

Aboriginal Human Rights and the Australian Criminal Justice System: Self-Determination as a Solution?

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PREFACE

IN RECENT YEARS THE massive over-representation of Aboriginal peoples at all stages of the criminal justice system in Canada has begun to attract the serious attention which it so clearly requires. In 1991 this concern was most vividly illustrated in this province by the *Report of the Aboriginal Justice Inquiry of Manitoba*,¹ which called for comprehensive changes to the underlying philosophy and practical operation of the justice system.

What has become apparent following detailed investigations of this type² is that the devastating impact of non-Aboriginal laws, police, courts, and prisons on the First Nations, Métis and Inuit peoples of Canada is not a unique phenomenon. Indeed, the story of over-policing, institutionalised racism and cultural irrelevance of non-Aboriginal substantive law and procedure which is catalogued in the pages of the *Report of the Aboriginal Justice Inquiry of Manitoba*,³ is

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¹ Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* by A.C. Hamilton & C.M. Sinclair (Winnipeg: The Inquiry, 1991).

² In Canada, see also Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: The Commission, 1989); Osnaburgh-Windigo Tribal Council Justice Review Committee, *Taw Bway Win: Truth, Justice and First Nations* (Toronto: Report prepared for the Ontario Attorney General and Solicitor General, 1990); Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (Edmonton: The Task Force, 1991); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); *Report of the Saskatchewan Métis Justice Review Committee* by Judge P. Linn (Regina: The Committee, 1992); and *Report of the Saskatchewan Indian Justice Review Committee* by Judge P. Linn (Regina: The Committee, 1992).

³ For a discussion of the significance of this particular contribution to the Aboriginal justice reform literature, see L. McNamara, "The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the Problem of Over-representation in the Criminal

mirrored with remarkable similarity by the experiences of the Aboriginal peoples of Australia. Several dimensions of this experience, including the routinely unsuccessful attempts of Australian governments to confront the fundamental conflict which is inherent in Aboriginal contact with the agencies of justice administration, are discussed in this paper.

An understanding of the common experience of indigenous peoples following the imposition of an alien system of social control and justice administration in countries such as Australia and Canada, is important to the implementation of effective solutions to the inadequacies and insensitivities of the contemporary justice system as it affects Aboriginal people. The parallel is significant in several respects. First, it supports an analysis which questions the legitimacy of the non-Aboriginal justice system rather than perpetuating the traditional preoccupation with explaining Aboriginal criminality. Second, it highlights the importance of going beyond minor adjustments to existing justice structures, and formulating alternatives within the context of Aboriginal self-government aspirations. Third, Aboriginal demands for political and cultural autonomy are being voiced not only at the provincial/state and national levels, but increasingly in international forums, where the common grievances of indigenous peoples are being used to support the formal protection of a range of Aboriginal rights based on the principle of self-determination.

I. INTRODUCTION

THE RELEASE OF THE *National Report of the Royal Commission into Aboriginal Deaths in Custody*⁴ in May 1991 can be seen as the culmination of a growing recognition in Australia that the gross over-representation of Aborigines⁵ at all stages of the criminal justice system was an intolerable situation which required serious and ongoing attention. The establishment of the Royal Commission followed a long period of public agitation and relentless pressure by Aboriginal individuals, communities and organisations, which eventually generated substantial domestic publicity and international

Justice System" (1992) 21 Man. L.J. 47.

⁴ *Royal Commission into Aboriginal Deaths in Custody — National Report* by E. Johnston (Canberra: Australian Government Publishing Service, 1991).

⁵ This paper adopts the convention, unless otherwise stated, of using the term "Aborigine" and "Aboriginal" to refer to both Aborigines of the mainland and Tasmania, as well as Torres Strait Islanders.

attention concerning the incidence and circumstances of Aboriginal deaths in custody. Federal, state and territory governments were forced to confront the most vivid and tragic manifestation of the fundamental problems which have arisen since a European system of law, social control and "justice administration" was imposed on sovereign indigenous peoples.

