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by

Talina Drabsch

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by

Talina Drabsch

NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

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APPENDIX A: Draft United Nations Declaration on the Rights of Indigenous Peoples

EXECUTIVE SUMMARY

Indigenous Australians represent approximately 2.4% of the total population of Australia. Almost one-third of all Aboriginal and Torres Strait Islanders live in New South Wales. This paper provides an overview of some of the key issues involving Indigenous Australians in NSW. Whilst there are many Indigenous cultures within Australia, this paper discusses issues that are generally a common experience for many Indigenous Australians.

The Indigenous community in NSW is disadvantaged both socially and economically when compared to the population in general. This paper identifies a number of the factors that have contributed to the current state of Indigenous affairs, and notes some of the strategies that have been developed as part of an attempt to improve the situation of the Indigenous population of Australia. It attempts to highlight the links that exist between the experience of many Indigenous persons in a number of areas including health, education, employment, housing, contact with the criminal justice system, the level of violence within the community, the removal of children from their families and an assortment of rights issues.

This paper provides an overview of Indigenous affairs as they existed on 15 April 2004, when Prime Minister Howard announced that the Coalition would introduce legislation to abolish ATSIC following the resumption of Parliament in May. A panel of Indigenous persons are to subsequently be appointed to have a purely advisory relationship with the Government. At this stage, the detail of how the abolition of ATSIC will impact many of the strategies outlined in this paper is uncertain.

This paper does not discuss the topic of native title and land rights. Whilst extremely important and intimately linked to the contents of this paper, the issue of land is a large subject and will be the topic of a forthcoming paper.

Section two (pp 5-10) gives a snapshot of the health of Indigenous Australians, which is significantly poorer on all levels when compared to the rest of the population. It highlights the factors that have contributed to this generally poor health status, and the strategies that have been developed in response.

Section three (pp 11-18) examines the Indigenous community's experience of education at the primary, secondary and tertiary levels. Information is provided on past and current education policies, in order to facilitate an understanding of contemporary attitudes towards education. The factors that have influenced the relatively poor educational outcomes of Indigenous students are identified.

An overview of Indigenous employment can be found in **section four** (pp 19-24). Details of the Community Development and Employment Projects Scheme and various small business initiatives are provided. Background information to the 'stolen wages' debate is also included.

An overview of various housing issues faced by the Indigenous community is located in **section five** (pp 25-28). It provides an outline of a number of housing programs that have been

developed, as well as noting the legislative framework of the Aboriginal Housing Office.

Section six (pp 29-41) examines the relationship between the Indigenous community and the criminal justice system. It explores various policing issues, the role of the courts (particularly in relation to sentencing) and rates of imprisonment. Some of the factors that contribute to the disproportionate contact between Indigenous Australians and the criminal justice system are identified and discussed, whilst a number of the strategies that have been developed in response are highlighted throughout.

Indigenous communities experience relatively high levels of family violence, self-harm, suicide, homicide and incarceration. **Section seven** (pp 42-50) discusses the level of violence experienced with particular attention given to violence against women and children, as well as the incidence of suicide and self-harm.

The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home*, was published in 1997. It brought into the open the impact of the various child removal policies that had operated in Australia until the 1970s as part of a broader assimilation policy. **Section eight** (pp 51-59) notes the response of various bodies, including the NSW Government, to its release. This section discusses various child removal policies that have applied in NSW, both past and present, and considers how their legacy continues to be felt today.

Section nine (pp 60-70) discusses a number of issues associated with the rights of Indigenous Australians. A short account of the process of reconciliation is included, as well as an overview of a sample of the particularly relevant human rights that are enshrined in international conventions. Various arguments for and against the concept of a treaty are considered, with a summary of what various authors and organisations have argued ought to be included in an agreement, should one be made.

The Draft United Nations Declaration on the Rights of Indigenous Peoples is attached as **Appendix A**.

1 INTRODUCTION

This paper provides an overview of some of the key issues involving Indigenous Australians in NSW. Whilst there are many Indigenous cultures within Australia, this paper discusses issues that are generally a common experience for many Indigenous Australians. The topics of health, education, employment, housing, violence, and criminal justice are discussed. This paper also considers the continuing impact of the child removal policies that resulted in the 'stolen generation', as well as the debate surrounding reconciliation, the expression of various human rights, including self-determination, and the possibility of a treaty. It does not discuss the topic of native title and land rights. Although extremely important and intimately linked to the contents of this paper, the issue of land is a large subject and will be the topic of a forthcoming paper.

Prime Minister Howard announced on 15 April 2004, that legislation to abolish ATSIC would be introduced when the Federal Parliament resumed in May. A panel of Indigenous persons are to subsequently be appointed to have a purely advisory relationship with the Government. At this stage, the detail of how the abolition of ATSIC will impact many of the strategies outlined in this paper is uncertain. This paper provides information on Indigenous affairs as at 15 April 2004.

Statutory definitions of Aboriginality often require three criteria to be satisfied:¹

1. The person must be a member of the Aboriginal race of Australia.
2. The person must identify as an Aboriginal person.
3. The Aboriginal community must accept the individual as an Aboriginal person.

Australia's Indigenous community comprises 2.4% of the total population.² Approximately 30% of all Aboriginal and Torres Strait Islanders live in New South Wales, and form about 2% of the total population of the state.³ The majority of Indigenous Australians live in major cities or inner regional areas, as opposed to the 'outback' and other remote areas.⁴ However, the area in NSW with the highest proportion, rather than number, of Indigenous persons is in the Far West, where they constitute 13% of the resident population.⁵

¹ For example, this definition is used in the *Aboriginal Land Rights Act 1983* (NSW) and the *National Parks and Wildlife Act 1974* (NSW).

² Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples: Summary Booklet*, 4704.0, Australian Bureau of Statistics, Canberra, 2003, p 3.

³ Australian Bureau of Statistics, *Population Characteristics: Aboriginal and Torres Strait Islander Australians*, 4713.0, Australian Bureau of Statistics, Canberra, 2003, p 19.

⁴ Human Rights and Equal Opportunity Commission, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia', www.humanrights.gov.au/social_justice/statistics/index.html Accessed 17/2/04.

⁵ Broken Hill and Menindee Rural Crisis Intervention Projects, *Community Solutions to Aboriginal Family Violence: Final Report and Model of Best Practice*, NSW Department for Women, Sydney, 2001, p 11.

The Indigenous population in Australia has increased substantially in the last ten or so years. In 1991, it was estimated that there were 265,000 Indigenous Australians. By 1996, the figure had grown to 352,000, and continued to increase reaching 460,000 in 2001.⁶ It is thought that this growth is due to a combination of factors including a higher birth rate, changed identification, and a greater tendency for children of mixed descent to identify as an Indigenous Australian.⁷

Australia's Indigenous population is socially and economically disadvantaged compared to the non-Indigenous population. The Steering Committee for the Review of Government Service Provision identified 12 headline indicators that can be used to measure Indigenous social and economic disadvantage. These factors include:⁸

1. life expectancy at birth;
2. rates of disability and/or core activity restriction;
3. years 10 and 12 retention and attainment;
4. post secondary education – participation and attainment;
5. labour force participation and unemployment;
6. household and individual income;
7. home ownership;
8. suicide and self-harm;
9. substantiated child protection notifications;
10. deaths from homicide and hospitalisations for assault;
11. victim rates for crime; and
12. imprisonment and juvenile detention rates.

⁶ Altman J and Hunter B, *Monitoring 'practical' reconciliation: Evidence from the reconciliation decade, 1991-2001*, Discussion paper no 254, Centre for Aboriginal Economic Policy Research, 2003, p 2.

⁷ Ibid.

⁸ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, 2003, p 2.

The data in the following table was compiled by Altman and Hunter and compares the socio-economic position of Indigenous and non-Indigenous Australians in 2001:

Social indicator	Indigenous	Non-Indigenous
Employment		
Labour force participation (% adults)	52.1	63.4
Unemployment rate	20.0	7.2
Total employment rate	40.4	58.9
Employed private sector (% adults)	23.0	48.5
Employed full-time (% adults)	22.2	38.8
Income (in 2001 \$)		
Median income, adults (pw)	226.2	381.1
Median income, families (pw)	628.8	872.7
Housing		
Home owner or purchasing (%)	33.4	72.7
Household size	3.4	2.6
Education		
Did not go to school (% adults)	3.2	1.0
Left school aged <15 years (% adults)	33.4	18.0
Now attending university aged 15-24 years (% youth)	3.8	16.9
Post-school qualifications (% adults)	27.9	44.7
Health		
Male life expectancy at birth (years)	57.0	76.0
Female life expectancy at birth (years)	65.0	82.0
Population age over 55 years (% adults)	6.7	22.0

Source: Altman J and Hunter B, *Monitoring 'practical' reconciliation: Evidence from the reconciliation decade, 1991-2001*, Discussion paper no 254, Centre for Aboriginal Economic Policy Research, 2003, p 8.

As the table demonstrates, the Indigenous population of Australia is disadvantaged when compared to the non-Indigenous population according to many key social indicators. This disadvantage is also marked when compared to indigenous communities in the US and Canada. Moran found that the Indigenous populations of North America experience higher levels of employment, education and home ownership than Indigenous Australians.⁹ For example:

- Indigenous Australians are three times less likely than Indigenous peoples in the US, and half as likely as Indigenous Canadians, to complete year 10.
- The unemployment rate for Indigenous Australians is twice the rate experienced by the

⁹ Moran M, 'Housing and health in indigenous communities in the USA, Canada and Australia: the significance of economic empowerment', *Aboriginal and Torres Strait Islander Health Bulletin*, Issue 7 May 2000. Available from www.healthinonet.ecu.edu.au Accessed 25/2/04.

Indigenous community in the US.

- Indigenous Australians are 2.5 times less likely to own their home than the Indigenous population in the US.

Moran attributes these differences to the better structure and greater efficiency of Indigenous affairs in North America. There is a concern that the position of the Indigenous community has only slightly improved with time. UNICEF has found that ‘around the world indigenous children consistently number among the most marginalized groups in society and are frequently denied the enjoyment of their rights, including the highest attainable standard of health, education, protection and participation in decision-making processes that are relevant to their lives’.¹⁰ The remainder of this paper will explore some of the differences in the quality of life experienced by Australia’s Indigenous peoples. It will discuss some of the causes, note what obstacles remain, and identify a number of the strategies that have been developed in response.

¹⁰ UNICEF Innocenti Research Centre, *Ensuring the Rights of Indigenous Children*, Innocenti Digest no 11, p 2.

2 HEALTH

2.1 Overview of Indigenous health

The health status of the Indigenous community in Australia is significantly poorer on all levels when compared to the rest of the population. The following figures give a snapshot of Indigenous health in Australia:

- In 2001, the life expectancy at birth for a non-Indigenous male was 76 years.¹¹ However, for an Indigenous male it was 57 years. In the words of Rosemary Neill, ‘Australia has the dubious distinction of being the only first-world country with a dispossessed Indigenous minority whose men, on average, will not live long enough to claim a retirement pension’.¹²
- In 2001, a non-Indigenous female could expect to live to 82 years.¹³ For an Indigenous female, life expectancy was only 65 years.
- The median age at death for Indigenous males and females in 2001 was 52 and 58 years respectively.¹⁴ This has contributed to the relative youth of the Indigenous community, with approximately half of the Indigenous population aged 21 years or less (compared to 36 years for the non-Indigenous population).¹⁵
- Infant mortality is much higher in the Indigenous community, with an Indigenous baby 2.5 times more likely to die before the age of one than a non-Indigenous baby.¹⁶
- Indigenous babies are more likely to have a low weight at birth than non-Indigenous babies. Between 1998 and 2000, 11.9% of babies with an Indigenous mother had a low birth weight compared to 6% of babies with a non-Indigenous mother.¹⁷
- 63% of the Indigenous population is overweight or obese compared to 50% of the non-Indigenous community.¹⁸

¹¹ Altman and Hunter, n 6, p 8.

¹² Neill R, *White Out: How Politics is Killing Black Australia*, Allen & Unwin, Crows Nest, 2002, p 34.

¹³ Altman and Hunter, n 6, p 8.

¹⁴ Human Rights and Equal Opportunity Commission, n 4.

¹⁵ Australian Bureau of Statistics, n 2, p 3.

¹⁶ Human Rights and Equal Opportunity Commission, n 4.

¹⁷ Steering Committee for the Review of Government Service Provision, n 8, p 21.

¹⁸ Human Rights and Equal Opportunity Commission, n 4.

- Almost half of Indigenous persons over the age of 18 are smokers compared to about a quarter of non-Indigenous persons.¹⁹
- 11% of the Indigenous community reported having diabetes in the National Health Survey compared to 3% of the non-Indigenous community.²⁰
- The number of hospital admissions for Indigenous men and women are 71% and 57% higher respectively than for non-Indigenous men and women.²¹
- 7% of Indigenous Australians in 2001 consumed alcohol at a high-risk level compared to 4% of non-Indigenous Australians.²² However, Indigenous Australians are less likely than non-Indigenous Australians to consume alcohol in the first place.²³

The six major actual causes of death of Indigenous Australians between 1999 and 2001 were:²⁴

- diseases of the circulatory system (eg heart disease);
- external causes (eg accidents, suicide);
- neoplasms (eg cancer);
- diseases of the respiratory system;
- endocrine, nutritional and metabolic diseases (eg diabetes); and
- diseases of the digestive system.

2.2 Contributing factors

Some of the factors that contribute to the poor health status of Australia's Indigenous population include:²⁵

¹⁹ Australian Bureau of Statistics, n 2, p 13.

²⁰ Australian Medical Association, *Public Report Card 2003: Aboriginal and Torres Strait Islander Health – Time for Action*, 2003, p 2. www.ama.com.au Accessed 10/3/04.

²¹ Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future*, Federation Press, Sydney, 2003, p 7.

²² Steering Committee for the Review of Government Service Provision, n 8, p 28.

²³ Australian Bureau of Statistics, n 2, p 13.

²⁴ Human Rights and Equal Opportunity Commission, n 4.

²⁵ Commonwealth, Office of Aboriginal and Torres Strait Islander Affairs, 'Indigenous Health', Indigenous Issues – Fact Sheet Series, October 2003; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, 2003, p 7.

- low incomes and high unemployment;
- poor education;
- a higher rate of substance misuse;
- poor nutrition;
- remoteness from services;
- the failure to access treatment at an early stage of illness;
- availability of transport;
- ongoing infectious disease;
- the incidence of accidents and violence;
- the inability to speak English (a number of Indigenous Australians speak an Aboriginal or Torres Strait Islander language);
- the prevalence of mental health problems;
- poor quality housing;
- overcrowding; and
- historical factors, such as the repercussions of dispossession of land and child removal policies.

However, whilst historical factors are important, Noel Pearson has warned that it is dangerous to place too much emphasis on them. He notes that such issues as substance abuse also need to be viewed as conditions in themselves, not merely the outcomes of past dispossession and suffering.²⁶

2.3 Strategies for improving the health status of Indigenous Australians

Numerous strategies have been developed over the years to improve the general health of Australia's Indigenous population. Nonetheless, there appears to have been little improvement in Indigenous health, and Australia's progress is considered poor when compared to the United States, Canada and New Zealand.²⁷ Primary health care programs were established in those countries before Australia, and it is thought that this has enabled them to deal more effectively with current health problems in their Indigenous communities.

Indigenous and non-Indigenous concepts of health can differ dramatically. Whilst medicine is often viewed as a distinct discipline in Australian society, Indigenous Australians generally adopt a much more holistic approach to their health. In its submission to the 'Bringing Them Home' inquiry, the Sydney Aboriginal Mental Health Unit wrote that:

Traditional Aboriginal culture like many others does not conceive of illness, mental or otherwise, as a distinct medical entity. Rather there is a more holistic conception of life in which individual wellbeing is intimately associated with collective wellbeing. It involves harmony in social relationships, in spiritual relationships and in the fundamental relationship with the land and other aspects of the physical environment. In these terms diagnosis of an individual illness is meaningless or even counterproductive if it isolates the individual from these relationships.²⁸

²⁶ Neill, n 12, p 51.

²⁷ Australian Medical Association, n 20.

²⁸ Human Rights and Equal Opportunity Commission, *Bringing them home: National Inquiry*

The Preamble to the Constitution of the World Health Organization similarly embraces a broad view of health, defining it as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’.

NSW Health believes that successful Indigenous health programs have usually embraced a holistic approach to health. Other factors that NSW Health has deemed effective include:²⁹

- community negotiation, consultation and participation;
- whole of life view of health;
- partnerships at state, regional and local levels;
- intersectoral collaboration and effective relationship building;
- engaging mainstream health services, programs and strategies to take responsibility for making Aboriginal health part of their core business;
- harnessing specialist medical, technical and allied health expertise to work together towards improving Aboriginal health;
- adequate resources to achieve program goals;
- capacity-building: monitoring, supporting, providing technical advice, advocacy, education, resource dissemination etc;
- workforce development: professional recognition and provision of education, career structures, training and support for Aboriginal health workers;
- sustainability; and
- cultural understanding and a recognition of trauma and loss.

NSW Health has developed a number of strategies that focus on particular aspects of Indigenous health.³⁰ These include maternal and infant health, mental health, oral health, sexual health, and youth drug and alcohol awareness. The NSW Otitis Media Strategic Plan for Aboriginal Children

into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, HREOC, Sydney, 1997, p 392.

²⁹ NSW Health, *Ensuring Progress in Aboriginal Health in New South Wales: a reader friendly information kit*, NSW Health Department, 2002, p 13.

³⁰ For information on these strategies and projects see NSW Health, n 29, pp 13-30.

recognises that the proportion of Indigenous children suffering from otitis media and conductive hearing loss is up to ten times the rate of non-Indigenous children.³¹ The Plan seeks to address the need for early intervention in this area, and to establish Aboriginal community based programs.

