

RECONCILIATION WITH AUSTRALIA'S YOUNG INDIGENOUS PEOPLE

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Words of reconciliation are meaningless without reducing the disproportionate over-representation of young Indigenous people within Australia's juvenile justice system. This disastrous situation, growing worse each year, presents a very real barrier to reconciliation between Indigenous and non-Indigenous Australia, and without national leadership underpinning the political will of state and territory governments, any document of reconciliation will do little toward this end so far as Indigenous young people are concerned.

This is a crisis. It is upon us already. It will simply become more acute in the future, as our kids, who are now babies, move with the relentlessness of mathematics into what has become their birthright as the Indigenous children of this country. Just as on average, adult Aboriginal and Torres Strait Islander peoples can expect to die 18 to 20 years earlier than other Australians,¹ so our kids can expect more abrasive encounters with the police, more frequent arrest and more frequent detention.²

How can the reconciliation process be taken seriously by Australia's young Indigenous people when the proportion of their over-representation within the juvenile justice system continues to grow while governments bolster their law and order campaigns, thereby widening the net? Of course the general community is entitled to be safe from harm, but there is more to crime control than wielding a bigger and bigger stick. More importantly, young Indigenous people are entitled to a certain standard of treatment as of right. Australia acknowledged this when it ratified the International Convention on the Rights of the Child in 1990.

In this paper we will discuss the reality of Australia's criminal justice system behind the facade of law and order, as a reminder of the young lives we cannot see. We will also discuss positive measures by governments both internationally

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¹ Australian Institute of Health & Welfare, *Australia's Health 1994*, AGPS (1994) p 26.

² Human Rights and Equal Opportunity Commission, *Third Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 1995 at 17.

and domestically as benchmarks, and further necessary developments such as the national minimum standards legislation recommended in the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families to prevent further breaches like those of the Northern Territory Government.

A. The Over-Representation of Young Indigenous People in Custody

It has been a decade since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) undertook its inquiry into the deaths of 99 Aboriginal people who died in custody, and five years since state and territory governments made the following resolution at the Ministerial Summit on Aboriginal Deaths in Custody:

to address the over-representation of Indigenous peoples in the criminal justice system, Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, State and Territory funding and service delivery for Indigenous programmes and services, including working towards the development of multi-lateral agreements between Commonwealth, state and territory governments and Indigenous peoples and organisations to further develop and deliver programmes.

Still, in 1999, “Australian prisons are still crammed full of Indigenous prisoners in disproportionate numbers”.³ The same can be said for the juvenile justice system where the level of over-representation is sky-rocketing through the country, as predicted. Between June 1994 and June 1997 there was a 20 per cent increase in the number of young Indigenous people in detention.⁴ Similarly, the level of over-representation is increasing from 18.19 in 1994 to 24.61 in 1997.⁵ The most recent figures, released in July this year, reveal that today 32 per cent of young people detained in Australia are Indigenous.⁶

It is in this context that discussions are taking place around how to phrase a Document. Meanwhile Indigenous young people are being marched into institutions, away from their homes, and we move toward that frightening scenario painted by the former Aboriginal and Torres Strait Islander Social Justice Commissioner in 1995 when he forecast that if nothing is done “by the year 2001, we would see a further 15 per cent increase in the level of over-representation by young people in the system and by 2011 another 44 per cent”.⁷

The changes required to turn this around have been researched, developed, written and researched again, in:

- the report of the Royal Commission into Aboriginal Deaths in Custody (1989);

3 J McDonald, “10 Years On, Prisons are ‘Crammed’ with Blacks”, *The Age*, p 4.

4 *Ibid.*

5 Aboriginal and Torres Strait Islander Commission, *Aboriginal and Torres Strait Islander Peoples and Australia’s Obligations under the United Nations Convention on the Elimination of all Forms of Racial Discrimination*, February 1999 at 100.

6 L Doherty, “Tragic Black Youth Key to Jail Deaths”, *The Sydney Morning Herald*, 6 July 1999, p 3, reporting statistics released by the NSW Department of Corrective Services in July 1999.