Particularly during the last 20 years, substantial resources have been utilised to examine the "fallout" which has resulted from the collision between Australian Aborigines and the various state agencies that constitute the Australian criminal justice system. At the same time Aboriginal groups and various human rights advocates and organisations have registered their growing frustration with the consistent failure of Australian governments to confront the fact of systematic and institutionalised violations of both individual and collective Aboriginal human rights in many forums of state regulation, including the delivery of health care and educational services, and of course in the operation of social control mechanisms such as the criminal justice system, which is frequently the end-product of a pervasive pattern of social, economic, and political deprivation.⁶

The apparent futility of attempting to have these issues recognised as fundamental problems worthy of serious political consideration and positive and constructive action, has prompted the Aboriginal community to look beyond the limitations of arguing for much needed but relatively short term and minor reforms, and to develop concrete proposals for a dramatic readjustment of the role of Aboriginal peoples in the political structures of Australian government. The ultimate aim of control, by Aboriginal communities, over all basic elements of their economic, social and cultural existences — variously discussed in terms of "self-management," "self-government," and "recognition" of Aboriginal law — draws heavily for its justification from an increasing

⁶ I do not propose to discuss in any detail the various forms of human rights abuse which occur in the context of the criminal justice system. In a submission to the Royal Commission into Aboriginal Deaths in Custody, John Hookey has outlined the numerous international human rights instruments which may be relevant in this area, particularly in relation to deaths in custody: see J. Hookey, *Aboriginal Deaths in Custody: International Law Issues* (submission prepared on behalf of the Aboriginal Law Centre, University of New South Wales for the Royal Commission into Aboriginal Deaths in Custody, 1990). Of particular relevance are the *International Convention on the Elimination of All Forms of Racial Discrimination 1965*, and arts. 6–10, 17 and 27 of the *International Covenant on Civil and Political Rights 1966*. The collective right of self-determination expressed in art. 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, is discussed below in Section V.

acceptance world-wide of the entitlement of indigenous peoples under international law to the basic human right of "self-determination" as expressed in art. 1 of the *International Covenant on Economic, Social and Cultural Rights*.⁷

The aim of this paper is to examine the relationship between these developments, by exploring the thesis that the basis of the various forms of human rights abuse which occur in the context of Aboriginal involvement with the criminal justice system, and with the agencies of government regulation more generally, is the historical and continuing reality that the dominant "system" (encompassing procedural, substantive and other social/political factors) is an imposed system of domination and control which is essentially inappropriate for, and in practice, discriminatory towards Australia's Aboriginal population.

In an effort to support this claim, this paper will begin with a brief survey of the various ways in which Aborigines suffer disproportionately as a result of contact with the agencies of criminal justice administration. This will be followed by an analysis of the largely misdirected and ineffective attempts to identify and solve the "problem," with which non-Aboriginal Australia has experimented in recent decades. Attention will then be focused on those strategies which may genuinely be considered to hold the potential for a substantial alleviation of the conditions and incidence of Aboriginal contact with the criminal justice system. It will be argued that the common element of strategies which hold this promise is an underlying rationale and motivation based on the endorsement of Aboriginal self-determination.

II. THE TREATMENT OF ABORIGINES WITHIN THE CRIMINAL JUSTICE SYSTEM

A. Policing

The editorial of a recent issue of the *Aboriginal Law Bulletin* stated that:

The gross over-representation of Aborigines in the criminal justice system is reflective of two serious and interrelated problems. Firstly, systemic problems including racism, corruption and a lack of accountability within Australian police forces impact disproport-

⁷ The *International Covenant on Economic, Social and Cultural Rights* came into force in 1976. The right of self-determination is also expressed in art. 1 of the *International Covenant on Civil and Political Rights*, and its elaboration in the specific context of indigenous peoples is one of the issues currently being considered by the United Nations Working Group on Indigenous Populations. This development is discussed below in Section V, part D.

tionately on Aboriginal communities. Secondly, critical social and economic problems in many Aboriginal communities create conditions conducive to law and order problems.⁸

This analysis highlights the pivotal role which police play, in relation to the cycle of Aboriginal contact with the criminal justice system, operating as they do, at the preliminary stage of "selecting" participants for the subsequent stages of judicial determination and incarceration.

The social status of many Aborigines is such that they are deemed to be a threat in terms of social control and therefore appropriate targets for a "law and order" campaign. This factor is particularly apparent in rural towns where Aborigines are often a substantial proportion of the local population, but it also comes into play in urban areas and in more isolated Aboriginal settlements. Aborigines are routinely targeted under strategies designed to maintain social order. Entrenched police attitudes concerning race and the nature of criminality are manifested in policing practices.