There are a number of eye conditions that are a particular issue for Indigenous Australians, including refractive error, diabetic retinopathy, cataract and trachoma.³² Whilst the incidence of these conditions, except for trachoma, is relatively similar for Indigenous and non-Indigenous persons, there is a concern that Indigenous communities are not receiving the level of services required to effectively treat those affected. Trachoma is a type of conjunctivitis that has the potential to cause blindness. Australians who are affected by this condition are overwhelmingly Indigenous. Whilst its incidence is decreasing, it is still common in parts of northern and central Australia.

The Standing Committee on Aboriginal and Torres Strait Islander Health has identified some factors in addition to the ones noted by NSW Health that are features of successful health initiatives. These include such things as: locating the control of primary health care services in the community; involving government, non-government and private organisations in collaborative efforts and not limiting them to the health sector; localising decision making, with Indigenous communities to define their health needs and priorities, and arrange for them to be met; viewing both the promotion of good health and illness prevention as core activities; and holding organisations accountable for health outcomes.³³

Since 1995 the NSW Government has formally collaborated with Aboriginal communities in relation to health. It is hoped this collaboration will enable culturally relevant programmes and policies to be developed that are accessible to Indigenous persons. The Aboriginal Health and Medical Research Council of NSW and NSW Health have formulated a joint agreement on health policies and the allocation of resources, known as the NSW Aboriginal Health Partnership Agreement.³⁴ The Partnership was originally formed in 1995 and despite revision has continued since. The Aboriginal and Torres Strait Islander Commission (ATSIC) has worked with the Commonwealth Department of Health and Ageing, the NSW Department of Health and the NSW Aboriginal Health and Medical Research Council to formulate the NSW Health Framework Agreement to ensure a more coordinated approach to the delivery of health services in NSW.³⁵

³¹ Ibid, p 21.

³² The information included in this paragraph is sourced from Australian Indigenous Health/InfoNet (June 2003), 'Frequently asked questions: what do we know about eye conditions among Indigenous people?', www.healthinonet.ecu.edu.au Accessed 29/4/04.

³³ Standing Committee on Aboriginal and Torres Strait Islander Health, *Aboriginal and Torres Strait Islander Health Workforce National Strategic Framework*, Australian Health Ministers' Advisory Council, Canberra, 2002, p 2.

³⁴ NSW Health, n 29, p 1.

³⁵ Aboriginal and Torres Strait Islander Commission, *Annual Report 2002/2003*, p 147.

However, the benefits of collaboration may potentially be reduced should adequate consideration not be given to the complexity of issues involved. Rosemary Neill has noted that:

Some critics argue that the widespread practice of governments consulting communities about what they want has vested power in younger and middle-aged indigenous leaders who can talk the talk of bureaucrats, rather than in elders. Thus, well-meaning outsiders who believe they are following the principles of self-determination accelerate the erosion of traditional authority at the same time as they romanticise it.³⁶

A number of non-government initiatives have also been developed to improve the health status of Indigenous Australians. The Aboriginal Medical Service was established in 1971 in response to the need to provide culturally appropriate health services. Another initiative is the 'Healing Hands' campaign that was launched by Australians for Native Title and Reconciliation on 18 February 2004. This campaign 'aims to turn the tide of the worsening crisis in Indigenous Health in Australia, and help lead a resurgence of the prominence of Indigenous issues on the national political agenda'.³⁷ It hopes to educate the community about Indigenous health, build support networks and develop advocacy initiatives.

³⁶ Neill, n 12, p 74.

³⁷ For further information on the campaign see Australians for Native Title and Reconciliation, 'Healing Hands', www.antar.org.au

3 EDUCATION

Almost 30% of Indigenous school students in Australia attend a school in NSW, the greatest number for any state or territory.³⁸ There were 32,874 Indigenous students enrolled in a government school in NSW as at August 2002, comprising 4.4% of all students.³⁹ However, the proportion of the student population that is Indigenous varies with each school. The overwhelming majority of Australian schools either have no Indigenous students (almost one third of Australian schools) or they constitute less than 5% of the student population (over 45% of schools).⁴⁰ This needs to be kept in mind as much research into Indigenous education focuses on remote and community based schools whereas the majority of Indigenous students are attending schools where they are a minority group.⁴¹ The Dubbo region has the greatest number of Indigenous students in NSW (2,991 enrolments representing over 24% of students).⁴² The Ryde, Hornsby and Northern Beaches districts have the lowest numbers of Indigenous students in NSW.⁴³

3.1 Primary

The proportion of Indigenous children achieving academically at school is markedly lower than for non-Indigenous children. This is despite numerous educational reforms since the 1970s that have attempted to make schooling more relevant and culturally appropriate to Indigenous students.⁴⁴ The following table compares the proportion of students, both indigenous and non-indigenous, achieving the reading, writing and numeracy benchmarks, in years three and five, in NSW and Australia in 2001:

³⁸ Australia, Department of Education, Science and Training, *National Report to Parliament on Indigenous Education and Training*, Department of Education, Science and Training, Canberra, 2002, p 55.

³⁹ NSW Department of Education and Training, *Statistical Bulletin: Schools and Students in New South Wales, 2002*, p 31. www.det.nsw.gov.au Accessed 19/3/04.

⁴⁰ Australia, Department of Education, Science and Training, n 38, p 29.

⁴¹ Mellor S and Corrigan M, *The Case for Change: A Review of Contemporary Research in Indigenous Education Outcomes*, Australian Council of Education Research Press, Camberwell, 2004, p 17.

⁴² NSW Department of Education and Training, n 39, p 31.

⁴³ Ibid.

⁴⁴ Beresford Q, 'Separate and unequal: An outline of Aboriginal education 1900-1990s', in Beresford Q and Partington G (eds) *Reform and Resistance in Aboriginal Education: The Australian Experience*, University of Western Australia Press, Crawley, 2003, p 64.

Percentage of Indigenous and non-Indigenous students in NSW and Australia attaining the reading, writing and numeracy benchmarks in years three and five

Skill	Year 3		Year 5	
	NSW	Australia	NSW	Australia
Reading				
% of students	91.3	90.3	92.0	89.8
% of indigenous students	79.2	72.0	76.6	66.9
Writing				
% of students	89.9	89.5	95.9	94.0
% of indigenous students	73.1	67.8	87.4	79.9
Numeracy				
% of students	95.0	93.9	91.7	89.6
% of indigenous students	86.9	80.2	74.6	63.2

Source: Ministerial Council on Education, Employment, Training and Youth Affairs, *National Report on Schooling in Australia 2001: Preliminary Paper*. Available from www.mceetya.edu.au

As illustrated by the table, the proportion of Indigenous students achieving the benchmarks is significantly lower than the percentage of non-Indigenous students in all categories. This is a particular concern given that failure to reach the benchmark is seen as an indication that a student will experience extreme difficulty in their schooling.⁴⁵

The National Indigenous English Literacy and Numeracy Strategy seeks to lift the level of literacy and numeracy achievement among Indigenous students so that it is similar to non-Indigenous students.⁴⁶ The Strategy aims to do this by:⁴⁷

1. *lifting school attendance rates of Indigenous students to national levels* – studies have found that on an average day, almost one quarter of Indigenous students will be absent from school,⁴⁸ and 3% do not attend school at all;⁴⁹
2. *effectively addressing the hearing and other health problems that undermine learning for a large proportion of Indigenous students* – a particular health issue that affects many young Indigenous students is otitis media, an ear infection that causes conductive hearing loss. It is thought to contribute to the isolation of children in the

⁴⁵ Ministerial Council on Education, Employment, Training and Youth Affairs, *National Report on Schooling in Australia 2001: Preliminary Paper*. Available from www.mceetya.edu.au

⁴⁶ Australia, Department of Education, Science and Training, n 38, p 101.

⁴⁷ Commonwealth Department of Education, Science and Training, 'The National Indigenous English Literacy and Numeracy Strategy', Available from www.dest.gov.au/schools/indigenous/publications/ Accessed 5/3/04.

⁴⁸ Beresford Q, 'The context of Aboriginal education', in Beresford Q and Partington G (eds) *Reform and Resistance in Aboriginal Education: The Australian Experience*, University of Western Australia Press, Crawley, 2003, p 14.

⁴⁹ Human Rights and Equal Opportunity Commission, n 4.

classroom, and to subsequently reduce both the likelihood of their attendance at school as well as their participation in school activities.⁵⁰

3. *providing, wherever possible, preschooling opportunities;*
4. *training sufficient numbers of teachers in the skills and cultural awareness necessary to be effective in Indigenous communities and schools and encouraging them to remain for reasonable periods of time;*
5. *ensuring that the most effective teaching methods are used; and*
6. *instituting transparent measures of success as a basis for accountability for schools and teachers.*

3.2 Secondary

The gap between the academic achievement of Indigenous and non-Indigenous students continues to widen with age. In 2001, only 17% of the Indigenous community compared to 40% of the non-Indigenous population had completed year 12.⁵¹ Whilst retention rates do appear to have improved slightly, Indigenous students continue to exhibit a tendency to leave school once it is not compulsory.⁵² The following table was included in the *National Report to Parliament on Indigenous Education and Training* and compares the apparent retention rates to year 12 for students who were in year 10 in 1999, for Indigenous and non-Indigenous students in Australia in 2001:

State/Territory	Indigenous %	Non-indigenous %	Gap %
New South Wales	37.1	71.0	33.9
Victoria	44.0	81.8	37.8
Queensland	59.1	80.6	21.5
South Australia	42.8	70.1	27.3
Western Australia	26.9	73.9	47.0
Tasmania	41.2	72.1	30.9
Northern Territory	42.9	68.7	25.8
Australian Capital Territory	53.8	93.7	39.9
Australia	43.6	76.2	32.6

Source: Australia, Department of Education, Science and Training, *National Report to Parliament on Indigenous Education and Training*, Department of Education, Science and Training, Canberra, 2002, p 57.

The retention rate of Indigenous students in NSW is particularly low at 37.1%. It is lower than in any other jurisdiction in Australia, except Western Australia. However, the retention rate of non-Indigenous students is also smaller in NSW, with only 71% continuing to year 12 compared to an

⁵⁰ Australia, Department of Education, Science and Training, n 38, p 14.

⁵¹ Human Rights and Equal Opportunity Commission, n 4.

⁵² Steering Committee for the Review of Government Service Provision, n 8, p 8.

Australian average of 76.2%. Nonetheless, the proportion of non-Indigenous students continuing is almost double that of Indigenous pupils. Failure to complete year 12 may hinder future opportunities in relation to further education, training and employment.

The transition between each level of schooling needs to be effectively managed to encourage Indigenous children to remain at school. It is thought that many Indigenous students find the transition to high school from primary school especially difficult. For example, many Indigenous males undergo initiation about the age of 12 and are subsequently treated as adults, a situation very different to school.⁵³

3.3 Tertiary

Despite recent improvement, Indigenous and non-Indigenous Australians participate in tertiary education at differing rates. A non-Indigenous person is almost twice as likely as an Indigenous person to attend university, but an Indigenous Australian is more likely to attend TAFE.⁵⁴ The participation rate of Aboriginal youth in university has gradually risen. In 1992, there were 153 Indigenous persons in higher degrees, 191 in post-graduate programs and 2,780 in bachelor degree programs.⁵⁵ By 2001 the numbers had increased to 433 in higher degrees, 283 in postgraduate programs and 4,629 in bachelor degree programs. However, the participation rate for non-Indigenous youth has also increased and to a much greater extent, thus the gap has actually widened.⁵⁶

A large number of Indigenous persons undertake some form of vocational training, especially in NSW. Almost 30% of Indigenous students in Australia in 2001 who were participating in vocational education and training were in NSW, the greatest number of any state or territory.⁵⁷ Over 28% of new Indigenous apprentices for the same year were also in NSW, the second highest number after Queensland.⁵⁸ About one quarter of Indigenous persons in NSW between the ages of 15 and 64 participated in some form of vocational training in 2001.⁵⁹

⁵³ Mellor and Corrigan, n 41, p 20.

⁵⁴ Steering Committee for the Review of Government Service Provision, n 8, p 9.

⁵⁵ Hughes P, 'Foreword' in Mellor S and Corrigan M, *The Case for Change: A Review of Contemporary Research in Indigenous Education Outcomes*, Australian Council of Education Research Press, Camberwell, 2004.

⁵⁶ Hunter B and Schwab R, 'Practical reconciliation and continuing disadvantage in Indigenous education', *The Drawing Board: An Australian Review of Public Affairs*, 4(2) November 2003, p 86.

⁵⁷ Australia, Department of Education, Science and Training, n 38, p 69.

⁵⁸ *Ibid*, p 69.

⁵⁹ *Ibid*.

3.4 Education policies: past and present

The historical relationship between Indigenous Australians and the education system is largely negative and is likely to have influenced attitudes to education within the Indigenous community. For many years, Indigenous children in NSW were subjected to a policy that prevented them from attending a school if the parents of white children objected to their participation.⁶⁰ This 'exclusion on demand' policy was government policy by 1902 when the NSW Minister for Education, John Perry ordered government schools to exclude Indigenous children if white parents objected to their inclusion, and it continued until the late 1960s.⁶¹ As a result, it is estimated that about 50,000 Aborigines did not have access to either white or special Aboriginal schools between 1900 and 1970.⁶² Beresford has concluded that:

It is impossible to separate the current issues and problems in Aboriginal education from the past. In fact, issues now confronting policy makers and teachers have been shaped by a century and more of efforts aimed at the educational marginalisation of Aboriginal people and to make them culturally conform to mainstream Australian values and society.⁶³

There has been a movement in recent decades to include Indigenous issues in the school curriculum and to ensure that the subject of history includes the history of Australia's Indigenous population and their relationship with non-Indigenous Australians post 1788. It is hoped that this will achieve two things. Firstly, that the relevance of the curriculum to Indigenous students will increase and secondly, that the awareness and understanding of all children regarding Australia's history and Indigenous culture will improve. As noted by Linda Burney:

there are parts of Australian history that we should be absolutely ashamed of, that should not have happened. But it's not about making people guilty. It's about getting Australia to recognise and acknowledge that whole history, and also to take pride and joy in the fact that we have the oldest continuous surviving culture on planet Earth as part of the Australian make-up.⁶⁴

'Aboriginal studies' has been taught as a HSC subject in NSW since 1991.⁶⁵ The current NSW Department of Education and Training Aboriginal Education Policy seeks to 'promote the

⁶⁰ Some examples of the operation of this policy may be found in: Fletcher J, *Documents in the History of Aboriginal Education in New South Wales*, J Fletcher, Sydney, 1989, pp 107ff.

⁶¹ Beresford, n 44, p 45; Neill, n 12, p 43.

⁶² Tatz C, *Aboriginal Suicide is Different*, Criminology Research Council, Canberra, 1999, p 28.

⁶³ Beresford, n 44, p 68.

⁶⁴ Burney L, 'Reconciliation and the Wik judgement', in *Sharing Country: Land Rights, Human Rights, and Reconciliation after Wik*, Research Institute for Humanities and Social Sciences, University of Sydney, 1997, p 6.

⁶⁵ Neill, n 12, p 243.

educational achievements of Aboriginal students’ and to ‘educate all students about Aboriginal Australia’.⁶⁶ The following six principles form the basis of the Aboriginal Education Policy in NSW:

1. Aboriginal students have an entitlement to appropriate and adequate resources, recognising the effects of past inequalities, to enable them to achieve educational outcomes from schooling that are comparable with those of the rest of the student population.
2. Aboriginal communities are entitled to negotiate the decisions that affect their children’s schooling through active partnership with the Department of School Education (DSE) at all levels.
3. Aboriginal students are entitled to high quality, culturally appropriate education and training programs as a foundation for lifelong learning.
4. All students are entitled to learn about Aboriginal Australia, understanding that Aboriginal communities are the custodians of knowledge about their own cultures and history.
5. Aboriginal students are entitled to feel safe and secure in expressing and developing their own identity as Indigenous people within school and the wider society.
6. Aboriginal students are entitled to participate in a system which is free of racism and prejudice.

The NSW policy builds on the goals of the National Aboriginal and Torres Strait Islander Education Policy which aims to: involve Aboriginal and Torres Strait Islander people in making decisions about education; ensure equality of access to education services and equity of educational participation; and equitable and appropriate educational outcomes.⁶⁷

However, the extent to which the reforms of the educational system have succeeded is disputed or doubted by some. For example, Rosemary Neill argues that ‘Australian schools have had more success “Aboriginalising” their curriculums than in educating Aboriginal pupils’.⁶⁸

3.5 Contributing factors to poor educational outcomes

Many factors contribute to the relatively poor outcomes in education for Indigenous Australians. Factors that are generally accepted as having a contributory role include the poor health of Indigenous people, their shorter life expectancy, greater poverty, higher incarceration and lower employment rate.⁶⁹ Whilst these factors may also apply to other groups within Australia, the ‘scale and the patterns of the combinations of social, economic and educational factors are uniquely

⁶⁶ NSW Department of School Education, ‘Aboriginal Education Policy’, www.det.nsw.gov.au/policies

⁶⁷ Commonwealth, Department of Education, Science and Training, ‘National Aboriginal and Torres Strait Islander Education Policy’, Available from www.dest.gov.au/schools/indigenous Accessed 2/3/04.

⁶⁸ Neill, n 12, p 244.

⁶⁹ Mellor and Corrigan, n 41, p 48.

Indigenous'.⁷⁰ This demonstrates the importance of adopting a holistic approach to improving education for Indigenous Australians.

The role of languages other than English in the lives of some Indigenous children may also influence the experience of an Indigenous child at school. For a number of children, English as spoken and taught at school is not their first language. Many Indigenous people speak a version of English known as Aboriginal English. 12% of the Indigenous population speak an Aboriginal or Torres Strait Islander language at home.⁷¹ As regions become more remote, the likelihood of an Indigenous language being used increases, rising from 1% of Indigenous persons in urban areas to 55% in remote regions.⁷²

Mellor and Corrigan found that Indigenous parents are often uninvolved with primary school activities and decision-making.⁷³ They believe that for learning to be effective it needs to be jointly managed by the students, teachers and parents/caregivers, the effect of which is to increase participation by the community and parents in the life of the school. Another way to encourage involvement in the school is to ensure that schooling is relevant to future employment. Mellor and Corrigan argue that education should be explicitly related to employment and life outcomes, to overcome the perceived weak link between education and employment.⁷⁴ This perception can mean that education is not viewed as a worthwhile investment, especially when financial resources and/or mainstream employment opportunities are limited.