7 Note 2 *supra* at 15.

- the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families (1996); and
- the report of Australian Law Reform Commission into Customary Law (1986).

The problem is not derived from some inherent criminality found amongst young Indigenous people, it is derived from a legal system that continues to fail Indigenous peoples. There is no conceivable reason why the Australian system should continue to fail. In the RCIADIC, of the 339 recommendations that followed, recommendation 62 of the RCIADIC called on governments and Indigenous organisations to:

recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need ... to negotiate ... strategies to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems, and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities⁸ whether by being declared to be in need of care, detained, imprisoned or otherwise.

It is significant that a relatively large proportion of the 339 recommendations explicitly or implicitly refer to socio-economic infrastructure. The RCIADIC recommended policy improvements to health, housing and educational infrastructures, which were termed the 'underlying issues' of incarceration. This is clear recognition that behaviour, and in this instance, offending behaviour, does not operate in isolation. And to effectively address the behavioural patterns, regard must be had to the whole environment. That is, a holistic approach is necessary to redress the outcomes of our inequalities and their manifestation in the criminal justice system.

B. National Minimum Standards

Six years after the RCIADIC, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, entitled *Bringing Them Home*, referenced the effects of separating Indigenous children from their families against the inherent values of attachment. Both the report of the RCIADIC, and the more recent *Bringing Them Home* report provide a set of comprehensive recommendations to combat the systemic inequalities facing young Indigenous people.

Bringing Them Home reinforced the importance of growing up with family, which helps the individual to achieve full intellectual potential, attain cultural identification, sort out perceptions, know the importance of family, think logically, develop a conscience, become self-reliant, cope with stress and frustration, handle fear and worry and develop future relationships.

The earlier the detachment and the displacement, the more diminished a person's capacity to develop these quality life skills. But, for Indigenous peoples, it is not merely these life skills that ensure survival, it is also the

⁸ Royal Commission Into Aboriginal Deaths in Custody, *National Report*, Recommendation 62.

specific ‘cultural life skills’ which make Indigenous people a distinct ‘people’. The effects of the loss of cultural life skills can not be underestimated.

A meaningful, strategic approach to reconciliation would see the Australian government supporting and promoting the National Minimum Standards recommended in the *Bringing Them Home* report. These standards are grounded in international law, and would ‘rein in’ rogue governments who choose to ‘get tough’ instead of opting for a restorative justice approach.

Recommendation 44 of the report provides:

That the Council of Australian Governments negotiate with the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Secretariat of National Aboriginal and Islander Child Care and the National Aboriginal and Islander Legal Services Secretariat national legislation binding on all levels of government and on Indigenous communities, regions or representative organisations which take legal jurisdiction for Indigenous children establishing minimum standards of treatment for all Indigenous children (national standards legislation).

The recommended national standards legislation would apply to Indigenous young people “whether subject to Indigenous community jurisdiction, state or territory jurisdiction or shared jurisdiction as negotiated between the Indigenous community and the state or territory”.¹⁰ However, the federal government has not responded positively to Recommendation 44 in *Bringing Them Home*, and has said, “for the Commonwealth to seek to override the legislative and related responsibilities of the states and territories in these circumstances would be counter productive to all concerned”.¹¹

It is difficult to understand how anything can be more counter-productive than the present system where 65 per cent of young people re-offend.¹² Invariably recidivism, that is re-offending, becomes a pattern that is harder to break the earlier and the longer young people experience institutionalisation and alienation from their natural environment, and community.

Similarly the attitude amongst states and territories suggests:

there is no consensus among Australian governments to pursue such uniform legislative goals through the Commonwealth Office of the Attorney General or appropriate Ministerial Councils... The current situation is that each jurisdiction is being left to pursue these goals relevant to the issues covered by the recommendations in a way, and to an end, that best suits its particular circumstances.¹³

While it is true that a “a strict adherence to federal divisions of responsibilities clearly presents an insurmountable obstacle”¹⁴ to the implementation of recommendations concerning national legislation, they suggest that the Commonwealth take the lead in ensuring a cooperative approach

9 Human Rights and Equal Opportunity Commission, *Bringing Them Home*, 1996 at 582.

10 *Ibid* at 581.