The result of these processes in Australia is that Aborigines have been subjected to an unjustifiably high level of harassment, arrest, police custody, prosecution and re-arrest. The huge net which police tend to cast at this level has major implications for Aborigines as they are directed into a cycle where the problems which they experience at the policing stage are only a precursor to the difficulties of contact with the judicial system and substantive non-Aboriginal criminal law, and the most destructive form of sanction/punishment: incarceration.

1. The Maintenance of Social Control⁹

Cunneen and Robb have stressed the historical context of contemporary police involvement in the control of Aborigines:

Historically the police have had, and practised, a level of intervention in to the lives of Aboriginal people which would not be considered permissible for any other group within the community.¹⁰

⁸ (1991) 49 A.L.B. 3.

⁹ This discussion will be focused primarily on the situation in north-western New South Wales, where events in recent years have indicated that the problems which Aborigines face in this respect are particularly acute.

¹⁰ C. Cunneen & T. Robb, *Criminal Justice in North West New South Wales* (Sydney: New South Wales Bureau of Crime Statistics and Research, 1987) at 190.

Quite obviously police officers do not maintain this level of "supervision" in a cultural vacuum. Their activities reflect, in large part, the attitudes of the dominant white community and the perceived need to confront the problems associated with Aboriginal social disorder. In her analysis of the "Brewarrina riots," Goodall critiques the notion of an objective police force impartially enforcing established criminal law and rules and regulations. In fact, she suggests that "there is substantial evidence to suggest the complexity of decision-making about policing, particularly in relation to Aborigines."¹¹

Local governments and local white businessmen play a significant role in influencing the agenda for policing priorities. This "unofficial" input is most obvious in the pressure placed on local police to enforce public order offences, which have little to do with abstract concepts of "criminality" and much to do with white concerns over the maintenance of social order. These issues were illustrated most graphically in the "law and order" campaigns which occurred in the north-west of New South Wales in the late 1980s¹² reflecting as they did "a racist doctrine which identifies Aborigines as a cause of the crime problem."¹³

2. Institutionalised Racism

In April 1991 a report¹⁴ commissioned by the Human Rights and Equal Opportunity Commission's (HREOC) National Inquiry into Racist Violence found "compelling reasons for considering the use of violence against Aboriginal youth as part of an institutionalised form of racial violence."¹⁵ During interviews conducted for the study, a high percentage of Aboriginal youths held in detention centres throughout Australia alleged that police officers had used physical assault, racist abuse and had even made various suggestions concerning suicide, including threats of hanging. This conduct was apparently

¹¹ H. Goodall, "Policing In Whose Interests: Local Government, the TRG and Aborigines in Brewarrina, 1987-1988" (1990) 3 J. Soc. Just. Stud. 19.

¹² *Ibid.* at 21.

¹³ C. Cunneen, "Aborigines and Law and Order Regimes" (1990) 3 J. Soc. Just. Stud. 35. See also C. Cunneen, "Constructing a Law and Order Agenda: Conservative Populism and Aboriginal People in North-West NSW" (1989) 38 A.L.B. 6.

¹⁴ C. Cunneen, *A Study of Aboriginal Juveniles and Police Violence: Report Commissioned by the National Inquiry into Racist Violence* (Sydney: Human Rights and Equal Opportunities Commission, 1991). A summary version appears as "Aboriginal Young People and Police Violence" (1991) 49 A.L.B. 6.

¹⁵ *Ibid.* at 8.

designed for a number of purposes including general intimidation, inducing suspects to confess or provide information and "summary punishment."¹⁶

The suggestion that violence is "part of the routine practices of policing"¹⁷ is particularly disturbing in relation to Aboriginal persons, not simply because of their gross over-representation which makes them even more vulnerable to this type of conduct, but also because it is both legitimated by the racism which pervades the "police mentality," including social attitudes about the entitlement of Aborigines to "equal treatment," and exacerbated by other, less overtly violent, discriminatory manifestations of institutionalised racism.