Improving the educational outcomes for Indigenous students is a national concern.⁷⁵ The Ministerial Council on Education, Employment, Training and Youth Affairs has established a Taskforce on Indigenous Education, Employment, Training and Youth. The role of the Taskforce is to provide advice on:⁷⁶

1. the achievement of educational equality and equitable outcomes in employment and well-being for Australia's Indigenous people.
2. policies and approaches that have been demonstrated to improve education and employment opportunities, outcomes and well being for Indigenous people.

⁷⁰ Ibid.

⁷¹ Human Rights and Equal Opportunity Commission, n 4.

⁷² Ibid.

⁷³ Mellor and Corrigan, n 41, p 40.

⁷⁴ Ibid, p 31.

⁷⁵ For information on various schemes regarding Indigenous education at the federal level see: Commonwealth, Department of Education, Science and Training, 'Indigenous', www.dest.gov.au/directory/indigenous.htm

⁷⁶ Ministerial Council on Education, Employment, Training and Youth Affairs, 'Taskforce on Indigenous Education, Employment, Training and Youth', www.mceetya.edu.au Accessed 4/3/04.

3. strategies for widespread implementation of such approaches as appropriate.
4. strategies in employment, education, training and youth affairs to support a whole of government approach to enhance outcomes for Indigenous people.

The *Indigenous Education (Targeted Assistance) Act 2000* (Cth) enables the Federal Minister for Education, Science and Training to make agreements with education providers for the purpose of providing targeted financial assistance to advance the education of Indigenous persons as expressed by the objects of the Act. The objects of the Act are set out in Part 2 and include: equitable and appropriate educational outcomes for Indigenous people; equal access to education by Indigenous people; equity of participation by Indigenous people in education; increasing involvement of Indigenous people in educational decisions; and to develop culturally appropriate education services for Indigenous people.

In 1995, the Ministerial Council on Education, Employment, Training and Youth Affairs noted that the professional development of staff involved in education needed to improve.⁷⁷ The Council also identified the need for more Indigenous staff to be employed in education and training. However, in 2001, only 0.8% of teachers in government schools were Indigenous Australians.⁷⁸

A review of the effectiveness of education and training for Aboriginal students in NSW has been announced. The terms of reference for the review are:⁷⁹

- (a) To examine current approaches in the delivery of Aboriginal education addressing issues including:
 - attendance
 - retention rates, and
 - academic performance.To bring about improved outcomes in these areas through consultation with interest groups;
- (b) To assess the extent that the principles of the Aboriginal Education Policy are incorporated in the education of all students, staff and school communities;
- (c) To review and develop system-wide approaches to improving Aboriginal Education and Training and achieving quality learning outcomes for Aboriginal students; and
- (d) To incorporate into this comprehensive system-wide approach the Action Plan for Aboriginal education developed under the *Two Ways Together* process.

The Review is to be conducted in partnership with the NSW Aboriginal Education Consultative Group, an Aboriginal community-based organisation that provides advice on issues of education and training.⁸⁰

⁷⁷ Australia, Department of Education, Science and Training, n 38, p xvii.

⁷⁸ Ibid, p 31.

⁷⁹ The terms of reference are available from www.det.nsw.gov.au/reviews/aboriginaledu/termsref.htm Accessed 2/3/04.

⁸⁰ For more information on the NSW Aboriginal Education Consultative Group Inc visit their website at www.nswaecg.com.au

4 EMPLOYMENT

4.1 An overview of the current situation

The level of economic disadvantage in the Indigenous community in Australia is significant in terms of rates of employment and incomes received:⁸¹

- In 2001, 42% of Indigenous adults were employed, compared to 58% of non-Indigenous adults.⁸²
- The overwhelming majority (93%) of Indigenous persons in the workforce are employees.
- 55% of employed Indigenous persons work in the private sector and almost one-quarter work for the government.
- 52% work full time.
- 60% work in low skill occupations.
- An Indigenous person earns about 65% of the average income of a non-Indigenous person. The average income of an Indigenous Australian is significantly lower than the mean for a non-Indigenous person irrespective of the location in Australia.⁸³ The difference between incomes grows as regions become more remote.

The Indigenous community experiences particularly high rates of unemployment. It hovered around 20% in 2001, almost three times the rate for non-Indigenous persons.⁸⁴ Youth unemployment is also high in the Indigenous community, with 32% of 15-17 year olds and 27% of 18-24 year olds unemployed.⁸⁵ This is almost double the level for the non-Indigenous population. It has been predicted that, without major changes, the Indigenous employment rate will continue to deteriorate due to the growth in the number of Indigenous youth (the relative youth of the Indigenous population was discussed in section 2).⁸⁶ Hunter has concluded that as 'Indigenous

⁸¹ Unless otherwise stated, the following statistics are from the Human Rights and Equal Opportunity Commission, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia', www.humanrights.gov.au/social_justice/statistics/index.html Accessed 17/2/04.

⁸² Australian Bureau of Statistics, n 2, p 4.

⁸³ Steering Committee for the Review of Government Service Provision, n 8, p 11.

⁸⁴ Ibid, p 10.

⁸⁵ Human Rights and Equal Opportunity Commission, n 4.

⁸⁶ Hunter B, *Australian Census Analytic Program: Indigenous Australians in the*

people want to work as much as other Australians... it is probable that poor educational outcomes and discrimination are the main wedges preventing the convergence of Indigenous and non-Indigenous employment rates'.⁸⁷

The issue of employment may be particularly complicated in remote regions of Australia where the availability of work is often limited. Some Indigenous Australians may be unwilling to move to areas where employment prospects are better because cultural priorities tie them to their current location.⁸⁸

4.2 The Community Development and Employment Projects Scheme

The Community Development and Employment Projects (CDEP) scheme⁸⁹ is one initiative that has been developed in response to the high rate of unemployment. The purpose of the scheme is 'to enable Aboriginal and Torres Strait Islander communities and organisations to take control of their own community, enhance economic and social development and to provide employment for people in their own communities'.⁹⁰ It seeks to reduce reliance on social security, promote self development, provide an opportunity for participation in the labour market, enable participants to develop job-related skills, and provide a sustainable economic, cultural and social base.

The CDEP scheme commenced on a pilot basis in 1977 and is currently run by the Aboriginal and Torres Strait Islander Commission, forming one of its major areas of expenditure. Under the scheme, the unemployed give up their Centrelink entitlements and work on a community project in return for government support. A variety of projects are encompassed by the scheme including housing construction and maintenance, road maintenance, artefact production, meals on wheels, video and music production, and horticultural enterprises, amongst other things.

The scheme accounted for 27% of all Indigenous workers in 2001, with 32,616 participants in 270 communities.⁹¹ There were 30 projects in the Sydney regional cluster as at 20 June 2003 involving 3,241 participants.⁹² Another 28 operated in the Wagga regional cluster with 2,351 persons involved. As the scheme absorbs some of the unemployed, it is likely that the official

Contemporary Labour Market, 2001, 2052.0, Australian Bureau of Statistics, 2004, p 63.

⁸⁷ Ibid, p 8.

⁸⁸ Ibid, p 3.

⁸⁹ Unless otherwise stated the information in this section is sourced from: Aboriginal and Torres Strait Islander Commission, *Community Development Employment Projects: CDEP – What It's All About 2002-2003*, Aboriginal and Torres Strait Islander Commission, July 2002. Available from www.atsic.gov.au Accessed 2/3/04.

⁹⁰ Ibid, p 3.

⁹¹ Hunter, n 85, p 2.

⁹² Aboriginal and Torres Strait Islander Commission, n 35, p 208.

estimations of unemployment in Indigenous communities are understated. It has been projected that without the CDEP scheme the unemployment rate would actually double.⁹³ This masking of the true level of Indigenous unemployment is viewed by some as one of the major flaws of the CDEP scheme. Hunter writes:

The presence of the CDEP scheme has tended to overstate the employment prospects (and understate unemployment rates) of Indigenous Australians, especially in non-urban areas. The scheme also had a 'distortionary' effect on the composition of Indigenous employment with the vast majority of such jobs being part-time, and [they] are largely concentrated in particular industries and occupations. The effect of the CDEP scheme on segregation in industrial and occupational distribution has been severely under-appreciated in previous analysis.⁹⁴

Other concerns have been expressed regarding the CDEP scheme. One cause of unease is that the CDEP scheme may not encourage Indigenous students to complete their education, as it is not necessary for gaining a job within the scheme.⁹⁵ This may result in education not being viewed, and valued as such, as a prerequisite for employment.

4.3 Small business initiatives

The Commonwealth Government has established an Indigenous Small Business Fund for the development and expansion of Indigenous businesses. The following is a list of projects that were approved for NSW between 1 October and 30 December 2003.⁹⁶

- *Ellimatta Housing Aboriginal Corporation* – to investigate the purchase and development of mixed farming properties;
- *Murri Ibai Aboriginal Co-operative Ltd* – to conduct a feasibility assessment of the commercial opportunities available through the management and development of 'Eurool' station at Collarenebri;
- *Northern Star Aboriginal Corporation Ltd* – to develop business and property management plans and applications to the Indigenous Land Corporation to obtain properties for a citrus orchard and mixed farming businesses in the Brewarrina area;
- *Red Chief Local Aboriginal Land Council* – to develop a feasibility study and business plan for a Cypress Pine Thinning Plant in Gunnedah in North Western NSW; and

⁹³ Aboriginal and Torres Strait Islander Commission, n 89, p 11.

⁹⁴ Hunter, n 85, p 118.

⁹⁵ Mellor and Corrigan, n 41, p 32.

⁹⁶ Commonwealth, Australian Employment Services, 'Indigenous Small Business Fund – New South Wales'. www.workplace.gov.au Accessed 20/2/04.

- *Wutuma Keeping Place Aboriginal Corporation* – to provide market research and business planning to assist Wutuma Keeping Place to restore, protect and house artefacts and art works to preserve and promote the cultural identity of the Dunghutti Nation.

There are a number of initiatives in NSW that support Indigenous businesses. ATSIC provided support for 91 businesses in the Sydney regional cluster and 63 in the Wagga regional cluster in 2003.⁹⁷ The NSW Department of State and Regional Development manages the First Peoples Business Partnerships known as Budyari Ngalaya. This initiative seeks to encourage businesses to work with Indigenous communities and develop business and employment opportunities. 23 partnerships between large firms and Indigenous enterprises and communities were formed in 2002-2003.⁹⁸ The Department of State and Regional Development has also established an Aboriginal Business Link Program to assist Indigenous businesses to participate in relevant trade exhibitions. The Aboriginal Business Review Program provides financial assistance of up to \$2,500 so that a business review can be conducted to identify the necessary steps for building the business. There were 36 Indigenous businesses active in the program in 2002-03.⁹⁹

Acknowledging the right of Indigenous persons to land could also improve the economic well-being of the Indigenous community. Land is an asset that can be developed, and it is thought that the provision of land will promote economic growth, social development and environmental protection.¹⁰⁰

4.4 The ‘Stolen Wages’ Issue

Between 1900 and 1969 the Aboriginal Protection Board (subsequently the Aboriginal Welfare board and the Department of Community Services) collected various monies owed to Indigenous people to be held in trust for them. This practice was based on a belief that Indigenous people could not effectively manage their finances. Section 11(1) of the *Aborigines Protection Act 1909* empowered the Board to collect and institute proceedings for the recovery of any wages payable to an Indigenous child who had been apprenticed. Discretion was granted to the Board in expending these wages with the proviso that it be in the interest of the child.

It was also common for family endowment to not be paid directly to Indigenous persons. They were required to apply to the police, who administered the scheme, for tickets to purchase goods from the local store.¹⁰¹ In the Second Reading debate for the *Aborigines Protection (Amendment) Bill 1936*, H J Bate MLA, also a member of the Aborigines Protection Board,

⁹⁷ Aboriginal and Torres Strait Islander Commission, n 35, p 204.

⁹⁸ NSW Department of State and Regional Development, *Annual Report 2002-2003*, p 12.

⁹⁹ Ibid, p 31.

¹⁰⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission, 2003, p 4.

¹⁰¹ M Davidson MLA, *NSWPD*, 2/5/40, p 8293.

referred to the practice of paying family endowment to the Board rather than directly to the person entitled. His comments are an example of the belief held by some at the time that Indigenous persons were incapable of managing their own money:

The action of the board in this direction has been the result of experience. The chief desire of the aborigine, like the white man, is to own some sort of motor vehicle, and in many cases every penny paid to aborigines by way of endowment has been used to buy a motor car or a motor lorry that ran for a few days or a few months. The result was that the “kiddies” received nothing. All the board desires is that endowment shall be paid to the mothers and children... Instead of allowing the fathers to get hold of the money and squander it, the board has put the money in trust for the young people.¹⁰²

The *Aborigines Protection (Amendment) Act 1936* granted the Board further power over the wages of Indigenous workers. It inserted section 13C into the *Aborigines Protection Act* which stated:

In any case where it appears to the board to be in the best interests of the aborigine concerned the board may direct employers or any employer to pay the wages of the aborigine to the secretary or some other officer named by him, and any employer who fails to observe such directions shall be deemed to have not paid such wages. The wages so collected shall be expended solely on behalf of the aborigine to whom they were due, and an account kept of such expenditure.

Whilst the declared intention behind section 13C was to protect the wages of an Indigenous person from an unscrupulous employer, R J Heffron MLA noted the potential for the provision to be misused:

I want to raise the point that with an officious person in charge of a mission there might be interference in the spending of the man's wages. The aboriginal might feel he was entitled to spend his wages as he pleased, just as any other persons, but the money might be eked out to him by the manager of the mission in dribs and drabs... I have mentioned that to ask the House to consider whether possibly we are not making this bill a little too stringent and curtailing unnecessarily the liberty of these people.¹⁰³

The circumstances in which an Indigenous person was entitled to directly receive the money owed to them continued to narrow. The *Aborigines Protection (Amendment) Act 1940* (NSW) dissolved the Board for the Protection of Aborigines and established the Aborigines Welfare Board in its place. It inserted section 11A(3) into the *Aborigines Protection Act* (NSW) which provided that, ‘All wages earned by any ward except such part thereof as the employer is required to pay to the ward personally as pocket money shall be paid by the employer to the board on behalf of such ward and shall be applied as prescribed’.

Reports have recently emerged that all of the money held in trust has not been returned to its rightful owners. The former Department of Services allegedly held 200 to 300 bank account books in the name of the Aborigines Welfare Board as trustee, and the number of potential

¹⁰² H Bate MLA, *NSWPD*, 23/6/36, p 4845.

¹⁰³ R Heffron MLA, *NSWPD*, 23/6/36, p 4847.

claimants has been estimated to be 11,500.¹⁰⁴

However, members of parliament in 1940 were already aware of the difficulty experienced by some Indigenous persons when attempting to access money held on their behalf. In the Second Reading debate for the *Aborigines Protection (Amendment) Act 1940*, M A Davidson MLA raised the issue, voicing his concern that young Indigenous men were having difficulty recovering from the Aborigines Protection Board the wages they had earned whilst labouring on stations.¹⁰⁵

Premier Carr formally apologised in parliament on 11 March 2004 for the government's failure to return the monies held in trust.¹⁰⁶ According to Carr, the records of the monies held are incomplete. However, State Cabinet has agreed to develop a scheme to identify and reimburse those to whom money is owed. The groups of people likely to be affected include:¹⁰⁷

1. children under the care of the Aborigines Protection or Welfare Board who were apprentices;
2. women who received family and child endowment;
3. recipients of Commonwealth pensions or other Commonwealth benefits; and
4. beneficiaries of lump sum payments.

¹⁰⁴ 'Where are the stolen wages?', *Sydney Morning Herald*, 1/3/04, p 11; 'Aborigines treated like Nazi slaves, says report', *Sydney Morning Herald*, 1/3/04, p 5.

¹⁰⁵ M Davidson MLA, *NSWPD*, 2/5/40, p 8293.

¹⁰⁶ Hon R Carr MP, *NSWPD*, 11/3/04, p 7163.

¹⁰⁷ *Ibid.*

5 HOUSING

5.1 An overview of the current situation

Many Indigenous Australians are also disadvantaged in relation to housing. For example:

- 19% of Australia's Indigenous population lives in government housing and another 13% lives in housing that is funded by the government but managed by the Aboriginal community.¹⁰⁸
- 7% of all households in public housing in NSW are Indigenous.¹⁰⁹
- 63% of Indigenous households rent their home compared to 27% of other Australians. About one-third of Indigenous families own or are buying their own home in contrast to approximately 70% of non-Indigenous families.¹¹⁰
- Indigenous Australians are 5.6 times more likely to live in overcrowded premises.¹¹¹

5.2 The complexity of the issue

The provision of housing for Indigenous communities by various governments has not always been culturally appropriate and has in many instances subsequently failed.¹¹² The role of family may be more prevalent in some Indigenous communities. The Australian Bureau of Statistics calculated that 82% of Indigenous households are family households compared to 70% of non-Indigenous households.¹¹³ In many Indigenous communities, individual possessions are seen as belonging to the collective. This may cause problems in tenancies if a person other than the official tenant damages property.

The provision of housing is also complicated by the consequence of past policies:

Australia and its indigenous population are still in a very early learning stage of how to provide and manage housing which is consistent with the cultural needs of Aboriginals but which recognise the damage caused by having disconnected them from the land and having created an economic and

¹⁰⁸ Burke T, 'Managing Social Housing for Indigenous Populations', www.sisr.net/programch/papers. Accessed 1/3/04.

¹⁰⁹ NSW Department of Housing, *Annual Report 2002-03*, p 20.

¹¹⁰ Australian Bureau of Statistics, n 2, p 6.

¹¹¹ Human Rights and Equal Opportunity Commission, n 4.

¹¹² Burke, n 108.

