legal Studies
- Bachelor of Indigenous Legal Studies
- Master of Legal Studies (leading to a Doctorate of Law)

There has also been a desire expressed by Legal Field Officers to articulate into other tertiary areas according to their interests (such areas may include Community Welfare, Public Administration, Nursing/Law, Education/Law, etc.). Legal Field Officers have also requested that as much of their study, as is practical, take place at work. The structures established will ensure the involvement of Indigenous Legal Field Officers at all stages of curriculum development, including the selection of consultants and the direction of consultants' work in formulating the National Indigenous Legal Curriculum.

From Human Rights Focus to Human Rights Framework

The National Indigenous Legal Curriculum Development Project, has evolved from its original concept to an organic model, truly reflective of Indigenous Community Education principles. The holistic character of the present project is in direct response to the advice given by Aboriginal Legal Services and Legal Field Officers. The organic nature of this project must be maintained, if the course is to genuinely respond to the needs and interests of Legal Field Officers and their clients.

The conceptual shift from a program with a **human rights focus**, to a project with a **human rights framework**, recognises the context within which Legal Field Officers operate. Legal Field Officers have existed since the establishment of Aboriginal and Torres Strait Islander Legal Services. Yet some 25 years down the track, Legal Field Officers exist in a career vacuum, with no agreed, nationally recognised role statement/s, no coherency in formal training or education, no permanency or national union representation. Having no career paths and little chance of advancement or recognition of the vital, common role they play in the operation and evolution of the Aboriginal and Torres Strait Islander Legal Services directly effects the quality of their service to clients.

'Framework', means to construct or to put together. In terms of this educational project, it provides a means to construct or build a structure for the advancement and enjoyment of the human rights of Indigenous peoples. Like professionals in other fields, Legal Field Officers, supported by a framework of skills enhancement, proper career paths and professional recognition, will receive appropriate remuneration and job security.

A **human rights focus**, as was the original intention, suggests that Legal Field Officers would merely be provided with relevant human rights information. By contrast, **a human rights framework** recognises the tenuous position of Legal Field Officers and seeks to promote their basic human rights, in terms of employment conditions and appropriate training and education. Concern for the rights of Legal Field Officers, while not the specific focus, is an integral part of the National Legal Indigenous Curriculum Development Project. A thorough, comprehensive education of Legal Field Officers is essential to provide a sound basis for their work on behalf of their clients.

I would argue that the work of Legal Field Officers, in assisting their clients to negotiate a complex alien legal system and to receive (through an acknowledgment of human rights) a just outcome has been largely unrecognised. I am convinced that this project will serve to enhance the continuing effectiveness of Legal Field Officers.

Indigenous Educational Implications

This project provides for a partnership between Indigenous law and Indigenous education, with education working for law.

In terms of community education, the National Indigenous Legal Curriculum Development Project brings together Indigenous Legal Workers and Indigenous Educators as a national community of Indigenous workers. This project is an opportunity for Legal Field Officers to work with Indigenous educators to ensure proper training and education is available.

The establishment of National Competency Standards, as a by-product of course development, will provide tools for Legal Field Officers which will assist them in lobbying for just and proper role descriptions and career paths. The Curriculum Development Advisory Committee (CDAC) may also provide a National Structure that could work to identify an appropriate representative union and to assist with negotiations for appropriate career structures.

This project also provides an example of community development on a national level. The processes being worked through are similar to those used throughout our communities in Community Development Plans. Finally, the project provides an opportunity to challenge the existing educational power structures, that seek to impose education and training courses, developed in isolation, onto Legal Field Officers. The project will empower, through Indigenous education, a hitherto disempowered group of Indigenous workers, who will actively participate in and control their own education and training.

We believe this National Indigenous Legal Curriculum Development Project, may provide a national model for:

- National Indigenous Curriculum Development; and,
- A National Indigenous Blueprint for career enhancement and stabilisation of Career Structures.

Conclusion

The role of the Aboriginal and Torres Strait Islander Social Justice Commissioner with respect to this project is to examine major controversies that may bear on the development of education as well as to talk with people about how we can, collectively, bring about culturally appropriate curriculum development.