The circumstances surrounding the now infamous "police raid" which was carried out on a number of houses occupied by Aborigines in Redfern in early 1990 provide a good illustration of the problem. This incident was also the subject of an investigation during the National Inquiry into Racist Violence. HREOC's Race Discrimination Commissioner recently announced the Inquiry's finding that "the Redfern raid constituted a significant act of racist violence against the Aboriginal community."¹⁸ The incident represents a recent and dramatic example of the forms of over-policing which Aborigines suffer as a result of the "endemic racism,"¹⁹ and social control priorities which impact on the broad strategies and more specific localised practices which Australian police commonly adopt in relation to Aboriginal people.

¹⁶ *Ibid.* at 6-7.

¹⁷ *Ibid.* at 9.

¹⁸ I. Moss, "The Report of the National Inquiry into Racist Violence" (1991) 4 A.L.B. 4. This article summarises the findings of Human Rights and Equal Opportunities Commission, *Racist Violence: Report of National Inquiry into Racist Violence in Australia* (Canberra: Australian Government Publishing Service, 1991). For a detailed report on the raid see C. Cunneen, *Aboriginal-Police Relations in Redfern: With Special Reference to the 'Police Raid' of 8 February 1990: Report Commissioned by the National Inquiry into Racist Violence* (Sydney: Human Rights and Equal Opportunities Commission, 1990).

¹⁹ See G. Cowlshaw, "Where is Racism?" (1990) 3 J. Soc. Just. Stud. 49; and B. Morris, "Racism, Egalitarianism and Aborigines" (1990) 3 J. Soc. Just. Stud. 61.

3. *Forms of Over-Policing*

A survey conducted by the research unit of the Royal Commission into Aboriginal Deaths in Custody²⁰ in 1988 found that during the period monitored, Aboriginal people constituted 29 per cent of the persons held in police custody, although they are only 1.1 per cent of the Australian population aged 15 years and above.²¹ Apart from the sheer extent of detentions, it is important to observe that a vast majority of Aborigines are detained for public order offences, often related to drunkenness.²² Research conducted in Wilcannia during 1987 revealed that 56 per cent of all detentions were effected under the *Intoxicated Persons Act 1979* (NSW), and of these, only 1.3 per cent were detentions of non-Aboriginal persons.²³ Similar findings in a 1983 study of policing led Ronalds, Chapman and Kitchener²⁴ to conclude that

the continual and repeated arrest of a high proportion of Aborigines for trivial street offences indicates that police believe, and act to implement this belief, that Aboriginal people warrant considerably more of their time and attention than do non-Aborigines. The Aboriginal population in towns surveyed are subjected to continuous police surveillance which alone constitutes harassment by ordinary standards.²⁵

The reintroduction of specific public order legislation — in the form of the *Summary Offences Act 1988* (N.S.W.) — by the Government of New South Wales can be seen as a political endorsement that such methods are necessary and appropriate.²⁶

²⁰ D. McDonald, *National Police Custody Survey August 1988: National Report* (Research Paper No. 13) (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1990).

²¹ *Ibid.* at 37.

²² McDonald found that approximately 57% of Aboriginal custodies were for drunkenness. This figure includes both arrests for the offence of drunkenness, or protective custody for public intoxication where, as in New South Wales under the *Intoxicated Persons Act 1979*, this is not in itself an offence.

²³ C. Cunneen, "Wilcannia: Detention of Aborigines in Police Cells" (1990) A.L.B. 8.

²⁴ C. Ronalds, M. Chapman & K. Kitchener, "Policing Aborigines" in M. Findlay, S.J. Egger & J. Sutton, eds., *Issues in Criminal Justice Administration* (Sydney: George Allen & Unwin, 1983) 168.

²⁵ *Ibid.* at 170–171.

²⁶ A case study of the operation of the *Summary Offences Act 1988* (N.S.W.) in Moree during a four month period in 1989 found that 91.6% of offensive language charges - s. 4(1)(b) — and 70.2% of offensive conduct charges — s. 4(1)(a) — involved Aboriginal defendants: M. O'Tarpy & L. Hunt, "The Open Wound: Policing of Aborigines under Summary Offences Legislation, 1970–1989" [unpublished]; see also R. Bonney, *New*