¹¹³ Australian Bureau of Statistics, n 3, p 28.

social mire from which it is difficult to escape.¹¹⁴

Recommendation 73 of the Royal Commission into Aboriginal Deaths in Custody suggested:

That the provision of housing and infrastructure to Aboriginal people in remote and discrete communities, including the design and location of houses, take account of their cultural perceptions of the use of living space, and that budgetary allocations include provision for appropriate architectural and town planning advice to, and consultation with, the serviced community.¹¹⁵

Burke has suggested that in order to ensure that housing is appropriate to the needs of the Indigenous community, the following principles should be taken into account at the design stage:¹¹⁶

- there needs to be an allowance for communal gatherings;
- housing needs to be flexible and have the ability to cope with larger occupancies. This could be achieved by creating areas that are able to be used for the dual purposes of living and sleeping;
- outdoor areas have an important role in social gatherings; and
- facilities such as toilets and stoves should be of a commercial standard so they have the ability to cope with the demands of larger groups when required.

5.3 The Aboriginal Housing Office

In keeping with the recommendations of the Royal Commission, the Aboriginal Housing Office (AHO) was established by the *Aboriginal Housing Act 1998* (NSW) to provide housing assistance for Aboriginal and Torres Strait Islanders who reside in NSW. Section 3 lists the objects of the Act as:

- (i) to ensure that Aboriginal people and Torres Strait Islanders have access to affordable and quality housing,
- (ii) to ensure that such housing is appropriate having regard to the social and cultural requirements, living patterns and preferences of the Aboriginal people or Torres Strait Islanders to whom the housing is to be provided,
- (iii) to enhance the role of Aboriginal people and Torres Strait Islanders in determining, developing and delivering policies and programs relating to Aboriginal housing,
- (iv) to ensure that priority is given, in providing housing assistance for Aboriginal people and Torres Strait Islanders, to those individuals who are most in need,
- (v) to increase the range of housing choices for Aboriginal people and Torres Strait Islanders so as to reflect the diversity of individual and community needs,

¹¹⁴ Burke, n 108, p 5.

¹¹⁵ Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 5*, Australian Government Publishing Service, Canberra, 1991.

¹¹⁶ Burke, n 108.

- (vi) to ensure that registered Aboriginal housing organisations are accountable, effective and skilled in the delivery of Aboriginal housing programs and services,
- (vii) to ensure that the Aboriginal Housing Office's housing programs and services are administered efficiently and in co-ordination with other programs and services that are provided to assist Aboriginal people and Torres Strait Islanders,
- (viii) to encourage the sustainable employment of Aboriginal people and Torres Strait Islanders in the delivery of Aboriginal housing assistance.

The NSW *Aboriginal Housing Act* is currently being reviewed. The review will consider whether these objects are still valid, and whether the terms of the Act are appropriate for securing those objectives.

The Aboriginal Housing Office has a number of functions. Its principal ones include the planning and development, delivery and evaluation of programs and services that meet the housing needs of Indigenous Australians.¹¹⁷ It has the 'power to acquire and sell property and to arrange for the construction and provision of housing and housing-related infrastructure in Aboriginal communities'.¹¹⁸

The NSW Department of Housing works with the AHO and as at 30 June 2003 was assisting 3,900 Indigenous households through the AHO properties it manages (4,055 in total).¹¹⁹ 25% of the Department's allocations under the Crisis Accommodation Program in 2002-03 were granted to services that address homelessness amongst Indigenous persons.¹²⁰ 10 properties were also allocated for Indigenous people in 2002-03 as part of the Community Housing Assistance Program.¹²¹

5.4 Housing programs

The Community Housing and Infrastructure Program¹²² is the second largest item of expenditure for ATSIC (after the CDEP scheme). It provides grants to Indigenous community organisations and relevant State and Territory government agencies in regard to the following five areas:

1. *Housing* – particular emphasis is placed on the construction, purchase and upgrade of housing.

¹¹⁷ Section 8(1).

¹¹⁸ Hon C Knowles MP, Second Reading Speech, *NSWPD*, 20/5/98, p 4886.

¹¹⁹ NSW Department of Housing, n 109, p 20.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² For further information on the Community Housing and Infrastructure Program see www.atsic.gov.au/programs/Social_and_Cultural

2. *Infrastructure* – funding is provided for water, roads, sewerage, and power to rural and remote communities.
3. *Municipal services* – funding is allocated for the maintenance of community power, water, sewerage, garbage collection, internal road maintenance, etc in places where Indigenous organisations are not serviced by mainstream agencies or the local government. No municipal services funding is allocated to NSW.¹²³
4. *National Aboriginal Health Strategy* – this strategy is concerned with the provision of capital funding for housing and related infrastructure to improve environmental living conditions.
5. *Program Support* – it is possible that funds will be provided for surveys, organisational reforms, planning and delivery of programs, needs analysis, technology research and design.

ATSIC provided \$12.6 million to the NSW AHO in 2002/2003.¹²⁴

The NSW Department of Aboriginal Affairs has established an Aboriginal Communities Development Program.¹²⁵ This program is concerned with capital construction and upgrading Indigenous housing for the purpose of raising the health and living standards of Indigenous communities. The program focuses on those communities it deems a priority.

¹²³ Aboriginal and Torres Strait Islander Commission, n 35, p 169.

¹²⁴ Ibid, p 155.

¹²⁵ NSW Department of Aboriginal Affairs, *Annual Report 2002-03*, p 8.

6 THE CRIMINAL JUSTICE SYSTEM

This section examines the relationship between the Indigenous community and the criminal justice system. It explores various policing issues, the role of the courts (particularly in relation to sentencing) and rates of imprisonment. Whilst Indigenous Australians represent only 2% of the population in NSW, they constituted 11% of court appearances, 10% of convictions, 19% of imprisonments, and 17% of imprisonments for a term of six months or more in 1999.¹²⁶ Some of the factors that contribute to this over-representation are identified and discussed, whilst a number of the strategies that have been developed in response to the disproportionate contact between the Indigenous population and the criminal justice system are highlighted throughout.

6.1 Policing

The quality of the relationship between various Indigenous communities and the local police force is important as the police form the first point of contact with the criminal justice system. Indigenous persons are arrested at a much higher rate than non-Indigenous persons. The Royal Commission into Aboriginal Deaths in Custody found that 'Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. However, what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community'.¹²⁷ The rate of arrest varies according to region, being highest in capital cities and significantly lower in rural and remote areas.¹²⁸ Indigenous persons are most likely to be arrested between the ages of 18 and 24 years, with alcohol consumption playing a significant role in the overall arrest rate.¹²⁹

The historical relationship between the police and Indigenous community has largely been negative. The report of the Royal Commission into Aboriginal Deaths in Custody described the genesis of a relationship that can at times be hostile:

Police officers naturally shared all the characteristics of the society from which they were recruited, including the idea of racial superiority in relation to Aboriginal people and the idea of white superiority in general; and being members of a highly disciplined centralist organisation their ideas may have been more fixed than most; but above and beyond that was the fact that police executed on the ground the policies of government and this brought them into continuous and hostile conflict with Aboriginal people. The policeman was the right hand man of the authorities, the enforcer of the policies of control and supervision, often the taker of the children, the rounder up of those accused

¹²⁶ Baker J, 'The scope for reducing indigenous imprisonment rates', *Crime and Justice Bulletin*, No 55, March 2001, p 2.

¹²⁷ Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 1*, Australian Government Publishing Service, Canberra, 1991, p 6.

¹²⁸ Hunter B, *Factors Underlying Indigenous Arrest Rates*, NSW Bureau of Crime Statistics and Research, Sydney, 2001, p 17.

¹²⁹ *Ibid*, p 2.

of violating the rights of the settlers.¹³⁰

The relationship between the Indigenous community and the police in the past can have an impact on the way police are viewed by the Indigenous population today and vice-versa. The tensions that continue to exist between some Indigenous communities and the police were highlighted in the violence that occurred in Redfern on 15 February 2004 after the death of a 17 year old boy. Thomas Hickey had been cycling through Redfern on 14 February 2004 when he was thrown from his bicycle and impaled on a fence. He died the following day. Some members of the Redfern community claim that the police were chasing Hickey prior to the accident. However, the police have denied this allegation. Nonetheless, violence subsequently erupted in Redfern with up to 60 police in riot gear, seven fire engines, 15 police cars and two ambulances attending the scene.¹³¹

The NSW Legislative Council Standing Committee on Social Issues was subsequently requested to inquire into and report on:

- (a) policing strategies and resources in the Redfern/Waterloo areas
- (b) other existing government programs in the Redfern/Waterloo areas, including local, state and federal programs
- (c) non-government services and service provision in the Redfern/Waterloo areas
- (d) strategies under the current New South Wales Government "Redfern/Waterloo Partnership Project", and the effectiveness in meeting the needs of local indigenous and other members of the community
- (e) proposals for the future of the area known as "The Block"
- (f) any other matters arising from these terms of reference.

The Committee is to table an interim report by 31 July 2004 and a final report by 30 November 2004.

Numerous strategies have been implemented over the years as part of an attempt to improve the relationship between the police and Indigenous Australians. Aboriginal Community Liaison Officers¹³² have been gradually introduced into the NSW police service since 1986. The role of the liaison officer is to establish a positive partnership and rapport between the Indigenous community and police. Officers do this by mediating disputes, providing assistance on visiting procedures to relatives of prisoners, and by helping the police and the Indigenous community to understand the perspective of the other. There are currently 55 liaison officers who work within 38 police patrols in NSW. They work in such areas as Bourke, Wilcannia, Redfern, Mt Druitt, Lismore and Batemans Bay.

Another initiative is the Aboriginal Employment Strategy 2003-05.¹³³ The Strategy commenced on

¹³⁰ Royal Commission into Aboriginal Deaths in Custody, n 127, p 10.

¹³¹ 'Teenager's death triggers fiery Aboriginal rampage', *Sydney Morning Herald*, 16/2/04, p 1.

¹³² For information regarding the scheme see NSW Police, 'Aboriginal Community Liaison Officers', www.police.nsw.gov.au

¹³³ NSW Police, *Annual Report 2002-2003*, p 52.

1 April 2003 and seeks to recruit more Indigenous persons into the NSW Police Service. It is hoped that this will have the effect of increasing the awareness of Indigenous issues amongst members of NSW Police. However, the often negative view of the police can place an Indigenous officer in a difficult situation. For example, it was reported that the only Indigenous police officer in Redfern was moved from the area following the death of Thomas Hickey because of concerns for his safety.¹³⁴

The Crime Prevention Division of the Attorney General's Department supports and often funds Aboriginal Community Patrols, which have been set up in various towns throughout NSW.¹³⁵ The Patrols operate in Armidale, Bowraville, Brewarrina, Campbelltown, Casino, Coffs Harbour, Dareton, Forster, Kempsey, La Perouse, Mungindi, Newcastle, Nowra and Wilcannia. Local workers manage bus services to provide transport to those in need. The Patrols also intervene in situations that might attract the police, and thus assist in reducing contact between Indigenous Australians and the criminal justice system.

Strategies that are designed to target various social and economic factors may also impact on arrest rates. Hunter has found that Indigenous arrest rates decrease as the level of schooling increases.¹³⁶ He has also noted that arrest rates are influenced by employment, particularly work that does not form part of the CDEP scheme.

6.2 The courts

Between 1997 and 2001, 25,000 Indigenous persons were charged with a criminal offence and appeared before a court in NSW (29% of the Indigenous population in NSW).¹³⁷ This is over four times the rate at which non-Indigenous persons appeared. Contact with the court system is particularly prevalent within certain age groups. Over 40% of Indigenous males and 14% of Indigenous females between the ages of 20 and 24 years were charged with a criminal offence and appeared before a NSW court in 2001.¹³⁸ For the majority of persons, this was not their first offence. Only 17% of Indigenous males and 27% of Indigenous females who appeared in court in 2001 had not attended on a prior occasion in the last five years.¹³⁹

¹³⁴ Australian Broadcasting Corporation, 'Riot in Redfern', *Four Corners*, 29/3/04.

¹³⁵ R Debus MP, Attorney General, 'Guide to Aboriginal Community Patrols Launched', *Media Release*, 12/5/03.

¹³⁶ Hunter, n 128, p 2.

¹³⁷ Weatherburn D, Lind B and Hua J, 'Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender', *Crime and Justice Bulletin*, no 78, August 2003, p 4.

¹³⁸ *Ibid*, p 9.

¹³⁹ *Ibid*, p 5.

6.2.1 *The Fernando principles*

The courts have acknowledged that many Indigenous communities are socially and economically disadvantaged, and that this disadvantage may be relevant when sentencing an Indigenous offender. The case of *R v Fernando* (1992) 76 A Crim R 58 involved a woman who was maliciously wounded with a knife by her partner. The offender was an Indigenous man who had been drinking heavily prior to the event, and had a history of alcohol abuse and criminal activity. At the time of sentencing, Wood J referred to a number of principles, which have subsequently become known as the Fernando principles:¹⁴⁰

- (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
- (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
- (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their care requires more subtle remedies than the criminal law can provide by way of imprisonment.
- (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
- (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
- (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
- (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
- (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime

¹⁴⁰

At 62.

and not to lose sight of the objective seriousness of the offence in the midst of what otherwise might be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

These principles suggest that some leniency may be exercised when sentencing an Indigenous offender, not by reason of his or her aboriginality, but in circumstances in which the social and economic disadvantages often associated with aboriginality are present. However, each case is considered individually. Further explanation of the Fernando principles was provided by Wood CJ in *R v Ceissman* (2001) 160 FLR 252 at 257 where he referred to his earlier decision and noted:

the eight propositions there enunciated were not intended to mitigate the punishment of persons of Aboriginal descent, but rather to highlight those circumstances that may explain or throw light upon the particular offence, or upon the circumstances of the particular offender which are, referable to their aboriginality, particularly in the context of offences arising from the abuse of alcohol.

The NSW Law Reform Commission noted in 2000 that ‘in several recent cases in New South Wales, consideration of the defendant’s history of disadvantage as an Aboriginal person and long history of substance abuse has resulted in shorter custodial terms and longer parole periods than would otherwise have been handed down’.¹⁴¹

6.2.2 Circle sentencing

A pilot circle sentencing scheme commenced in Nowra in 2002.¹⁴² It is ‘a holistic strategy designed not only to address the behaviour and punishment of offenders but also to consider the needs of victims, families, and communities’.¹⁴³ Clause 7 of Schedule 3 of the *Criminal Procedure Regulation 2000* sets out the objects of the program as:

- (a) to include members of Aboriginal communities in the sentencing process,
- (b) to increase the confidence of Aboriginal communities in the sentencing process,
- (c) to reduce barriers between Aboriginal communities and the courts,
- (d) to provide more appropriate sentencing options for Aboriginal offenders,
- (e) to provide effective support to victims of offences by Aboriginal offenders,
- (f) to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process,
- (g) to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong,
- (h) to reduce recidivism in Aboriginal communities.

It is therefore designed to alleviate the over-representation of Indigenous persons in the criminal

¹⁴¹ NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96, NSW Law Reform Commission, Sydney, 2000, p 41.

¹⁴² For a more detailed discussion of circle sentencing in NSW see: Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation*, Judicial Commission of NSW, Sydney, 2003.

¹⁴³ Connors D, ‘Circle Sentencing’, *IMPACT*, Summer 2004, p 10.

justice system.

The components and structure of circle sentencing are detailed in Schedule 3 of the *Criminal Procedure Regulation 2000*. An Indigenous offender can apply to have his or her matter dealt with via circle sentencing if he or she has either pleaded guilty or has been found guilty by the court. However, the offence must be one that can be finalised by the Local Court and for which a term of imprisonment is likely. Circle sentencing does not apply to strictly indictable offences and an Aboriginal Community Justice Group must also deem the offender to be appropriate for the scheme. The police, offender, victim, a magistrate, support persons and local elders discuss the offence and its impact before working out an appropriate sentence. It is designed to partly merge the Indigenous and general justice systems.

The scheme is notable for its success, as only one of the 25 offenders who participated in the scheme in Nowra has re-offended.¹⁴⁴ It is noteworthy that the person who re-offended did not have strong ties to the Indigenous community in Nowra. An extensive evaluation of the program was conducted jointly by the Judicial Commission of NSW and the Aboriginal Justice Advisory Council. It found that circle sentencing: reduced the barriers between the courts and Indigenous persons; provided better support for both the offender and victim and thus promoted healing and reconciliation; empowered Indigenous persons and heightened their confidence in the system; enabled sentencing options to be more relevant and meaningful; and assisted with breaking the cycle of recidivism.¹⁴⁵ Participants expressed a high level of satisfaction with the process.¹⁴⁶ The success of the program is thought to be due to the way it involves the Indigenous community, its use of colloquial language, the participation of the victim, and the collaborative approach towards sentencing.¹⁴⁷ The involvement of Aboriginal elders is also seen as a great strength of the process, because they are able to provide valuable advice, possess cultural knowledge, and add a sense of legitimacy and authority to the outcome.¹⁴⁸ The only negative aspect of the program found by the evaluation team was its cost, as the sentencing process took much longer than it would have in a court.¹⁴⁹ The evaluation team concluded that, 'As circle sentencing gains increased acceptance by the community it is more than likely to assist in reducing the tensions and barriers that currently exist between Aboriginal communities and the criminal justice system generally'.¹⁵⁰ As a result, the program was extended to Dubbo in August 2003, with the scheme to also be established in Walgett and Brewarrina.

¹⁴⁴ Ibid.

¹⁴⁵ Potas, n 142, p iv.

¹⁴⁶ Ibid, p 39.

¹⁴⁷ Connors, n 143, p 10.

¹⁴⁸ Potas, n 142, p 44.

¹⁴⁹ Ibid, p 51.

¹⁵⁰ Ibid.

For further information on the sentencing of Indigenous offenders see Briefing Paper No 2/02, *Sentencing Law: A Review of Developments in 1998-2001* by Rowena Johns, pp 103-110. It discusses the circle sentencing program in greater detail and provides an overview of the findings of the NSW Law Reform Commission in its 2000 report, *Sentencing: Aboriginal Offenders*.

