REFORMING JUVENILE JUSTICE AND CREATING THE SPACE FOR INDIGENOUS SELF-DETERMINATION

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I. INTRODUCTION

A substantial part of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was concerned with issues relating to the *contemporary* separation of children and young people.[1] The Inquiry found that the high levels of criminalisation and subsequent incarceration of Indigenous young people through State and Territory juvenile justice systems in Australia effectively amounted to a new practice of forced separation.

The Inquiry extensively examined the range of factors through which Indigenous young people are removed. At the level of policing, these included adverse discretionary decisions by police when using diversionary options such as cautioning, preference of the use of arrest rather than summons, inadequate bail options, and overpolicing in public places, including the use of public order

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1 Hereafter referred to as the Inquiry. Page references in relation to the Inquiry refer to the Report of the Inquiry; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997. (Herein *Bringing Them Home*).

offences such as offensive language. At the point of sentencing, Indigenous young people continued to be more likely to receive harsher outcomes. Non-custodial sentencing options and diversionary programs continued to be limited in scope and availability, and were generally not designed or operated by Indigenous communities or organisations. Juvenile justice legislation failed to provide any framework for realistic consideration of Indigenous issues and did not reflect a commitment to self-determination. New sentencing provisions in legislation such as the *Young Offenders Act* 1994 (WA) and recent amendments to the *Juvenile Justice Act* 1983 (NT), which are designed to incarcerate repeat offenders, are likely to have an adverse effect on Indigenous young people.

The Inquiry also examined the social, cultural and economic reasons which make Indigenous young people more susceptible to criminalisation and removal. These underlying issues include high levels of unemployment, poverty, ill health, homelessness and poor educational outcomes. They arise from the intergenerational effects of earlier assimilationist policies, as well as being the direct outcome of dispossession and marginalisation. In addition, failure to understand and respect cultural difference, particularly different familial structures and child rearing practices, can lead to adverse decisions by juvenile justice, welfare and other agencies.

Perhaps one of the disturbing findings of the Inquiry was simply that the issues facing Indigenous young people in the area of juvenile justice have been identified and demonstrated time and time again. Many of the issues were addressed comprehensively in the findings and the recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991. Since that period the problem of over representation of Indigenous young people in the juvenile justice system has actually deepened.[2]

New legislation has done little to face the issues which affect Indigenous young people or to reduce the levels of police and detention centre custody. Some of the legislative changes, such as the repeat offender sentencing regimes, are unashamedly punitive in their intent. Whole legal systems regulating juvenile justice have changed in many states in recent years. Yet a review and evaluation of the new South Australian system could be applied to most of Australia:

> In overall terms, the position of Aboriginal youths within the new juvenile justice system does not seem to be any better than under the old system. They are still being apprehended at disproportionate rates and once in the system, are still receiving the 'harsher' options available.[3]

Why have new legislative regimes failed? The evidence before the Inquiry suggests several reasons. Many of the more progressive changes have been restricted in form, content and applicability. In other words, they are designed

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2 *Ibid*, p 498. There were 26 *per cent more Indigenous young people in detention* at the end of June 1996 than there were at the end of September 1993. The rate per 100 000 of the Indigenous youth population incarcerated had also *increased by 24 per cent* from 408.0 to 539.8. During the same period, the number of non-Indigenous young people in detention centres decreased by 5 per cent.

3 J Wundersitz, *The South Australian Juvenile Justice System: A Review of Its Operation*, South Australia Office of Crime Statistics (1996), p 205.

and implemented as non-Indigenous systems with the expectation of finding solutions to the problems facing Indigenous people. In addition, tokenism pervades many of the changes, particularly in relation to police cautioning and family conferencing schemes, because they fail to represent any shift in the locus of decision making. Finally, there has been the failure to address the 'underlying issues' which contribute so substantially to Indigenous offending levels.[4] Recommendation 42 of the Inquiry requires Australian Governments to develop and implement a social justice package and to also implement the recommendations from the Royal Commission into Aboriginal Deaths in Custody which addressed underlying issues.[5]

II. A NEW FRAMEWORK

The Inquiry found that existing systems have failed miserably to solve the issues relating to juvenile justice and welfare matters and nowhere is this failure more profoundly reflected than in the inability of states to reduce the number of Indigenous children placed in care, held in police cells and sentenced to detention centres. The Inquiry argues for a new framework which respects the right to self-determination for Indigenous people and complies with other international obligations for the treatment of children and young people. It advocates a two tiered approach with recommendations for national framework legislation for negotiation and self-determination in areas (including juvenile justice and welfare) that affect the wellbeing of Indigenous children and young people, and recommendations for the development of minimum standards applicable to juvenile justice and welfare interventions.

A. Self-determination

The Inquiry considered in detail the draft *Declaration on the Rights of Indigenous Peoples* in relation to the emerging human rights norms which reflect the aspirations of Indigenous people. The draft Declaration contains a number of basic principles, including self-determination, which directly impact on the development of self-government and the exercise of control over matters affecting Indigenous children and young people, particularly in regard to child welfare, custody and juvenile justice issues. The draft Declaration affirms "the right of Indigenous people to control matters affecting them" including the right of self-determination.[6]

Article 3 of the draft Declaration describes the right of self-determination as involving the free choice of political status and the freedom to pursue economic, social and cultural development (it is established in the same terms as Article 1 of the ICCPR)[7]. Article 4 provides that:

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4 Note 1 *supra*, pp 539-40.