Policing of this type is a central component of the "process of criminalisation," or of "maintaining law and order" which, as Carrington points out, "is predominantly concerned with policing public space ... regulating public conduct and protecting property ..."²⁷ Aborigines are particularly vulnerable to policing practices which reflect these priorities.²⁸ A product of the poor social conditions in which many Aborigines live is that a great deal of time is spent in public areas.²⁹ But overpolicing is not simply a problem of the large number of Aborigines detained or arrested. It also involves the methods which police employ to achieve their aim of "public order." The pattern which became particularly obvious during the late 1980s saw police employing increasing resources in their efforts to combat the "Aboriginal problem." In the *Report of the Inquiry into the Death of Lloyd Boney*, Commissioner Wootten commented on the response of the Police Force to increasing tension in Brewarrina:

The response of the senior levels of the Police Force itself to the problems of policing a racially divided town appeared to be the provision of more men and weapons, rather than a well thought out policy and other resources to ameliorate the real problems so apparent in the town.³⁰

Goodall has discussed the increased use of Tactical Response Group (TRG) officer, riot control tactics and special weapons³¹ against Aboriginal communities in New South Wales, with particular refer-

South Wales Summary Offences Act 1988 (Sydney: New South Wales Bureau of Crime Statistics and Research, 1989).

²⁷ K. Carrington, "Aboriginal Girls and Juvenile Justice: What Justice? White Justice" (1990) *J. Soc. Just. Stud.* 1 at 4.

²⁸ In the context of a discussion of the death of John Pat in Roebourne, Western Australia in 1983 (which was also the subject of an investigation by the Royal Commission into Aboriginal Deaths in Custody), Grabosky comments that, "The fact that [police] respond more vigorously to public drunkenness in Aborigines than to domestic violence in white society suggests something about their priorities": see P.N. Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector* (Canberra: Australian Institute of Criminology, 1989) 83.

²⁹ See T. Milne, "Aborigines and the Criminal Justice System" in Findlay, Egger & Sutton, eds., *supra* note 24, 184.

³⁰ J.H. Wootten, *Report of the Inquiry into the Death of Lloyd James Boney* (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1991) at 168.

³¹ Goodall, *supra* note 11 at 21.

ence to events in Brewarrina in 1987-88. "Para-military squads"³² — the TRG and the Special Weapons and Operations Squad (SWOS) — have been employed in dramatic style in recent years, most notably against Aboriginal people.³³ As Cunneen has commented, "[w]hat was initially seen to be an extraordinary response capability ... had become normalised by the late 1980s into an acceptable technique for the control of particular groups."³⁴

In June 1991 the New South Wales Police Service TRG and SWOS units were formally replaced by the "State Protection Unit." While this move has been portrayed officially as part of a "scaling down" of the use of paramilitary law enforcement strategies in response to recent criticisms of this form of policing in New South Wales, it is unclear at this stage just what practical changes will accompany the name change.

B. Post-Arrest and Court Proceedings

The conclusion of a recent report to the Human Rights and Equal Opportunity Commission National Inquiry into Racist Violence that physical violence and intimidation are practices routinely employed by police officers when questioning young Aborigines, is only the most vivid illustration of the difficulties which Aborigines face at this point. While concerns over police impropriety in the interrogation of suspects generally have been raised in recent years, there has been, as Rees notes, "recognition in some Australian jurisdictions that the present deficiencies in the law have a significant impact upon Aborigines."³⁵

Aboriginal vulnerability to police questioning results from several factors including problems of communication,³⁶ and an apparent tendency of many Aborigines to provide the "expected response" to police

³² Cunneen (1990), *supra* note 13 at 37.

³³ *Ibid.* at 38.

³⁴ *Ibid.*

³⁵ N. Rees, "Police Interrogation of Aborigines" in J. Basten *et al.*, eds., *The Criminal Injustice System* (Sydney: Australian Legal Workers Group, 1982) 36 at 37.

³⁶ During the course of his judgement in *R. v. Anunga*, Foster J. of the Northern Territory Supreme Court observed that "... Aboriginal people often do not understand English very well and ... even if they do understand the words, they may not understand the concepts which English phrases and sentences express ... Police and legal English is sometimes not translatable into the Aborigines languages at all ...": (1975) 11 A.L.R. 412 at 441. The Anunga guidelines for the conduct of police officers when interrogating Aborigines are discussed below at the text accompanying notes 77-83.