6.3 Imprisonment

The disproportionate imprisonment of Indigenous men and women is well known. In 2002-03, Indigenous adults in Australia were imprisoned at 16 times the rate of non-Indigenous adults (1,850.5 per 100,000 compared to 115.4 per 100,000).¹⁵¹ The rate of imprisonment is even higher in NSW, second only to Western Australia, with over 2,000 indigenous prisoners per 100,000 adults.¹⁵² NSW has the largest number of Indigenous prisoners when compared to other Australian jurisdictions, with 1,427 Indigenous persons in prison in 2002/03.¹⁵³ There is even a prison exclusively for Indigenous males. Brewarrina Centre, a minimum security prison, opened in 2000.

The rate at which Indigenous persons are imprisoned in NSW has also increased. In 1991, they were imprisoned at 7.7 times the rate of the general community. However, the rate had risen to 9.8 times by 1998.¹⁵⁴ A significant proportion of the Indigenous population has received a custodial sentence at some point in their life. Between 1997 and 2001, 5,900 Indigenous persons received a custodial sentence, equivalent to almost 7% of the Indigenous community in NSW.¹⁵⁵ The Bureau of Crime Statistics and Research has found that whilst Indigenous persons are over-represented in terms of court appearances (five times more than their proportion of the general community) this over-representation increases at sentencing (10 times the rate for the size of their population).¹⁵⁶ Nonetheless, Indigenous persons are slightly less likely to be convicted and to be imprisoned long-term when compared to non-Indigenous persons at the same stage of the criminal justice system. If terms of imprisonment of less than six months were eliminated, the number of Indigenous offenders in prison would decrease by 54%.¹⁵⁷

¹⁵¹ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2004*, volume 1, Productivity Commission, Canberra, 2004, p 7.5.

¹⁵² Ibid, p 7.6.

¹⁵³ Aboriginal and Torres Strait Islander Commission, n 35, p 52.

¹⁵⁴ Baker, n 126, p 2.

¹⁵⁵ Weatherburn, Lind and Hua, n 137, p 7.

¹⁵⁶ Baker, n 126, p 3.

¹⁵⁷ Ibid, p 8.

6.3.1 Indigenous women in custody

Indigenous women are the fastest growing prisoner population in Australia.¹⁵⁸ In October 2002, 30% of the female prisoner population was Indigenous. By June 2003, Indigenous women were imprisoned at over 19 times the rate of non-Indigenous women.¹⁵⁹ Indigenous women in remanded custody in NSW can be placed at Mulawa, Emu Plains, Grafton and Broken Hill Correctional Facilities. The 2002 Aboriginal Justice Advisory Council report, *Speak Out Speak Strong* surveyed 48% of Indigenous women who were imprisoned during the week that the research team visited correctional centres in NSW. The Council made a number of findings in relation to Indigenous women in custody. Some of these findings are highlighted below:¹⁶⁰

- 54% of imprisoned Indigenous women in NSW are single and 86% have children. 46% of women in custody usually cared for their children as single parents. The imprisonment of Indigenous women is therefore likely to have a major impact on many children.
- 70% left school before completing the year 10 School Certificate.
- 43% of women with dependent children did not receive an income, either through employment or Centrelink, prior to being held in custody.
- 25% had relied on crime to support themselves.
- 22% of those in prison had been a ward of the state at some stage in their lives and of these 54% had been made a ward when between the age of one and two years old.
- 82% had pleaded guilty for their most recent charge at the time of sentencing.
- 70% were not granted bail.
- 98% had a prior conviction as an adult and 58% had received this conviction when either 18 or 19 years old.
- 75% of the women in prison had served a full time prison sentence on a prior occasion.
- 60% had been convicted by a children's court.

¹⁵⁸ Lawrie R, *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody*, NSW Aboriginal Justice Advisory Council, 2002, p 7. An electronic version of the paper is available from www.lawlink.nsw.gov.au/ajac

¹⁵⁹ Human Rights and Equal Opportunity Commission, n 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, Sydney, 2002, p 135.

¹⁶⁰ Lawrie, n 158.

- 68% were on drugs at the time of the offence and 14% were under the influence of alcohol.
- 70% had been a victim of child abuse and 78% had been a victim of violence as an adult.

One program that may relieve some of the pressure on mothers in prison is the Residential Mother's and Children's Program which was established at the correctional centre in Emu Plains and the transitional centre in Parramatta in 1996. The program consists of full time and occasional care components. The fulltime program allows children up to school age to live with their mothers, whilst children who are of school age but are less than 12 years old are able to spend weekends and school holidays with their mothers as part of the occasional care program.

In response to the release of *Speak Out Speak Strong*, the NSW Government announced in August 2003 that it planned to:¹⁶¹

- provide an alternative facility with culturally appropriate services on the mid north coast for Indigenous persons;
- have specific programs for Indigenous women at the new correctional centres at South Windsor, Kempsey and Wellington;
- appoint Aboriginal elders to new correctional centres;
- increase the number of Indigenous staff employed by the Department of Corrective Services;
- grant \$503,658 to the Bundjalung Tribal Society Ltd to operate Namatjira Haven, an alcohol and drug rehabilitation service on the North Coast for Indigenous persons recently released from prison;
- establish a task force on sexual assault to develop a range of options to tackle the issue in Indigenous communities;
- continue to expand such Aboriginal justice programs as circle sentencing and community justice groups;
- launch an Aboriginal Offenders Strategic Plan 2003-2005; and
- improve initiatives already in operation.

¹⁶¹ R Debus MP, Attorney General, and J Hatzistergos MLC, Minister for Justice, 'Government Responds to AJAC Report on Aboriginal Women in Custody', *Media Release*, 8/8/03.

6.3.2 *Juvenile justice*

The disproportionate representation of the Indigenous community in the Australian prison population is particularly stark in regard to juveniles. Since 1997, Indigenous youth have constituted 42% of all juveniles in detention.¹⁶² Rosemary Neill has described imprisonment as a new rite of passage for Aboriginal juveniles.¹⁶³

The Crime Prevention Division of the Attorney General's Department provides grants to Aboriginal Youth Projects that 're-engage young people with learning; or promote awareness of safe and lawful driving practices' in order to 'reduce or prevent the involvement of young Aboriginal people in unlawful or anti-social behaviour; and/or reduce the number of young Aboriginal people entering the criminal justice system'. In 2002-03, 12 grants were made.¹⁶⁴

For a comprehensive review of the criminal law as it applies to juvenile offenders, including an outline of the *Young Offenders Act 1997* (NSW) see Briefing Paper No 7/03, *Young Offenders and Diversionary Options* by Rowena Johns.

6.3.3 *Deaths in custody*

The Royal Commission into Aboriginal Deaths in Custody was established to examine the deaths of 99 Indigenous persons in custody between 1 January 1980 and 31 May 1989. Recommendation 41 advocated that Aboriginal and non-Aboriginal deaths in prison, police custody and juvenile detention centres be monitored nationally on an ongoing basis. The Australian Institute of Criminology conducts the National Deaths in Custody Program in keeping with the recommendation of the Commission. It monitors any deaths in police, prison and juvenile custody. There were 69 deaths in custody in 2002, with the highest number (29) being recorded in NSW.¹⁶⁵ The overwhelming majority of custodial deaths in 2002 in NSW involved a non-Indigenous person (82.8%). 14 of all custodial deaths in Australia in 2002 were of an Indigenous person, which is the lowest number since a peak of 21 in 1995. Five of the deaths involving an Indigenous person occurred in NSW. One died from natural causes, one from gunshot, two from external/multiple trauma, and one from drugs/alcohol. None of the deaths of Indigenous persons in custody in 2002 in NSW or elsewhere in Australia were by hanging. This is in contrast to the Royal Commission's finding that 30 of the 99 Aboriginal deaths in custody between 1 January 1980 and 31 May 1989 were the result of hanging.¹⁶⁶

¹⁶² Human Rights and Equal Opportunity Commission, n 4.

¹⁶³ Neill, n 12, p 98.

¹⁶⁴ NSW Attorney General's Department, *Annual Report 2002-2003*, p 7.

¹⁶⁵ Collins L and Ali M, *Deaths in Custody in Australia: 2002 National Deaths in Custody Program (NDICP) Annual Report*, Australian Institute of Criminology, Research and Public Policy Series No 50, Canberra, 2003, p 13.

¹⁶⁶ Royal Commission into Aboriginal Deaths in Custody, n 127, p 4.

6.4 Reasons for over-representation

The NSW Bureau of Crime Statistics and Research has explored the reasons for the over-representation of Indigenous Australians in the criminal justice system. It believes there are a number of reasons for the higher imprisonment rate including the fact that Indigenous persons are more likely to:¹⁶⁷

- be convicted of offences against the person, robbery/extortion and offences against justice which are violent in nature. These offences are more likely to attract a prison sentence; and
- have prior criminal convictions.

These factors occur against a background of social and economic disadvantage that may contribute to the offending in the first place. In 1991, the Royal Commission into Aboriginal Deaths in Custody noted the relationship between the poor socio-economic status of the Indigenous community in general and their over-representation in the criminal justice system. It determined that ‘to understand the last hours of life of each individual and to truly understand the circumstances of their deaths Commissioners had to know the whole life of the individuals and, equally important, had to understand the experience of the whole Aboriginal community through their two hundred years of contact with non-Aboriginal society’.¹⁶⁸ It found that ‘generally speaking the standard of health of the ninety-nine varied from poor to very bad... their economic position was disastrous and their social position at the margin of society; they misused alcohol to a grave extent’.¹⁶⁹

It is also claimed that the high rates of imprisonment are at least partly attributable to the failure of the NSW Government to fully implement all of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.¹⁷⁰ The Aboriginal Justice Advisory Council noted that of the 339 recommendations made by the Royal Commission, 299 applied to NSW. However, following an assessment of the implementation of these initiatives in 2000, the Council concluded that half of the recommendations had not been implemented in NSW.¹⁷¹ The recommendations of concern were in regard to policing, public drunkenness, bail, juvenile justice and the involvement of Indigenous persons in the development of policies and programmes.

¹⁶⁷ Baker, n 126, p 8.

¹⁶⁸ Royal Commission into Aboriginal Deaths in Custody, n 127, p 5.

¹⁶⁹ Ibid, p 6.

¹⁷⁰ Baker, n 126, p 2.

¹⁷¹ Aboriginal Justice Advisory Council, *Review of the NSW Government Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, 2000, www.lawlink.nsw.gov.au/ajac.nsf/pages/rciadireport Accessed 29/4/04.

On 31 October 2002, the former Minister for Corrective Services, Hon R Amery MP, outlined some of the initiatives that have been implemented by the Department of Corrective Services since the release of the Royal Commission's recommendations. They include:¹⁷²

- The development of a Reception Screening and Induction Program – suicide and self harm prevention program;
- The introduction of a Risk Assessment and Intervention Team at the Metropolitan Remand and Reception Centre as well as risk intervention teams at other centres;
- A review of segregation procedures to ensure safe management of all inmates;
- The establishment of a Suicide and Equivocal Deaths in Custody Committee;
- The recruitment of Aboriginal Official Visitors;
- Holding inmates as close as possible to their families;
- The Probation and Parole Service developing programs to address domestic violence;
- The establishment of an Indigenous Services Unit in the Department of Corrective Services and the employment of a Regional Aboriginal Project Officer in each region;
- Requiring Court Escort Security staff to complete a three day Safe Custody Course.

6.5 Strategies

The NSW Government has established partnerships with the Aboriginal community to improve the relationship between the indigenous population and the criminal justice system. The Aboriginal Justice Advisory Council was established in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. It advises the NSW Government on law and justice issues relating to Indigenous Australians. The Council also commissions research, evaluates criminal justice agency performance, and develops partnerships, to prevent and reduce the contact of Aboriginal people with the criminal justice system.¹⁷³

Community Justice Groups, which are concerned with community-based ways to solve crime and offending problems in Indigenous communities, have been established in Nowra, Lismore, Grafton, Kempsey, Maclean, Yamba and Bowraville.¹⁷⁴ In 2002-03, the Aboriginal Specialist

¹⁷² R Amery MP, 'Minister outlines deaths in custody issue', *Media Release*, 31/10/02.

¹⁷³ NSW Attorney-General's Department, 'Aboriginal Justice Advisory Council', www.lawlink.nsw.gov.au/ajac Accessed 3/3/04

¹⁷⁴ NSW Attorney General's Department, n 164, p 5.

Program established 15 Indigenous positions in local courts in regions where the Indigenous population is significant.¹⁷⁵

Whilst efforts have been made to ensure that the Indigenous population is treated the same as the non-Indigenous population, inadvertent discrimination remains. The Aboriginal and Torres Strait Islander Social Justice Commissioner has highlighted how the various law and order policies popular at election time often have a disproportionate impact on the Indigenous community due to the overrepresentation of the Indigenous community at all levels of the criminal justice system.¹⁷⁶

Dr Don Weatherburn, Director of the Bureau of Crime Statistics and Research, believes that the high rate of contact between Indigenous persons and the criminal justice system ‘reflects the high rate of Aboriginal involvement in serious crime, rather than any bias in the way Aboriginal people are treated by police, magistrates and judges’ and has stressed that ‘If we want to bring down rates of Aboriginal contact with the criminal justice system we have to bring down rates of Aboriginal involvement in crime’.¹⁷⁷ The NSW Bureau of Crime Statistics and Research concluded that:

focusing on the factors that lie behind Indigenous offending, such as alcohol abuse, poor school performance and unemployment, is likely to do more to reduce crime in Indigenous communities than policies designed to apprehend and imprison an even higher proportion of Indigenous offenders.¹⁷⁸

¹⁷⁵ Ibid, p 7.

¹⁷⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 159, p 2.

¹⁷⁷ Bureau of Crime Statistics and Research, ‘Contact with the New South Wales court and prison systems: The influence of age, Indigenous status and gender’, *Media Release*, 20/10/03.

¹⁷⁸ Weatherburn, Lind and Hua, n 137, p 9.

7 VIOLENCE IN INDIGENOUS COMMUNITIES

7.1 An overview

Violence affects the lives of many Australians. However, Indigenous communities experience relatively high levels of family violence, self-harm, suicide, homicide and incarceration.¹⁷⁹ The issues associated with incarceration were explored in the previous section. This section discusses the level of violence experienced in the Indigenous community generally. However, particular attention is given to violence against women and children, as well as the incidence of suicide and self-harm.

The term ‘family violence’ is often used in place of ‘domestic violence’ in relation to Indigenous persons, as it is seen as involving all types of relatives and is therefore viewed as more appropriate to Indigenous culture.¹⁸⁰ The NSW Department of Aboriginal Affairs acknowledges that family violence can take the form of a number of behaviours including physical and sexual assault, homicide, suicide, abuse (verbal, psychological, financial or child abuse) and social, cultural and spiritual forms of violence.¹⁸¹ The issue of violence within Indigenous communities has attracted greater attention recently. On 23 July 2003, the Prime Minister convened a meeting with Indigenous leaders to discuss the subject. According to Neill, discussion of the issue has not always been forthcoming due to a fear that it will promote negative stereotypes of Indigenous Australians.¹⁸²

Indigenous persons are over-represented as offenders and victims of crime. In NSW, Indigenous persons are between 2.7 and 5.2 times more likely to be a victim of violent crime than members of the NSW community in general.¹⁸³ In the majority of violent offences committed against an Indigenous person, the offender is also an Indigenous Australian.¹⁸⁴ Alcohol is involved in almost three-quarters of Indigenous homicides (both the victim and offender having consumed alcohol), four times the rate for non-Indigenous homicides.¹⁸⁵

¹⁷⁹ Atkinson J, ‘Voices in the wilderness: Restoring justice to traumatised peoples’, *University of New South Wales Law Journal Forum*, 8(1) July 2002, p 19.

¹⁸⁰ Memmott P et al, *Violence in Indigenous Communities: Full Report*, Attorney-General's Department, Canberra, 2001, p 1.

¹⁸¹ NSW Department of Aboriginal Affairs, ‘Family Violence’, www.daa.nsw.gov.au Accessed 31/3/04.

¹⁸² Neill, n 12, p 84.

¹⁸³ Fitzgerald J and Weatherburn D, ‘Aboriginal victimisation and offending: The picture from police records’, *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research, December 2001, p 1.

¹⁸⁴ *Ibid*, p 3.

¹⁸⁵ Steering Committee for the Review of Government Service Provision, n 8, p 29.

The following table was produced by the NSW Bureau of Crime Statistics and Research and compares the number and victimisation rate of Aboriginal victims and all NSW victims for selected offences in 2000:

Offence type	ATSI victims		Total NSW victims	
	Number	Victimisation rate per 100,000	Number	Victimisation rate per 100,000
Murder	8	5.5	107	1.7
Sexual assault	231	159.3	3,704	57.3
Sexual assault against children	123	84.8	2,045	31.6
Robbery	68	46.9	15,347	237.4
Assault	4,699	3,240.8	68,854	1,065.3
Assault (DV related)	2,573	1,774.6	21,815	337.5
Grievous bodily harm	211	145.5	2,012	31.1

Source: Fitzgerald J and Weatherburn D, 'Aboriginal victimisation and offending: The picture from police records', *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research, December 2001, p 1.

The table reveals that Indigenous persons are more likely than non-Indigenous persons to be a victim of murder, assault, sexual assault and domestic violence. However, they are less likely to be a victim of robbery.

7.2 Violence against women

Indigenous women are subjected to a high rate of violence. In NSW they are between 2.2 and 6.6 times more likely to be a victim of violence than women in general.¹⁸⁶ The following table compares the number and victimisation rate of female Aboriginal victims and all female victims in NSW for selected offences in 2000:

Offence type	Female ATSI victims		Total female NSW victims	
	Number	Victimisation rate per 100,000	Number	Victimisation rate per 100,000
Murder	4	5.4	44	1.4
Sexual assault	185	251.7	3,294	101.4
Sexual assault against children	88	119.7	1,735	53.4
Robbery	19	25.8	4,144	127.5
Assault	3,076	4,184.9	32,824	1,010.3
Assault (DV related)	2,114	2,876	19,137	589.0
Grievous bodily harm	65	88.4	431	13.3

Source: Fitzgerald J and Weatherburn D, 'Aboriginal victimisation and offending: The picture from police records', *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research, December 2001, p 2.