5 *Ibid*, p 558.

6 R Coulter, "The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?" (1995) 13 *Netherlands Quarterly of Human Rights* 2 at 128.

7 International Covenant on Civil and Political Rights.

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

Article 31 sets out the extent of governing powers of Indigenous peoples:

> 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.

Part II of the draft Declaration is concerned with the rights to life and existence. Of particular relevance is the right to existence as a collective right of Indigenous peoples to maintain and develop their distinct identities and characteristics. It has been recognised that a major theme of the draft Declaration is the "protection of the unique character and attributes of Indigenous peoples, including culture, religion and social institutions".[8] Articles 6 and 7 of the draft Declaration deal with genocide, ethnocide and cultural genocide. They are significant because they deal with specific problems affecting many Indigenous peoples.[9] Article 6 of the draft Declaration protects Indigenous peoples from genocide through the separation of children from their families "under any pretext". This Article is of clear relevance to the removal of children and young people through *both* child welfare and juvenile justice mechanisms. The draft Declaration expands international human rights through the development of provisions on ethnocide and cultural genocide (Article 7). According to Burger and Hunt, these provisions represent a logical extension of existing legal provisions.[10] Article 7 (d) prohibits "any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures". Such a provision also has implications for child welfare and juvenile justice laws which may seek either directly or indirectly to impose the standards and cultural and social mores of the dominant group on Indigenous children, young people and families.

The Inquiry noted the widespread desire of Indigenous people in Australia to exercise far greater control over matters affecting young people as reflected in many written submissions and much evidence presented at hearings. The Inquiry also noted that self-determination could take many forms from self-government to regional authorities, regional agreements or community constitutions. Some communities or regions may see the transfer of jurisdiction over juvenile justice matters as essential to the exercise self-determination. Other communities may wish to work with an existing modified structure which provides greater control in decision making for Indigenous organisations. The level of responsibility to

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8 Note 6 *supra* at 127.

9 *Ibid* at 133.

10 J Burger and P Hunt, "Towards the International Protection of Indigenous Peoples' Rights" (1994) 12 *Netherlands Quarterly of Human Rights* 4 at 405-23.

be exercised by Indigenous communities must be negotiated with the communities themselves.[11]

The Recommendations from the Inquiry stress the importance of self-determination, as well as greater controls over decision making in the juvenile justice system, and matters relating to welfare. Recommendation 43 is the key recommendation pertaining to self-determination. It requires that national legislation be negotiated and adopted between Australian Governments and key Indigenous organisations to establish a framework of negotiations for the implementation of self-determination. The national framework legislation should adopt principles which bind Australian Governments to the Act; that allow Indigenous communities to formulate and negotiate an agreement on measures best suited to their needs in respect of their children and young people; that adequate funding and resources be available to support the measures adopted by the community; and that the human rights of Indigenous children are ensured. Part (c) of Recommendation 43 authorises negotiations to include either the complete transfer of juvenile justice and/or welfare jurisdictions, the transfer of policing, judicial and/or departmental functions or the development of shared jurisdiction where this is the desire of the community.[12]

Recommendation 43 provides a significant advance in serious discussion of the issue of self-determination in Australia. It provides the framework for transfer of jurisdiction to Indigenous communities in situations where those communities see the development of self-government powers as an appropriate response to ensuring the wellbeing of Indigenous children and young people. One limitation of the Recommendation is, however, the fact that it is directed to the Council of Australian Governments (COAG). In the final analysis, the Inquiry was unwilling to reflect the demand by many organisations that the Commonwealth exercise its special responsibility for Indigenous people.

B. National Minimum Standards

Recommendation 44 is concerned with the development of national legislation which establishes minimum standards for the treatment of all Indigenous children and young people, irrespective of whether those children are dealt with by Government or Indigenous communities and organisations. This legislation to be negotiated by COAG and key Indigenous peak bodies. Recommendation 45 requires a framework for the accreditation of Indigenous organisations who perform functions prescribed by the standards.

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

11 Note 1 *supra*, pp 575-6.

12 *Ibid*, p 580.

separately represented by a representative of the child's choosing or appropriate accredited Indigenous organisation where the child is incapable of choosing.

Standard 8 of Recommendation 53 deals specifically with matters relating to juvenile justice. There are 15 rules established within the standard. Rules 1 and 2 seek to minimise the use of arrest and maximise the use of summons and attendance notices. Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained. Rule 4 requires consultation with the accredited organisation before any further decisions are made. Rules 5 to 8 provide protection during the interrogation process. Rules 9 to 12 ensure that Indigenous young people are not denied bail and that detention in police cells is eliminated except in truly exceptional circumstances. Rule 13 prioritises the use of Indigenous-run, community based sanctions. Rule 14 establishes the sentencing factors which need to be considered. Rule 15 requires that custodial sentences be for the shortest possible period, and that reasons must be stated in writing.

The development of national minimum standards recognises the need for immediate change in the level of control by Indigenous communities and organisations in the decisions which affect the future of their children and young people. One significant limitation of the development of the national standards legislation is that it relies on adoption by all Australian Governments. Again, the Inquiry was reluctant to consider overriding federal legislation.

III. CONCLUSION

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

Despite some noteworthy shortcomings in the development of the Recommendations, *Bringing Them Home* provides a framework for progressive change which respects the rights of Aboriginal and Torres Strait Islander people. It represents a significant potential development for Indigenous self-determination in Australia.