in order to avoid any sanctions which may result from non-compliance.³⁷ It has also been observed that these factors, along with the "popular crimes" with which Aborigines are most commonly charged, make it relatively easy for police to improperly "load up" or "bulk bill" Aboriginal offenders in order to achieve a higher clear-up rate.³⁸ There is also evidence to support the claim that, at least in relation to Aboriginal youth, police exercise their discretion at the point of apprehension in a discriminatory manner.³⁹

When an alleged Aboriginal offender is brought before a magistrate or judge many of the problems which are evident at the interrogation stage re-occur. The basic problem of incomprehension becomes more acute, a situation which has been explained by the "complexity of court procedure."⁴⁰ Perhaps the most damaging consequence is that the reliability of Aboriginal testimony is thus undermined.⁴¹ Kearins cites the example that direct eye contact during a conversation or questioning process is considered by many Aboriginal people to be disrespectful and discourteous.⁴² As a result, when being examined, Aborigines may attempt to avoid eye contact by looking away or at the floor. As Kearins suggests, "[s]uch courtesies from Aborigines may be misinterpreted as shifty or disinterested behaviour by Westerners who define courtesy differently."⁴³

³⁷ Rees, *supra* note 35 at 39. Foster J. saw this willingness on the part of Aborigines to provide the "desired answer" as, at least in part, a product of the fact that Aboriginal people are essentially polite and courteous. See F. Bates, "Interrogation of Australian Aborigines" (1984) 8 *Crim. L.J.* 373 at 374.

³⁸ Rees, *supra* note 35 at 41.

³⁹ F. Gale & J. Wundersitz, "The Operation of Hidden Prejudice in Pre-Court Procedures: The Case of Australian Aboriginal Youth" (1989) 22 *A.N.Z. J. Crim.* 1. For a comprehensive analysis of the disproportionate impact of the juvenile justice system on Aboriginal children, see F. Gale, R. Bailey-Harris & J. Wundersitz, *Aboriginal Youth and the Criminal Justice System* (Cambridge: Cambridge University Press, 1990). For a summary of the findings of the extensive research which this book represents, see J. Wundersitz, R. Bailey-Harris & F. Gale, "Aboriginal Youth and Juvenile Justice in South Australia" (1990) 44 *A.L.B.* 12.

⁴⁰ E. Eggleston, *Fear, Favour, or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) at 155.

⁴¹ See J. Kearins, "Factors Affecting Aboriginal Testimony" (1991) 16 *Legal Serv. Bull.* 3.

⁴² *Ibid.* at 4.

⁴³ *Ibid.* See also D. Nash, "Aborigines in Court: Foreigners in Their Own Land" (1979) 4 *Legal Serv. Bull.* 105.

Disadvantage also results from other cultural differences such as customs of avoiding verbal confrontation and the tendency of some Aboriginal people to respond slowly to questioning. Further, Liberman has raised the problem of administering the oath, particularly in relation to traditionally-oriented Aborigines.⁴⁴

The application of culturally inappropriate criminal laws in Australian courts perpetuates many of these procedural difficulties. McCorquodale has argued that it is possible to identify several aspects of judicial racism in Australia:⁴⁵

... [T]he overall impression gained from the mass of criminal and civil cases now available, and of recent origin, is that Aboriginality is a judicial perception working to the disadvantage of Aborigines in both areas of the law. Judicial recognition of pronounced, or even assumed, cultural differences militates against almost all segments of Aboriginal society other than that tiny minority still in a tribal state.⁴⁶

Specific examples of the difficulties which the imported criminal laws pose for Aborigines include the cultural irrelevance of the notion of *mens rea* in many circumstances,⁴⁷ and the failure of concepts such as "reasonableness" to deal with Aboriginal differences, which is particularly apparent in relation to the availability of legal defences or mitigating factors such as self-defence and provocation.⁴⁸

C. Imprisonment

Two hundred years ago, Europeans came to this country to establish a prison. The Koorie people who they displaced had a strong system of justice, but they didn't have prisons. Part of the story of white settlement has been that the prison system that was

⁴⁴ K. Liberman, "Problems of Communication in Western Desert Courtrooms" (1978) 3 Legal Serv. Bull. 94. Other cultural differences which seriously affect the courts' capacity to elicit the "legal truth" surrounding the alleged offence include the different notions of time and distance relevant to many Aborigines. See J. Coldrey, "Aborigines and the Criminal Courts" in K.M. Hazlehurst, ed., *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987) 81 at 88-89 [hereinafter *Ivory Scales*].