Like Indigenous Australians in general, Indigenous women are more likely to be a victim of sexual

¹⁸⁶ Fitzgerald and Weatherburn, n 183, p 1.

assault, assault and murder. However, it is likely that much crime is unreported. Indigenous women have been found to not report violent crimes committed against them because they: are afraid of how the community might respond; fear that their partner may die in custody; are concerned that the perpetrator may seek revenge upon release; and believe that the criminal justice system has not always responded appropriately to their needs in the past.¹⁸⁷

Indigenous women who have been the victim of a sexual assault are particularly reluctant to report the attack. Memmott et al identified some additional factors to the ones mentioned above that may influence a decision to not report sexual assault:¹⁸⁸

- Indigenous women when giving evidence in court may be easily intimidated by authority figures.
- Some Indigenous women may be shy around white people.
- Sexual matters are not discussed in mixed company in Indigenous culture.
- Many women live in small communities.
- The relationship between the victim and offender is often close.

Violence between partners also occurs at a high rate. Studies have found a number of characteristics common to spousal assault in the Indigenous community. Alcohol is often involved, and police tend to not respond to the call for help, or to stay until the incident has died down, with the violence reigniting once the police have left. The offender has often been incarcerated on at least one prior occasion. The violence tends to have continued for many years despite the victim's efforts to prevent it from reoccurring, with a cycle of repeated abuse and reconciliation. It is also not unusual for the offender's family to try and protect him from any retribution.¹⁸⁹

7.3 Violence against children

Some Indigenous communities experience relatively high levels of child abuse. Stanley, Tomison and Pocock believe that the forced separation of Indigenous children from their families in the past has caused a loss of parenting skills in general, which has been exacerbated by such contemporary social problems as alcohol, poverty, drug addiction and family violence.¹⁹⁰ They believe that, 'This

¹⁸⁷ Quayle C, 'Breaking the silence: Putting the violence into context', *University of New South Wales Law Journal Forum*, 8(1) July 2002, p 3.

¹⁸⁸ Memmott, n 180, p 41.

¹⁸⁹ Ibid, p 37.

¹⁹⁰ Stanley J, Tomison A and Pocock J, 'Child abuse and neglect in Indigenous Australian communities', *National Child Protection Clearinghouse Issues*, No 19, Spring 2003, p 7.

socio-economic disadvantage is closely entwined with family violence, being both a cause of child abuse, in the traditional sense and, it is argued, a form of child abuse and neglect in itself.¹⁹¹

The following table compares the type of abuse or neglect to which Indigenous children were subjected in 2002-03:

Children who were the subject of a substantiation: type of abuse or neglect, by Indigenous status and state and territory, 2002-03 (per cent)

Type of abuse or neglect	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Indigenous children								
Physical abuse	32	18	26	24	28	53	18	39
Sexual abuse	9	6	5	15	5	0	3	11
Emotional abuse	33	44	25	11	25	0	48	10
Neglect	25	32	44	50	42	47	30	39
Other	0.42	..	..	..	..	..	..	..
Total	100	100	100	100	100	100	100	100
Other children								
Physical abuse	32	26	24	29	32	41	31	50
Sexual abuse	18	8	6	34	10	31	6	5
Emotional abuse	32	44	32	10	23	7	39	26
Neglect	17	22	37	28	34	21	25	19
Other	0.40	..	..	..	..	..	..	..
Total	100	100	100	100	100	100	100	100

The category 'other' used for New South Wales comprises children identified as being at high risk but with no identifiable injury. An Australian total has not been included as the data is not comparable across the states and territories.

Source: Australian Institute of Health and Welfare, *Child protection Australia 2002-03*, Australian Institute of Health and Welfare, Canberra, 2004, p 21.

The table reveals that in NSW, in relation to the children who were the subject of a substantiation, a similar proportion of Indigenous and non-Indigenous children were subjected to physical and emotional abuse. However, whilst a smaller proportion of Indigenous children were victims of sexual abuse, one quarter of Indigenous children who were the subject of a substantiation in NSW were found to be neglected compared to 17% of other children. However, these figures should be interpreted with caution. They do not reflect the actual incidence of abuse within the community, only the cases that have been substantiated.¹⁹²

It is likely that child abuse in Indigenous communities is underreported. According to Stanley, Tomison and Pocock, the abuse and neglect of Indigenous children may not be reported for a

¹⁹¹ Ibid, p 9.

¹⁹² Substantiation means that 'there was reasonable cause to believe that the child has been, was being or was likely to be abused, neglected or otherwise harmed. Substantiation does not necessarily require sufficient evidence for a successful prosecution and does not imply that treatment or case management was provided': Australian Institute of Health and Welfare, *Child protection Australia 2002-03*, Australian Institute of Health and Welfare, Canberra, 2004, p 12.

number of reasons including:¹⁹³

- shame and a fear of experiencing racism;
- fear of reprisal from the perpetrator in small communities;
- fear of pay-back from relatives;
- fear of the police response;
- a perceived need to protect the perpetrator because of the high number of Indigenous deaths in custody;
- the absence of an official to whom the matter can be reported;
- the lack of any means of reporting the matter in a remote community; and
- a lack of confidence that anything will be done because of past inaction.

These are obstacles that will need to be overcome if Indigenous children are to be sheltered from abuse to a greater extent in the future.

7.4 Suicide and self-harm

The incidence of suicide amongst Indigenous communities appears to be a relatively recent phenomenon, as it is believed that the concept of suicide was originally alien to Indigenous culture.¹⁹⁴ The level of suicide in the Indigenous community today is disproportionately high. Colin Tatz studied Indigenous suicides in NSW and the ACT in the period between 1 January 1996 and 30 June 1998. He found that in NSW and the ACT:¹⁹⁵

- the annual rate of Indigenous suicides was 40 per 100,000;
- the annual rate of Indigenous suicides in the 15 to 24 age group was 48.56 per 100,000;
- the Indigenous male youth suicide rate was 127.8 per 100,000; and
- the Indigenous child suicide rate was 15.6 per 100,000.

To provide some indication of the relative size of these figures the following general suicide rates

¹⁹³ Stanley, Tomison and Pocock, n 190, p 5.

¹⁹⁴ Tatz, n 62, p 23.

¹⁹⁵ Ibid, p 59.

as measured by the Australian Bureau of Statistics (ABS) are included. ABS recorded the rate of suicide in Australia in 2001 as 13 per 100,000 persons.¹⁹⁶ The rate for males between the ages of 15 and 24 years in 2001 was higher at 20 per 100,000 (a decrease since a peak of 31 in 1997). However, the suicide rate in NSW is usually lower than the national rate.¹⁹⁷ In 2001, it was 11.5 per 100,000 persons. There is thus a dramatically higher level of suicide in the Indigenous community compared to Australia in general.

The Royal Commission into Aboriginal Deaths in Custody highlighted the issue of Indigenous suicide within the criminal justice system. However, whilst that is still an important issue, Rosemary Neill argues that it is a major misconception in the community that imprisonment is the leading cause of Indigenous suicide, whereas Indigenous Australians are more likely to commit suicide when outside prison.¹⁹⁸

Tatz contends that much Aboriginal suicide is not the result of mental illness but rather an attempt to end the meaninglessness and lack of purposefulness of life.¹⁹⁹ He describes the phenomenon amongst Indigenous communities as:

a new violence, of which suicide is but one facet. And within that facet, there are behaviours motivated or occasioned by *many* things other than the personal family histories of suicide, aggressive behaviour, substance abuse, 'depression' and other mental illnesses.²⁰⁰

Tatz believes there are many distinctive characteristics associated with Indigenous suicide. He found that many of the cases in his study fell into one of the following categories.²⁰¹

1. *accidental/indirect suicide or sub-intentional suicide* – a group Tatz sees as the 'risk runners';
2. *focal suicide* – included in this group are the 'slashers', self-mutilators, those who 'kill' an offending part of the body;
3. *political suicide* – the act of suicide is intended to make a statement about either their lack of care or desire for revenge or retaliation;

¹⁹⁶ Australian Bureau of Statistics, *Australian Social Trends 2003*, 4102.0, Australian Bureau of Statistics, Canberra, 2003, p 62.

¹⁹⁷ Australian Bureau of Statistics, *Information Paper: Suicides 2001* (revised edition), 3309.0.55.001, Australian Bureau of Statistics, Canberra, p 15.

¹⁹⁸ Neill, n 12, p 209.

¹⁹⁹ Tatz, n 62, p 66.

²⁰⁰ *Ibid*, p 81.

²⁰¹ *Ibid*, p 80.

4. *respect suicide* – the person perceives themselves as so utterly forlorn and forsaken that suicide is seen as the only way to command attention;
5. *grieving suicide* – a response to irremediable grief;
6. *rational suicide* – the act is viewed as ‘an inspirational answer to that which appears unanswerable’;
7. *appealing suicide* – the person is violent to others and him/herself in an appeal for support and assistance;
8. *empowerment suicide* – the person feels such a lack of power that suicide is seen as the only way to successfully exercise autonomy or personal sovereignty;
9. *stress of loss suicide* – according to Tatz, individuals that fall into this group believe that ‘no meaning is to be found in an Aboriginality which is meant to produce an inner sense of belonging from within and which is the basis of so much antagonism from without’.

7.5 Why is the level of violence so high?

The reasons for such high rates of violence are many and complex. Memmott et al have categorised the causes of violence in Indigenous communities into three groups: underlying factors, situational factors and precipitating causes.²⁰² *Underlying factors* are the historical circumstances of Indigenous people in combination with ongoing cultural dispossession. The provision of land, housing, health services, education, and employment amongst other things has been suggested as a means of addressing the underlying factors. *Situational factors* are those that exacerbate violence and include alcohol abuse, family or financial problems, unemployment, psychological problems and conflicting social differences. Violence may have been part of life for a number of generations and is subsequently viewed as normal and inevitable. These factors might be addressed at the local level by providing shelters for women and children, establishing sobering-up facilities, and by improving alcohol awareness. A *precipitating cause* is the particular trigger of a violent episode. This needs to be addressed on an individual level with the support of family and friends, and with the assistance of counselling and other services where appropriate.

7.6 How can the level of violence be reduced?

Carmen Lawrence MP has noted the link between violence and the unique situations and history of many Indigenous communities:

there are factors present in Indigenous communities that are not present in non-Indigenous communities: dispossession of land and culture, the separation of children from parents over successive generations, and the failure of governments to enforce sanctions against violence, to name but a few. The contribution of associated social problems including high unemployment, poor

²⁰²

The information in this paragraph is drawn from Memmott, n 180, p 11ff.

mental health, poverty and low levels of educational attainment must be recognised in any strategy or program developed to combat violence.²⁰³

Care must be exercised when developing strategies to reduce the level of violence in Indigenous communities. Many competing interests need to be balanced. For example, encouraging people to report crime to a greater extent may exacerbate the overrepresentation of Indigenous persons in the criminal justice system, and therefore needs to be taken into account.²⁰⁴

The NSW Aboriginal Family Health Strategy published by the NSW Health Department in 2002 recognised the need to overcome family violence within Indigenous communities. As part of the strategy, Indigenous communities, together with the NSW Department of Health and the Aboriginal Health Resource Co-operative (now the Aboriginal Health and Medical Research Council), committed to 'an holistic and culturally appropriate approach to the reduction of family violence and sexual assault in Aboriginal communities'.²⁰⁵ The Strategy explored the characteristics of some indigenous communities that influenced and complicated the issues of family violence and sexual assault. It found that:

within Aboriginal communities the particular importance of the family, of kinship structures and relationships increases further the difficulty in acknowledging and reporting family and sexual assault. Economic and social structural factors such as unemployment, lack of adequate housing, minimised access to services and institutionalised racism combine to increase pressures towards both incidence and denial of violence.²⁰⁶

The Strategy identified educational programs and the development of long term preventative programs as likely to be the most effective means of ending cycles of violence in the community.²⁰⁷

Associate Professor Paul Memmott believes that successful strategies for overcoming violence within Indigenous communities need to start from the premise that an Indigenous community has the ability to solve the problem on their own.²⁰⁸ He believes that this will ensure that Indigenous communities take ownership of the particular strategy and are committed to seeing it succeed. He has identified nine types of community violence programs.²⁰⁹

²⁰³ Lawrence C, 'A national disgrace: Violence against women and children in Indigenous communities', *University of New South Wales Law Journal Forum*, 8(1) July 2002, p 9.

²⁰⁴ Fitzgerald and Weatherburn, n 183, p 4.

²⁰⁵ NSW Health, *NSW Aboriginal Family Health Strategy*, NSW Health Department, 2002, p 3.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, p 8.

²⁰⁸ Memmott P, 'Community-based strategies for combating Indigenous violence', *University of New South Wales Law Journal Forum*, 8(1) July 2002, p 11.

²⁰⁹ Memmott, n 180, p 3.

1. Support programs (counselling, advocacy);
2. Strengthening identity programs (sport, education, arts, cultural activities, group therapy);
3. Behavioural reform programs (men's and women's groups);
4. Policing programs (night patrols, wardens);
5. Shelter/protection programs (refuges, sobering-up shelters);
6. Justice programs (community justice groups);
7. Mediation programs (dispute resolution);
8. Education programs (tertiary courses, miscellaneous courses, media awareness); and
9. Composite programs (comprising elements from all programs).

The extent to which the urgency of addressing the incidence of violence has been recognised can be seen in what various organisations have deemed to be their priorities. Domestic and family violence was deemed a priority area for the 2002/03 first round of grants made to various programs by the NSW Department of Aboriginal Affairs.²¹⁰ The prevalence of violence in Indigenous family life has also been highlighted by ATSIC. The ATSIC Board of Commissioners identified child abuse and family violence as priority issues in January 2003 and subsequently endorsed an ATSIC Family Violence Action Plan the following June.²¹¹ At the state level, family violence was deemed a key priority in the 2003 strategic plan for the NSW ATSIC State Council.²¹² ATSIC plans to create another 1,000 places in the CDEP scheme for the purpose of training participants to deal with family violence and substance abuse in remote communities.

Grassroots organisations have also been established. For example, Wurringa Baiya,²¹³ an independent Aboriginal Women's Legal Centre managed by Aboriginal women, was established in 1995 to provide Indigenous women, youth and children in NSW with culturally appropriate legal representation, advice and referrals. The Service also aims to provide advocacy, support services, and community education.

²¹⁰ NSW Department of Aboriginal Affairs, n 125, p 28.

²¹¹ Aboriginal and Torres Strait Islander Commission, n 35, p 145.

²¹² Ibid, p 146.

²¹³ For further information see www.wurringabaiya.org.au

8 THE REMOVAL OF CHILDREN

8.1 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children – *Bringing Them Home*

The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home*, was published in 1997. The terms of reference required the Human Rights and Equal Opportunity Commission to:

- (a) trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies;
- (b) examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress or undue influence of Aboriginal and Torres Strait Islander children from their families, including but not limited to current laws, practices and policies relating to access to individual and family records and to other forms of assistance towards locating and reunifying families;
- (c) examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations;
- (d) examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

Bringing Them Home brought into the open the impact of the various child removal policies that had operated in Australia until the 1970s as part of a broader assimilation policy. The exact number of Indigenous children who were removed under such policies is not known. Many records are either incomplete, were badly maintained or have been destroyed. The historian, Peter Read, estimates that 5,625 Indigenous children were separated from their parents in NSW between 1883 and 1969.²¹⁴ However, it is likely that this figure underestimates the number of children removed. *Bringing Them Home* concluded, in relation to all of Australia, that:

between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970... In that time not one Indigenous family has escaped the effects of forcible removal.²¹⁵

The Inquiry found that the rights of Indigenous people under the common law and their basic rights as humans had been breached by the child removal policies:

the removal of Indigenous children by compulsion, duress or undue influence was usually authorised by law, but that those laws violated fundamental common law rights which Indigenous Australians should have enjoyed equally with all other Australians. As subjects of the British Crown, Indigenous

²¹⁴ Human Rights and Equal Opportunity Commission, n 28, p 36.

²¹⁵ Ibid, p 37.

people should have been accorded these common law liberties and protections as fundamental constitutional rights.²¹⁶

Apart from finding many of the practices to be racially discriminatory, the Inquiry also concluded that the child removal policies had amounted to genocide:

from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide. From this period many Indigenous Australians were victims of gross violations of human rights.²¹⁷

The response to the *Bringing Them Home* report varied. The Commonwealth Government in its submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation claimed that it was incorrect to use the phrase ‘stolen generation’ as:

At most it might be inferred that up to 10 percent of [Indigenous] children were separated for a variety of reasons, both protective and otherwise, some forcibly, some not. This does not constitute a ‘generation’ of ‘stolen’ children. The phrase ‘stolen generation’ is rhetorical.²¹⁸

Rosemary Neill criticised the *Bringing Them Home* report for not distinguishing between absorption and welfarist assimilation and for ‘its misleading implication that postwar assimilation was driven by genocidal objectives’.²¹⁹ She believes that, ‘The authors of BTH are inclined to view indigenous children as cultural assets, as instruments for collective rights, rather than as vulnerable individuals with the same emotional and physical needs as other children’.²²⁰

The NSW Government responded with an apology and the implementation of a number of schemes that are outlined in section 8.4 below.

8.2 Past child removal policies in NSW

The separation of Indigenous children from their family, under the guise of it being in their interests, has a long history in NSW. A Protector of Aborigines was first appointed in NSW in 1881. Two years later, following an inquiry into the condition of Indigenous people in NSW, a Board of Protection was created. However, the Board lacked statutory authority. This was provided by the *Aborigines Protection Act 1909* (NSW).

²¹⁶ Ibid, p 277.

²¹⁷ Ibid, p 278.

²¹⁸ Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs. Quoted in Commonwealth, Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (Senator J McKiernan Chair), Commonwealth Parliament, 2000, p 292.