As you have read previously, I have a dedicated Team working on this project. This National Indigenous Legal Curriculum Development (NILCD) Team work in collaboration with a Curriculum Development Advisory Committee (CDAC) which is made up of Indigenous community-based legal operators, and a Curriculum Development Consortia (CDC) which is made up of Indigenous people and non-Indigenous people involved in education at University and TAFE levels. The CDC includes the University of Technology-Jumbunna CAISER and the Faculty of Law and Legal Practice; University of Technology-Division of Community and Aboriginal Education; Aboriginal and Torres Strait Islander Curriculum Consortium-Queensland TAFE; and, Rowitta Designs-Aboriginal Consultancy. Inclusive in the Curriculum Development Consortia (CDC), are other Indigenous people contracted as consultants on a fee for service basis, who have long serving experience in Indigenous education.

Situational Needs Analysis

Issues arising from the Darwin Conference which will be prioritised and addressed by the Curriculum Development Advisory Committee and the National Steering Committee. Refer to 'The Darwin Report', for further details, including explanation

General Issues

- Survey of pre-existing training programs
- Access to professional indemnity insurance for Para-legals
- Timeframe for the proposed course
- The need for formal role descriptions for Para-legal workers
- Need for first class legal advice and properly trained Indigenous solicitors
- Danger of Mainstreaming
- Recognition of the unique roles of Para-legal workers and Aboriginal Legal Services
- Need to change attitudes of Judges, Magistrates, police and court workers towards Para-legal workers
- Demarcation disputes the roles of Para-legal workers, court workers, solicitors

Course structure and delivery issues

- The need to establish and maintain Indigenous ownership of the course
- Access of the course by other Indigenous peoples, working in related areas
- Relationship of course to pre-existing Tertiary and non-accredited professional development courses
- Different Law Domains: Local, Regional, State, National, International/Traditional Customary
- Aboriginal and Torres Strait Islander peoples Para-legal Studies as a Diploma of Legal Studies
- Assessment of the course
- Recognition of Prior Learning
- Accreditation of the course
- Payment for Study
- 'On the Job' Training
- Recognition of Indigenous Cultural Knowledge
- Language/s and Vocabulary of the course

- Survey of what training is already available to Legal Field Officers
- Articulation and Portability of Training and Qualifications
- Financing of Training and New Career Structures
- Course Assess and Recognition of Prior Learning
- Delivery of course: Mode, Format, Structure
- Workplace and/or Community based Training
- Presentation and Format/s of course
- Appropriate career structures for Para-legal workers

Course content issues

- Family Law
- Juvenile Justice
- Criminal Law
- Copyright laws
- Civil Law
- Indigenous Cultural Studies
- Credit Laws
- Consumer Laws
- Training in Networking
- Women's Perspectives
- Content/Parameters of course
- National Core for course
- Basic Office Skills Training
- Communication skills
- Literacy and Numeracy
- Priorities in the content of the course
- Legal Jargon and 'Everyday' English
- Practices and Procedures of ALSs
- Organic Nature of the Legal System
- Land Issues and Native Title
- Skills /Competency Based Training
- Debriefing and Stress Management Skills
- The Law, Health and Mental Health
- Disabilities and the Law
- Customary/Traditional Law
- Sentencing Options
- The Royal Commission into Aboriginal Deaths in Custody
- Literacy/Numeracy levels of potential course participants
- Variations in the Law: Federal; State; Local Government; Local Customary Law
- Proposed Human Rights Focus of Course to become Framework
- The Future: law reform issues, current Indigenous law reform issues, lobbying
- New Laws – Protocols – The Mass Media
- Access to Knowledge of International Law and Treaty Obligations, pertinent to Indigenous peoples
- Histories: recognition of the role of the Aboriginal Legal Services in the contemporary history of Indigenous Australia, knowledge of Legal history as it relates to Indigenous peoples, Indigenous Historical Studies
- Relevant Knowledge of Related Areas:
 - (a) Police
 - standing orders, conduct requirements, relevant Government reports

(b) Government

Westminster System, the Legal System, Role of Judges /Magistrates and other court personnel, and Australian Politics

- Correctional Institutions and the Rights of Inmates: knowledge of correctional institution policies and procedures, rights of inmates, parole and early release procedures, classification systems, support for inmates after release