11 Human Rights and Equal Opportunity Commission, *Social Justice Report*, 1999 at 110

12 Human Rights and Equal Opportunity Commission, *Fourth Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 1996 at 24

13 Human Rights and Equal Opportunity Commission, *Social Justice Report*, 1999 at 110

14 *Ibid* at 109.

to establishing "common frameworks and setting common standards in achieving common goals".¹⁵

After all, it is the federal government that negotiates and ratifies international standards concerning the treatment of young people who come into contact with the criminal justice system. It is also the federal government who is answerable on matters of compliance.

There is a duty on each nation State - including federal States such as Australia - to bring the internal legal and political system into conformity with obligations under international law. Realising that some governments will try to dodge their obligations under international law, the Vienna Convention on the Law of Treaties, Article 27, provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

C. International Standards

In December 1990, the Australian Government ratified the Convention on the Rights of the Child (CROC), and in 1993 the Department of Foreign Affairs and Trade expressed its commitment to implementation by claiming that "the Convention will have an increasingly important impact on law and policy in Australia".¹⁶

This states the obvious. The Australian government, like other signatories, made a contract with the world when it signed the Convention and yet breaches continue to occur at all levels.

CROC requires that arrest and detention following arrest should be measures of last resort,¹⁷ and that non-custodial alternatives should be utilised unless the circumstances are exceptional. Amnesty International has criticised Australia for non-compliance and pointed specifically to the over-representation of Indigenous children in the criminal justice system.¹⁸

D. Creating Benchmarks

Governments of some jurisdictions are moving in the direction of positive criminal justice reform, and thereby elevating the currency of 'reconciliation'. The New South Wales Government has endorsed the "National Commitment for Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders" which declares itself to be the "foundation for moving forward".¹⁹ The Victorian strategy talks of an 'umbrella' framework within which both existing and future policies for Koori services will sit.²⁰

In New South Wales, the Aboriginal Justice Advisory Committee (NSW) (AJAC) was established in June 1993 by the then Attorney General, the Hon John P Hannaford MLC, in response to Recommendation 2 of the RCIADIC.

15 *Ibid* at 110.

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

17 Article 37(b).

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

19 Human Rights and Equal Opportunity Commission, *Social Justice Report*, 1999 at 110.

20 "Improving Human Services for Victorian Koories: A Five Year Plan", March 1998 at 5.

The AJAC was a body established to consider and advise the Attorney General on law and justice issues which affect Aboriginal and Torres Strait Island people in their contact with the criminal justice system in New South Wales.

More recently the NSW AJAC was restructured so that it may better meet the specific needs of NSW communities. The new structure is primarily one of a ‘bottom-up’ approach rather than the traditional ‘top-down’ approach. For AJAC purposes, there are six regions in the state, each region having its own AJAC. Members of the AJAC are local community representatives and local justice agency representatives, that have the role of:

- providing a co-operative framework between the Aboriginal communities and justice agencies;
- providing operational support and co-ordination of grass-roots community justice initiatives;
- assisting in resolving complaints about justice issues at a local level;
- ensuring that resources meet the needs and priorities of local communities; and
- providing feedback to the state AJAC on regional issues.

The State AJAC comprises the chair of each region and members of the AJAC Unit. The Unit, among other functions, monitors and assists the local initiatives and has a direct relationship with the four principle justice agencies of NSW. Those agencies are the Attorney-General’s Department, Department of Correctional Services, Department of Juvenile Justice and the NSW Police Service. Part of the relationship is that those four bodies, and the Aboriginal and Torres Strait Islander Commission, fund the State Unit. But more than this, it means that the AJAC is in a very real position to influence the legislature and is in a very strong position to have a collaborative inter-agency approach to the holistic healing of our people – particularly in the areas of those identified as being our ‘underlying issues’ – health, housing and education.

Previously, the AJAC was not comprised of regional councils, was funded singularly by Attorney-Generals and therefore only had a direct relationship with them and not the other critical agencies. So, although the success of this new structure is yet to be realised, it looks highly promising. And the fact that it identified and responded to its initial weakness is very positive.