²¹⁹ Neill, n 12, p 130.

²²⁰ Ibid, p 166.

The purpose of the *Aborigines Protection Act* was to 'provide for the protection and care of aborigines'. Section 7(c) specified that it was the duty of the Aborigines Protection Board 'to provide for the custody, maintenance, and education of the children of aborigines'. 'Aborigine' was defined in section 3 to mean 'any full-blooded aboriginal native of Australia, and any person apparently having an admixture of aboriginal blood who applies for or is in receipt of rations or aid from the board or is residing on a reserve'.²²¹

Section 11 of the Act enabled the Aborigines Protection Board to apprentice an Indigenous child and to collect his or her wages. Section 11A was added by the *Aborigines Protection Amending Act 1915*, which empowered the Board to remove a child who refused to go to the person to whom they had been apprenticed, and send them to a home or institution for the purposes of being trained. The Act also inserted section 13A which stated:

The Board may assume full control and custody of the child of any aborigine, if after due inquiry it is satisfied that such a course is in the interest of the moral or physical welfare of such child. The Board may thereupon remove such child to such control and care as it thinks best. The parents of any such child so removed may appeal against any such action on the part of the Board to a Court as defined in the Neglected Children and Juvenile Offenders Act, 1905, in a manner to be prescribed by regulations.

Thus, an Indigenous child no longer had to be considered neglected before the Board had the power to remove him or her from family.

Contemporary views concerning the removal of Indigenous children from their parents were not uniform. Many opposed the policy, viewing it as inhumane. The following extracts are from the Second Reading debate of the *Aborigines Protection Amending Bill* on 27 January 1915 (p 1951ff), and are examples of various contemporary views:

The main principle embodied in the proposed amendment is actually to empower the board to take the place of the parents... It is not a question of stealing the children, but of saving them... The moral status of these Aborigines is very different from that of white people... the half-castes remain in the camp to be brought down to the same standard as the aborigines... the aborigines will soon become a negligible quantity and the young people will merge into the present civilisation and become worthy citizens.

- J H Cann MLA -

To steal the child away from the parents!... To me the separating of a swallow from its parents is a cruelty... it would be well if the Government provided decent protection of some kind for the unfortunate people concentrated in that camp instead of introducing a bill of this kind... We are told that the parents have an appeal. What does an appeal mean? Suppose a poor aboriginal woman goes into court, who will listen to her?

- P McGarry MLA -

In dealing with aborigines we have to recognise that we are dealing with a class altogether different

²²¹ This definition was amended by the *Aborigines Protection (Amendment) Act 1918* which defined Aborigine as 'any full-blooded or half-caste aboriginal who is a native of New South Wales'.

from the white children.

- A James MLA -

I have always felt that we have never done our duty to the aboriginal owners of this country; that we have neglected our manifold duties to them in many directions, and that we have a very great deal to learn from other countries...

- G Black MLA -

I object to the reintroduction of slavery into New South Wales, and that is what this bill means... At Darlington Point I have heard an aborigine, who was highly educated, explaining in the best of English how the aborigines were being plundered of their rations, robbed of their lands, and reduced to the position of slaves. I do not say the man was right in all his contention, but when you meet men who understand all these things, you cannot expect them to calmly submit to an order to take from them their girl or boy in order to place them in a Government institution.

- R Scobie MLA -

Numerous missions were established in NSW including at Bomaderry, Bowraville, Erambie, Lake Macquarie, Maloga School, Parramatta, Warrangesda and Wellington Valley.²²² Institutions were also established at Kinchela and Cootamundra.²²³

New South Wales was the first Australian jurisdiction in 1940 to cease the indiscriminate removal of part Aboriginal children.²²⁴ Indigenous children were subsequently subject to general child welfare laws under the *Child Welfare Act 1939*. However, if they were found to be neglected under the *Child Welfare Act* they were committed to the Aborigines Welfare Board. The *Aborigines Act 1969* abolished the Aborigines Welfare Board with Indigenous children previously under the care of the Board to subsequently become wards of the state.

8.3 The legacy of the past

Bringing Them Home viewed current problems regarding Indigenous health, education, employment, housing and self-esteem as intimately connected to the child removal policies that had operated for so long.²²⁵ The Report viewed the separation of Indigenous children from their families as contributing to the loss of parenting skills, with many children subsequently lacking a parental role model. The impact of this may be felt for many generations. Past child removal policies are also thought to be one of the driving factors behind Indigenous arrest rates.²²⁶ Joanne Selfe from the NSW Aboriginal Women's Legal Resource Centre described the problem in her submission to *Bringing Them Home*:

as children who grew up under the stolen generations, the fact that we didn't often have our own

²²² Tatz, n 62, p 26.

²²³ Ibid.

²²⁴ Neill, n 12, p 129.

²²⁵ Human Rights and Equal Opportunity Commission, n 28, p 4.

²²⁶ Hunter, n 128, p 25.

parents, that we in fact as children when we were raised were not parented by other people and as adults and as women we go on to have children and those skills and experiences that our extended family would have instilled in us are not there – that puts us at great risk of having our children removed under the current policies and practices that exist today.²²⁷

The possibility of an Indigenous person receiving compensation for the effects of being removed from his or her family as a child has been unsuccessfully tested in a number of cases (*Kruger v Commonwealth of Australia* (1997) 190 CLR 1; *Cubillo and Gunner v Commonwealth of Australia* (2000) 174 ALR 97; *Williams v The Minister, Aboriginal Land Rights and State of NSW* [1999] NSWSC 843). The case of *Williams* was tested in the Supreme Court of NSW. The plaintiff, Ms Joy Williams, a part-Indigenous woman, had been placed, with the consent of her mother, under the control of the Aborigines Welfare Board following her birth in 1942. She initially resided at the Aborigines Children's Home in Bomaderry until she was moved to Lutanda Children's Home in Wentworth Falls when she was four and a half years old. Ms Williams remained under the control of the Board until she reached the age of 18 years. Ms Williams claimed that as a result of her childhood experiences she had: developed Borderline Personality Disorder and substance abuse disorder; been denied bonding and attachment; and been materially deprived. She accordingly sought damages for negligence, breach of fiduciary duty, breach of statutory duty, and trespass, as well as exemplary and aggravatory damages. Abadee J held that duty of care and trespass were not established. A private action for breach of statutory duty was held to not be available, and that if a fiduciary duty could be established it was in any event not breached. The NSW Court of Appeal, whilst noting it to be 'a very sad case, and a very hard case', dismissed Ms Williams' appeal.²²⁸

There are a number of difficulties associated with pursuing redress through litigation. Chris Cunneen has identified six characteristics that make success in the courts problematic: limitations periods; the difficulty of obtaining records; a hostile court environment; the financial cost of litigation; the amount of time involved in pursuing a case; and establishing specific liability for the harms caused by removal.²²⁹ The establishment of a reparations tribunal might remove some of these difficulties.²³⁰

8.4 How the NSW Government responded to *Bringing Them Home*

The NSW Government was the first government in Australia to apologise for its role in the

²²⁷ Human Rights and Equal Opportunity Commission, n 28, p 226.

²²⁸ *Williams v Minister Aboriginal Land Rights Act 1983 and State of NSW* [2000] Aust Tort Reports ¶ 81-578.

²²⁹ Cunneen C, 'One way to give back to the stolen generations', *Sydney Morning Herald*, 14/8/00, p 14.

²³⁰ For an overview of the issues associated with the establishment of a reparations tribunal as well the model endorsed by the Public Interest Advocacy Centre see: Mc Rae H et al (eds) *Indigenous Legal Issues: Commentary and Materials* (3rd ed), Lawbook Co, Pyrmont, 2003, p 609ff.

removal of indigenous children from their families. On 14 November 1996, Premier Carr stated:

That is why I reaffirm in this place, formally and solemnly as Premier on behalf of the Government and people of New South Wales, our apology to the Aboriginal people. I invite the House to join with me in that apology... I acknowledge with deep regret Parliament's own role in endorsing the policies and actions of successive governments which devastated Aboriginal communities and inflicted, and continue to inflict, grief and suffering upon Aboriginal families and communities. I extend this apology as an essential step in the process of reconciliation. In particular, we should repudiate any idea that the severance of children and the break-up of families was justified, in terms still used today, as being only for their own good.²³¹

Following the release of the *Bringing Them Home* report, the Legislative Assembly passed the following motion on 18 June 1997:

That this House, on behalf of the people of New South Wales –

1. apologises unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities;
2. acknowledges and regrets Parliament's role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians;
3. calls upon all Australian Governments to respond with compassion, understanding and justice to the report of the Human Rights and Equal Opportunity Commission entitled *Bringing them home*; and
4. reaffirms its commitment to the goals and processes of reconciliation in New South Wales and throughout Australia.

In NSW, the police, justice agencies, and the departments of juvenile justice, community services, health, aging and disability also apologised for past policies.²³²

The NSW Government responded to the *Bringing Them Home* report by implementing a number of strategies, with a particular focus on education.²³³ It has committed to establishing: a one stop shop to access information on family history, an oral history project, and a NSW Aboriginal Languages Research and Resource Centre.²³⁴ It has distributed a copy of *Bringing Them Home* to all schools in NSW and aspects of the report are being incorporated into the syllabus for K-6 Human Society and Its Environment, 7-10 History and Aboriginal Studies, and HSC online material for years 11 and 12 Aboriginal Studies.²³⁵ There is also an Indigenous

²³¹ Hon R Carr MP, *NSWPD*, 14/11/96, p 6030.

²³² Ministerial Council of Aboriginal and Torres Strait Islander Affairs, *Evaluation of Responses to Bringing Them Home Report: Final Report*, December 2003, Appendix C. A copy of the report is available from www.daa.nsw.gov.au

²³³ For a comprehensive list of the various ways in which the NSW Government responded to the release of the *Bringing Them Home* report see: Ministerial Council of Aboriginal and Torres Strait Islander Affairs, n 233, Appendix C.

²³⁴ *Ibid*, p 14.

²³⁵ *Ibid*, p 32.

Languages in Schools initiative.

There is increasing awareness of the role that can be played by corrective services, juvenile justice and child welfare. Whilst NSW has not made any specific commitments in this regard, the NSW Government has acted to such an extent that the Ministerial Council of Aboriginal and Torres Strait Islander Affairs noted, 'The scope and content of these responses is impressive'.²³⁶ Some of these responses are legislative such as amendments to the *Children's and Young Persons Act 1998*, the *Evidence Act 1997*, *Young Offenders Act 1997* and the *Crimes Amendment Act 1997*. Other responses include the introduction of the Youth Justice Conferencing Scheme and the Aboriginal Justice Advisory Council. The Ministerial Council of Aboriginal and Torres Strait Islander Affairs has acknowledged the efforts of the NSW Government to involve Aboriginal organisations and communities in developing a number of programs and services including the Aboriginal Justice Agreement, Aboriginal Justice Plan, Two Ways Together, the Aboriginal Child, Youth and Family Strategy, the NSW Health Partnership Agreement, and the Aboriginal Communities Development Plan.²³⁷

Link-Up (NSW) Aboriginal Corporation was established in 1980 and is funded by ATSIC to assist members of the stolen generation with tracing their family. It also provides support and counselling (grief, loss and relationship building) before, during and after a reunion takes place, should the parties wish to be reunited. The NSW Department of Aboriginal Affairs commenced work on an Indexing Project in January 2003, which is designed to assist Indigenous persons to find information on their family history.²³⁸ The project involves indexing the records of the Aborigines Welfare Board and Aborigines Protection Board.

8.5 Children and Young Persons (Care and Protection) Act 1998 (NSW)

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides for the care and protection of, and provision of services to, persons under the age of 18 years in NSW. It seeks to ensure that children and young persons receive such care as is necessary for their safety, welfare and well-being.²³⁹ One of the aims of the Act is to assist parents and guardians, where appropriate, in their parenting role. Decisions are to take account of the culture and language of the child and, where appropriate, that of the person/s with parental responsibility.²⁴⁰ However, the safety, welfare and well-being of a child is to be the paramount consideration in all decisions.²⁴¹

²³⁶ Ibid, p 38.

²³⁷ Ibid, p 44.

²³⁸ NSW Department of Aboriginal Affairs, n 125, p 24.

²³⁹ Section 8.

²⁴⁰ Section 9.

²⁴¹ Section 9.

Part 2 of the Act sets out the principles that are to apply in cases involving an Aboriginal or Torres Strait Islander. It is underpinned by the need to prevent the wide scale removal of children from their families occurring again. Section 11 of the Act stresses that ‘Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible’. It requires that various representatives from the Indigenous community have the opportunity to participate in decisions made about the placement of children and young persons.²⁴²

The Aboriginal Child Placement Principle is found in section 13. It stresses that Indigenous children and young persons removed from their family should be placed with a member of their extended family or kinship group where possible. If that is not suitable, then arrangements are to be sought within the child’s Indigenous community. Should that not be possible, the child should be placed with other Indigenous people residing in the vicinity of the child or young person’s usual place of residence. If none of these options are suitable, a decision regarding the placement of the child or young person is to be made in consultation with his or her extended family or kinship group and appropriate Indigenous organisations.

However, implementation of the Aboriginal Child Placement principle can be difficult. There are not enough Indigenous foster families to care for the children who are removed from their homes, possibly exacerbated by the low life expectancy of the Indigenous population, which has also reduced the availability of grandparents.²⁴³ Nonetheless, 87% of Indigenous children in NSW are placed with an Indigenous carer or relative.²⁴⁴

Section 71 sets out the grounds for which the Children’s Court may view a child or young person as in need of care or protection, and thus require a care order to be made:

- (i) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,
- (ii) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
- (iii) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,
- (iv) subject to subsection (2), the child’s or young person’s basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents,
- (v) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,
- (vi) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children’s Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,
- (vii) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,

²⁴² Section 12.

²⁴³ Neill, n 12, p 165.

²⁴⁴ Australian Institute of Health and Welfare, *Child protection Australia 2002-03*, Australian Institute of Health and Welfare, Canberra, 2004, p 47.

(viii) section 171(1) applies in respect of the child or young person.

However, section 71(2) stipulates that the Children's Court cannot conclude that the basic needs of a child or young person are likely not to be met only by reason of a parent's disability, or poverty.

8.6 Has much changed?

According to Rosemary Neill, the rate at which Indigenous children are removed from their homes has actually increased since the release of the *Bringing Them Home* report.²⁴⁵ A disproportionate number of Indigenous children in Australia are subject to protection orders, equivalent to six times the rate of non-Indigenous children.²⁴⁶ In NSW the rate of Indigenous children on care and protection orders is even higher at 8.4 times the rate of other children.²⁴⁷ Indigenous children are placed in out-of-home care at 9.3 times the rate of non-Indigenous children.²⁴⁸ A disproportionate number of child protection substantiations also involve Indigenous children. In 2002-03, the rate of child protection substantiations in relation to Indigenous children in NSW was 32 per 1000 children.²⁴⁹ The rate for other children was 6.5 per 1000.

It is thought that the over-representation of Indigenous children in welfare services is due to a number of factors including:²⁵⁰

- the legacy of past policies of the forced removal of Aboriginal children from their families;
- intergenerational effects of previous separations from family and culture;
- poor socio-economic status; and
- cultural differences in child-rearing practices.

²⁴⁵ Neill, n 12, p 167.

²⁴⁶ Australian Institute of Health and Welfare, n 244, p xiv.

²⁴⁷ *Ibid*, p 36.

²⁴⁸ *Ibid*, p 46.

²⁴⁹ *Ibid*, p 20.

²⁵⁰ *Ibid*.

9 RIGHTS ISSUES

9.1 Reconciliation

9.1.1 *What is it?*

The Senate Legal and Constitutional References Committee noted in its 2003 report, *Reconciliation: Off Track*, that the concept of reconciliation embodies a number of ideas. Reconciliation is about: nation-building and national unity; recognition of Indigenous peoples; and overcoming Indigenous disadvantage.²⁵¹ The reconciliation process began in some ways with the 1967 Referendum and has been a particular feature of national politics for the last decade or so.

The need for reconciliation was recognised by the Royal Commission into Aboriginal Deaths in Custody which recommended:

That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.²⁵²

The need for reconciliation appears to have gained momentum in the late twentieth century when it attracted widespread public support. In May 1997, 1,800 people attended the Australian Reconciliation Convention. The Council for Aboriginal Reconciliation presented the national reconciliation documents to government leaders at Corroboree 2000, which was held in Sydney on 27 May 2000. On the following day, an estimated 250,000 people participated in the Reconciliation walk across the Sydney Harbour Bridge.

The Howard Government argues that there are two aspects to reconciliation – the symbolic and the practical. It believes that too much attention has been given to symbolic issues in the past at the expense of improvements in the practical aspects of Indigenous life (health, education, employment and housing). Prime Minister Howard, in a press conference following the announcement of plans to introduce legislation to abolish ATSIC, claimed that one of the reasons for the failure of ATSIC was that ‘it has become too preoccupied with what might loosely be called symbolic issues and too little concern with delivering real outcomes for indigenous people’.²⁵³

²⁵¹ Senate Legal and Constitutional References Committee, *Reconciliation: Off Track*, 2003, p 14.

²⁵² Royal Commission into Aboriginal Deaths in Custody, n 115, Recommendation 339.

²⁵³ A transcript of the joint press conference with Senator Amanda Vanstone held on 15 April 2004 at Parliament House, Canberra, is available from www.pm.gov.au/news/interviews. Accessed 16/4/04.

Rosemary Neill has criticised the construction of an artificial divide between the two aspects of reconciliation as:

Any effective indigenous affairs policy must strike a workable balance between the symbolic and the practical; an agenda of rights and an agenda of social and economic reform. It must recognise that past injustices bear down on subsequent generations, and that on-the-ground realities affecting health, housing, education and family and community wellbeing must be tackled as vigorously as claims for redress for stolen lands and children. Without this balance, self-determination for Australia's indigenous people will remain a hollow promise.²⁵⁴

9.1.2 *Council for Aboriginal Reconciliation*

The Council for Aboriginal Reconciliation was established by the *Council for Aboriginal Reconciliation Act 1991* (Cth) in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. It met for the first time in Canberra in February 1992 and ceased to exist at the end of 2000. Prior to its cessation it drafted an 'Australian Declaration Towards Reconciliation'²⁵⁵ to which the Commonwealth Government produced its own version in response.²⁵⁶ The Commonwealth's version is reproduced below. To aid comparison of the two declarations, the Council's version, where different, is set out in italics immediately after the relevant section.