The AJAC is one manifestation of the Royal Commission’s recommendations aimed squarely at self-determination and more generally at reforming the criminal justice system. The cornerstone of the recommendations directed at reforming the system is the principle of ‘imprisonment as a last resort’. There are two recommendations that go directly to this principle.

(i) Acceptance that Community Service Orders May be Performed in Many Ways

In short, Community Service Orders are a restorative mechanism through which the offender may ‘atone’ for his/her actions by giving back to the

community. It has traditionally been considered an Order for the person to work within the community in a manner that is useful or beneficial to the community.

The Commission recommended that there be an acceptance that the Orders may be issued in the broader sense of community benefit by reducing the risk of recidivism. So, the Order could be that the person undertake personal development courses in order to improve, or expand, their skills, knowledge and interests or perhaps to undertake counselling.

The decision for an Order to be imposed as an alternative to a sentence is one of judicial discretion. One criterion for its imposition is that there be a community programme in place for the person to be supervised, and it is the judiciary and the lack of community programme development that have proven to be hindrances in the broader application of Community Service Orders as a viable alternative.

There are two issues with regard to the judiciary. First, it is given no legislative guidance as to the use of non-custodial options. Furthermore, non-custodial options are typically viewed as 'soft-options' that are most applicable to penalties such as fines.

As to community programmes, this is an issue of self-determination. A programme can only be developed and successfully maintained if it is a community initiative that is couched in community values and standards. More importantly, it must be a programme that the community is ready and able to design.

In legal jargon, these obstacles are substantive, procedural and social: substantive in that the legislation must provide the judiciary with the necessary guidance for imposing non-custodial options; and procedural to the extent that the judiciary must be adequately informed as to the likely restitution and rehabilitative processes that the individual will go through, and how that will benefit the broader community. Such information will necessarily involve the commitment of the community to a culturally appropriate programme of supervision.

In many respects, both the substantive and procedural issues can be addressed by a foundation of education. The new structure of AJAC means that it is particularly well placed to facilitate such an educative process.

(ii) Negotiation with Aboriginal Communities to Devise Strategies to Reduce the Rate of Separation of Juveniles from Communities

One strategy that has been employed in NSW is Youth Justice Conferencing, modelled on New Zealand's Family Group Conferencing. The model is reflective of traditional Maori legal and cultural norms, with the philosophical basis being one of restorative justice. There are certain criteria to be met in order to be eligible for conferencing. These include the fact that it must be a summary offence, or one that can be dealt with summarily, and that the offender must make an admission of guilt. The discretion to grant conferencing rests with the police in the first instance and the judiciary in the second.

There has been criticism that the model's development, application and process in NSW, or at least in specific communities, has not been appropriate to

our particular cultures. It is reasonable to see how its application may be problematic just on the grounds of ‘admission of guilt’ and ‘discretionary granting’. In respect of ‘admission’, there is a fine line between refusing to make an admission and refusing to make a statement. However, refusing to make a statement is very often understood to be a refusal to make an admission. Couple this misunderstanding with the discretionary powers of the police, with whom we have a notoriously bad relationship, and the judiciary’s view of non-custodial options as soft-options – and it is not difficult to appreciate why only 1 per cent adoption (and not the 6 per cent target) has been achieved.

But even if the model did not pose such fundamental obstacles, even if the model’s development, application and process was culturally appropriate, we live in a political climate that renders non-custodial options for our youth almost negligible.

In restructuring the AJAC, and moving forward since the Ministerial Summit on Deaths in Custody in Canberra 1995 in developing multi-lateral agreements, the New South Wales government is to be applauded for its efforts in addressing the on-going trend of over-representation of Indigenous young people in the juvenile justice system. Whether other state and territory governments are prepared to do the same will gauge their real commitment to reconciliation, as well as preparedness of the federal government to lead the way in accordance with international law.

Words on a page can be argued and thrashed out and presented to the Australian people, but they are irrelevant to the very immediate concerns of young Indigenous people in this country, especially those sitting behind locked doors. Their prospects are bleak, they are removed from their families and their links to culture have been weakened through absence from community at a crucial developing age. That is what is important when talking about reconciliation.