- We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.
- We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.
- We recognise this land and its waters were settled as colonies without treaty or consent.
- Reaffirming the human rights of all Australians, we respect the cultures and beliefs of the nation's first people and recognise the place of traditional laws within these cultures.

Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.

- Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.
- Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

²⁵⁴ Neill, n 12, p 18.

²⁵⁵ Council for Aboriginal Reconciliation, *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and Commonwealth Parliament*, December 2000, Appendix 1. An electronic version of the report is available from www.austlii.edu.au/au/other/IndigLRes/car/

²⁵⁶ Commonwealth Government, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge*, September 2002. An electronic version is available from www.atsia.gov.au/media/reports

- Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories.
- As we walk the journey of healing, Australians express their sorrow and profoundly regret the injustices of the past and recognise the continuing trauma and hurt still suffered by many Aboriginals and Torres Strait Islanders.

As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.

- We desire a future where all Australians enjoy equal rights, live under the same laws and share opportunities and responsibilities according to their aspirations.

We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.

- And so, we pledge ourselves to stop injustice, overcome disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples, along with all Australians to determine their own destiny.

And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.

Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.

The Commonwealth Government did not fully endorse the version promoted by the Council as it disagreed with its approach to customary law. Nor is it in favour of self-determination, with a preference for such terms as self-empowerment and self-management. In addition, the Federal Government does not support the idea of a formal apology. It believes that an apology would imply that present generations are responsible for the wrongs of the past.²⁵⁷

Reconciliation Australia (www.reconciliationaustralia.org) is an independent, non-profit organisation that was established by the Council for Aboriginal Reconciliation and continues in its place. It reports on the progress of and provides information on the cause of reconciliation in Australia. It also raises funds to advance the process of reconciliation.

9.2 International rights

A number of international conventions are concerned with human rights that are particularly relevant to Australia's Indigenous community. This section contains a sample of some of the relevant provisions found in the *International Covenant on Civil and Political Rights 1966* (ICCPR),²⁵⁸ the *International Covenant on Economic, Social and Cultural Rights 1966*

²⁵⁷ Ibid, p 10.

²⁵⁸ The *International Covenant on Civil and Political Rights* (1966) came into force for Australia on 13 November 1980.

(ICESCR),²⁵⁹ the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* (CERD),²⁶⁰ and the *Draft Declaration on the Rights of Indigenous Peoples*. The selection is not comprehensive and is intended to be illustrative only.

Article 1 of the ICCPR provides for a right of self-determination, that is, the ability of peoples to 'determine their political status and freely pursue their economic, social and cultural development'. State parties are required to promote the realisation of the right of self-determination. The right to self-determination can also be found in article 1 of the ICESCR, where it is expressed in terms identical to article 1 of the ICCPR. A more specific right to self-determination is found in the *Draft Declaration on the Rights of Indigenous Peoples*. Article 3, in its present form, provides for the right of Indigenous peoples to self-determination.

The Royal Commission into Aboriginal Deaths in Custody noted that most concepts of self-determination include the right of Indigenous people to have control over the decision-making process regarding political status and social, economic and cultural development. It also refers to the establishment of an economic base to provide the resources with which Indigenous persons can control their future.²⁶¹

The right to freedom of thought, conscience and religion is established in article 18 of the ICCPR. It requires States to respect the liberty of parents and guardians regarding the religious and moral education of their children. Article 27 then provides that:

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

Article 2 of CERD requires State Parties to eliminate racial discrimination in all its forms. It also stipulates that State Parties are to:

when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5 of CERD leaves no doubt as to what is meant by human rights. It specifies that all persons are to enjoy the following rights without any distinction as to race:

²⁵⁹ The *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR) came into force for Australia on 10 March 1976.

²⁶⁰ The *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) (CERD) entered into force for Australia on 30 October 1974.

²⁶¹ Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, Australian Government Publishing Service, Canberra, 1991, p 508.

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

The earlier sections of this paper have highlighted some of the obstacles that prevent or have prevented Indigenous Australians from fully realising their rights. The failure of the Australian government to adequately recognise the rights of Indigenous Australians has been the subject of international attention in recent years. A number of international human rights committees have indicated their concern about breaches of human rights since 1999 to the federal government.²⁶²

Behrendt has suggested three mechanisms by which the protection of Indigenous rights in Australia could be improved:²⁶³

1. there could be better compliance with the obligations imposed under the international human rights instruments that have been ratified by Australia;
2. ratified human rights instruments could be further incorporated in domestic legislation

²⁶² Aboriginal and Torres Strait Islander Social Justice Commissioner, n 159, p 81.

²⁶³ Behrendt, n 21, p 149.

by use of the external affairs power in section 51(xxix) of the Constitution; and

3. Indigenous people could continue to participate in the international arena, for example, through the Working Group on Indigenous Populations.

The rights of indigenous peoples have attracted greater international attention in recent years. A Working Group on Indigenous Populations was established in 1982. The 22nd session of the working group is to meet at the UN office in Geneva between 19 and 23 July 2004. Other relevant developments include the 1989 Convention on the Rights of the Child, the 1989 International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries, and the Permanent Forum on Indigenous Issues, which was established in 2000.²⁶⁴

A draft United Nations Declaration on the Rights of Indigenous Peoples has been prepared (a copy of the draft declaration is attached as Appendix A). The Aboriginal and Torres Strait Islander Social Justice Commissioner has criticised the response of the Australian government to the draft declaration. According to the Commissioner, Australia is one of only four countries, together with the United States of America, United Kingdom and Japan, to actively reject the collective rights of its Indigenous population, including the right to self-determination, during negotiations on the draft declaration at the United Nations.²⁶⁵ The Australian Government has continued to oppose the concept of self-determination on the basis that it implies the establishment of a separate nation and laws.²⁶⁶

9.3 The treaty debate

9.3.1 *The background*

When the British arrived in Australia in 1788, the land was regarded as 'terra nullius' – no one's land. No treaty or agreement was made with the Indigenous peoples who were living on the land. The British simply acquired sovereignty. As a result, Australia was viewed as having been settled rather than conquered or invaded by the British. Some argue that as Indigenous Australians never ceded their sovereignty it has not ceased to exist, it is only the exercise of this authority that has been limited.²⁶⁷

Whilst there has been much discussion since the end of the 1970s over the need for a treaty with Australia's indigenous peoples, references to a treaty have been made since the early stages of the

²⁶⁴ UNICEF Innocenti Research Centre, n 10, p 2.

²⁶⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 159, p 7.

²⁶⁶ Ibid, p 45.

²⁶⁷ Mansell M, 'Finding the foundation for a treaty with the indigenous peoples of Australia, *Balayi: Culture, Law and Colonialism*, vol 4, 2002, p 87.

colonisation of Australia. In 1837, the first Attorney General of NSW, Saxe Bannister, submitted to the Select Committee of the House of Commons that a treaty with the Indigenous people should be entered into.²⁶⁸

The National Aboriginal Islander Day Observance Committee organises a week each year known as NAIDOC (National Aboriginal and Islander Day of Commemoration) week, which 'is a way of celebrating and promoting a greater understanding of Aboriginal and Torres Strait Islander peoples and our culture'.²⁶⁹ The choice of a treaty theme for separate NAIDOC weeks more than 20 years apart illustrates its ongoing relevance to the community (the theme for NAIDOC week in 1980 was 'Treat us to a treaty on land rights', with the treaty theme used again for 2001's 'Treaty – Let's Get it Right').

A number of organisations have been set up for the specific purpose of considering the issues surrounding the concept of a treaty. The Gilbert and Tobin Centre for Public Law recently began a Treaty Project in 2002 that is to continue for three years. One of its research projects will explore the public law aspects and implications of a treaty. ATSIC also established a National Treaty Support Group and a Treaty Think Tank in 2002.

9.3.2 *What should be included in a treaty?*

There are many opinions on what should be included in a treaty. This section provides an overview of what various activists and organisations since 1978 have argued should be incorporated.

The **Aboriginal Treaty Committee** was formed in 1978 and formulated five provisions deemed essential to a treaty:²⁷⁰

1. The protection of Aboriginal identity, languages, law and culture.
2. The recognition and restoration of rights to land by applying, throughout Australia, the recommendations of the Woodward Commission.²⁷¹
3. The conditions governing mining and exploration of other resources on Aboriginal land.
4. Compensation to Aboriginal Australians for the loss of traditional lands and for damage to

²⁶⁸ Council for Aboriginal Reconciliation, n 255, Appendix 5.

²⁶⁹ Aboriginal and Torres Strait Islander Commission, 'NAIDOC', www.atsic.gov.au/Events/NAIDOC Accessed 15/3/04.

²⁷⁰ Huggins J, 'Reconciliation and native title', *Balayi: Culture, Law and Colonialism*, vol 4, 2002, p 37.

²⁷¹ Aboriginal Land Rights Commission, *Second Report*, Commonwealth of Australia, 1974.

those lands and to their traditional way of life; and

5. The right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose.

Galarrwuy Yunupingu wrote in 1987 that a treaty must state that:²⁷²

- Aboriginal people are the indigenous sovereign owners of Australia and adjacent islands since before 1770 and as such have rights and treaty rights;
- Their sovereignty was never ceded; and
- The doctrine of terra nullius cannot be supported in international law as the legal basis for European occupation of, and acquisition of sovereignty over, our land.

Patrick Dodson, the first Chair of the Council for Aboriginal Reconciliation, suggested in 1999 that a treaty should include references to the right of Indigenous persons to:²⁷³

- equality;
- the maintenance of their distinct characteristics and identities;
- self-determination;
- their own law, customs and traditions;
- their own spiritual and religious traditions;
- their own language, history, and stories;
- participate in decision-making;
- determine priorities and strategies for economic and social development;
- special measures to improve economic and social conditions;
- education and training;
- land and resources;

²⁷² Quoted in Attwood B and Markus A, *The Struggle for Aboriginal Rights: A Documentary History*, Allen & Unwin, Sydney, 1999, p 314. For examples of other opinions on what should be included in a treaty see p 310ff.

²⁷³ Behrendt, n 21, p 90ff.

- self-government;
- constitutional recognition;
- have their treaties and agreements respected by governments; and
- establish a forum to promote public awareness and draft legislation in respect of the above.

Geoff Clark, suspended Chairman of ATSIC, suggests that a treaty should include the role and responsibilities of all levels of government and the indigenous community.²⁷⁴ Other things that might be included, according to Clark, are: the scope of Aboriginal decision-making; the limits of Aboriginal autonomy; the return of lands; clarification of the right of indigenous persons to practice their culture; and provision for indigenous representation in parliament.

9.3.3 *Different views regarding the need for a treaty*

Australia is the only country in the Commonwealth to have not made a treaty with its indigenous population.²⁷⁵ For example, in New Zealand, the Treaty of Waitangi was made with the Maori population in 1840. The Council for Aboriginal Reconciliation recommended in its final report that, as part of the reconciliation process, each government within Australia should recognise that Australia was settled without treaty or consent, and acknowledge that treaties or agreements would assist the process of reconciliation.²⁷⁶ ATSIC has also indicated its support for the concept of a treaty, as they believe it to be a key part of the reconciliation process.²⁷⁷

The perceived need for the relationship between Indigenous and other Australians to be clarified is highlighted by what various authors have deemed necessary for inclusion in a treaty, as identified in section 9.3.2. Judith Wright has described how the protection afforded by a treaty is greater than that provided by a statute. She writes:

Ultimately, therefore, there must be some instrument, such as a treaty, which will confirm for all time equal and just treatment for Aboriginal Australians wherever they live, putting their land and their rights beyond the reach of sovereign parliaments. There is no security for Aboriginal people in Acts of Parliament, which can be repealed or amended.²⁷⁸

²⁷⁴ Clark G, 'From here to a treaty', *Balayi: Culture, Law and Colonialism*, vol 4, 2002, p 6.

²⁷⁵ Senate Legal and Constitutional References Committee, n 251, p 83.

²⁷⁶ Council for Aboriginal Reconciliation, n 255, Recommendation 5.

²⁷⁷ Senate Legal and Constitutional References Committee, n 251, p 45.

²⁷⁸ Quoted in Huggins, n 270, p 37.

However, a number of objections to the prospect of a treaty have been made. It has been argued that the sovereign rights of all citizens were vested in the parliament and court in 1901 and therefore a treaty is not possible. However, Clark argues the situation of Indigenous Australians is different, as 'the only reference to Aborigines in the 1901 constitution was to exclude us'.²⁷⁹

Keith Windschuttle believes there are ten reasons why there should not be a treaty between Australia and its Indigenous population:²⁸⁰

1. *A treaty would re-establish political rights based on race* – Windschuttle urges that caution be exercised before such principles as equal rights for all people are abandoned.
2. *A treaty would be socially divisive* – it would possibly encourage the rise of new forms of racism.
3. *A treaty would not solve Aboriginal economic problems.*
4. *A treaty would inhibit Aboriginal self-determination* – Windschuttle cites the failure of Indigenous self-determination in relation to education in the Northern Territory as an example. He believes a treaty would foster separatism rather than self-determination.
5. *The problems of instituting customary law are insurmountable* – he argues that the Western legal system is better able to serve the interests of Indigenous Australians.
6. *Aboriginal self-government would be undemocratic* – many Indigenous organisations, including ATSIC, are not genuinely representative.
7. *Sociologically, it is too late to revive Aboriginal sovereignty* – Indigenous Australians are spread throughout the continent.
8. *The logic of the case is flawed* – he notes how difficult it has been to establish Aboriginal concepts of land ownership.
9. *The theory behind the demand has been a historical disaster* – he likens it to the rise of nationalism in Germany, the Soviet Union, Cambodia and the Balkans.
10. *A treaty jeopardises Australian sovereignty* – Windschuttle believes that Australia has everything to lose and nothing to gain. He also warns that an Aboriginal state has the potential to be powerful, and could be used as a political platform to make allies that are not necessarily in Australia's interests.

²⁷⁹ Clark, n 274, p 7.

²⁸⁰ Windschuttle K, 'Why there should be no Aboriginal treaty', *Quadrant*, 45(10) October 2001, p 15ff.

Windschuttle concluded that:

Many white people today, especially those who last year walked across bridges for reconciliation, no doubt see a treaty as some kind of welfare measure or as a nice symbolic gesture. It deserves to be recognised, rather, as a device that, in one stroke, would establish Aborigines as a politically separate race of people. For all the reasons offered here, this would be bad for Australia and worse for Aboriginal people themselves.²⁸¹

The Commonwealth government, whilst acknowledging that Australia was settled as colonies without treaty or consent, has been reluctant to support any proposals that embody notions of self-determination or a treaty. It believes that:

such a legally enforceable instrument, as between sovereign states would be divisive, would undermine the concept of a single Australian nation, would create legal uncertainty and future disputation and would not best harness the positive environment that now exists in relation to reconciliation.²⁸²

The Commonwealth also believes that a treaty is unnecessary, as agreements have been made in regard to health, housing and native title.

In contrast, Behrendt argues that a treaty would be unifying as it builds a relationship between Indigenous and non-Indigenous Australians.²⁸³ Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson, also disagrees that a treaty would be the cause of division. He believes that:

those who fear that full recognition of our unique place in modern Australia will be divisive, or that it violates Australian principles of social equality, are dead wrong. Australia is divided already.²⁸⁴

²⁸¹ Ibid, p 24.

²⁸² Commonwealth Government, n 256, p 23.

²⁸³ Behrendt L, 'The link between rights and a treaty "practical reconciliation"', *Balay: Culture, Law and Colonialism*, vol 4, 2002, p 23.

²⁸⁴ Aboriginal and Torres Strait Islander Social Justice Commission, *Indigenous Social Justice: Strategies and Recommendations*, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Sydney, 1995, p 8.

10 CONCLUSION

The factors that influence the experience of the Indigenous community are many and complex, and only some have been noted in this paper. The relationship between various Indigenous peoples and the land is just one aspect that has not been discussed. This paper has attempted to provide an overview of some of the issues affecting the Indigenous community in NSW. It has identified a number of the factors that have contributed to the current state of affairs, and has noted some of the strategies that have been developed as part of an attempt to improve the situation of the Indigenous population of Australia.

The Indigenous community in NSW is disadvantaged both socially and economically when compared to the population in general. The impact of a history that includes the dispossession of land, destruction of culture and removal of children is likely to have contributed to this disadvantage. This paper has attempted to highlight the links that exist between the experience of many Indigenous persons in a number of areas including health, education, employment, housing, contact with the criminal justice system, the level of violence within the community, the removal of children from their families and an assortment of rights issues. Various activists, agencies and other interested parties, have repeatedly identified the need for a holistic approach to Indigenous affairs. According to Geoff Clark,

Neither a treaty alone, nor return of land alone, nor education alone, nor finding jobs for Aborigines in itself is the answer to providing a decent future for Aboriginal people. But a collective approach to all of those issues, which includes clarifying the political rights Aborigines have in this country is, in my view, that way to proceed.²⁸⁵

The benefit of collaborating with the Indigenous community, rather than imposing solutions from above, has only been recognised relatively recently. The Aboriginal and Torres Strait Islander Social Justice Commissioner noted in his 2002 Social Justice Report that:

One of the ongoing impacts of the past treatment of Indigenous peoples in Australia is the fact that the historic 'lack of respect for, and failure to recognise the value of, Indigenous cultures permeates the design of the institutions of society and government today'.²⁸⁶

²⁸⁵ Clark, n 274, p 9.

²⁸⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, n 159, p 22.

APPENDIX A: Draft United Nations Declaration on the Rights of Indigenous Peoples
Available from www.unhcr.ch/indigenous/groups-01.htm

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

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

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely

agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment,

social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

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