⁴⁵ J. McCorquodale, "Judicial Racism in Australia? Aborigines in Civil and Criminal Cases" in *Ivory Scales*, *ibid.* at 30.

⁴⁶ *Ibid.* at 51.

⁴⁷ M.W. Daunton-Fear & A. Frieberg, "'Gum-tree' Justice: Aborigines and the Courts" in D. Chappell and P. Wilson, eds., *The Australian Criminal Justice System*, 2d ed. (Sydney: Butterworths, 1977) 45 at 47; see also M.C. Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia" (1960) 5 U.W.A. L. Rev. 1 at 20.

⁴⁸ McCorquodale, *supra* note 45 at 47.

established to deal with British criminals, now discriminates strongly against Koories. Not only are Koories imprisoned much more frequently than white people, but for many of them, the experience of imprisonment is especially traumatic.⁴⁹

The most telling and tragic indictment of the criminal justice system's fundamental inadequacies in relation to Aboriginal people is found at this final stage in the justice administration cycle. A study carried out for the Royal Commission into Aboriginal Deaths in Custody⁵⁰ found that Aborigines are conservatively estimated to be 10 times more likely than non-Aborigines to be in prison.⁵¹ In various parts of the country the present extent of the over-representation is much greater.⁵²

Perhaps the greatest irony is that despite the massive over-representation of Aborigines in Australian prisons, it is in relation to

⁴⁹ C. Barry, "Programmes for Koorie Prisoners: Past, Present and Future" in D. Biles, ed., *Current Australian Trends in Corrections* (Sydney: The Federation Press, 1988) 31 at 37. See P. Lowe, "The Relevance of Imprisonment?" in K.M. Hazlehurst, ed., *Justice Programs For Aboriginal and Other Indigenous Communities* (Seminar Proceedings No. 7) (Canberra: Australian Institute of Criminology, 1985) 33 at 36-38. Lowe sites examples which "illustrate the quite different criteria of guilt and blame applied by Aboriginal people."

⁵⁰ D. Biles, *Aboriginal Imprisonment - A Statistical Analysis* (Research Paper No. 6) (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989).

⁵¹ *Ibid.* at 7. The 1986 population census indicated Aborigines and Torres Strait Islanders comprised 1.46% of the national total while the 1987 prison census indicated that 14.6% of all prisoners on 30 June were Aboriginal. A recent study by NAILSS has indicated that Australian Institute of Criminology Prison Census figures underestimate the number of Aborigines serving sentences in any one year, and that Aborigines are in fact 28 times more likely to go to prison than non-Aborigines. See L. Munro and G. Jauncey, "Keeping Aborigines Out of Prison: An Overview" - a paper presented at the Keeping People Out Of Prison Conference, Australian Institute of Criminology, 27-29 March 1990. Other studies have suggested a higher level of over-representation. For example, in 1987 Walker found that "overall, in Australia an Aboriginal is over 16 times more likely to be in prison than a non-Aboriginal." See J. Walker, "Prison Cells With Revolving Doors: A Judicial or Societal Problem" in *Ivory Scales*, *supra* note 44, 106 at 107.

⁵² For example a report completed by the Australian Institute of Criminology in 1983 revealed that the imprisonment rate on Groote Eylandt, where approximately 60% of the population is Aboriginal, was 25 times the national average: D. Biles, *Groote Eylandt Prisoners* (Canberra: Australian Institute of Criminology, 1983); also D. Biles, "The Use of Imprisonment on Groote Eylandt" (1985) 20 *Austl. J. Soc. Issues* 215. In 1988 an inquiry conducted by the West Australian Government found that in police lock-ups, the proportion of Aboriginal prisoners was a staggering 91.7%: cited by D. Brown, "Are We Sending Too Many People to Gaol?" in A. Gollan, eds., *Questions For The Nineties* (Sydney: Left Book Club Co-Operative, 1990) 81 at 85.

Aboriginal offenders that the inadequacy of the philosophy of deterrence is best illustrated. As Hazlehurst has concluded, there is strong evidence that for many Aboriginal people, short term prison sentences are simply not a deterrent.⁵³ In some circumstances prison is said to offer Aborigines "a change of scene and a place that offers them regular meals and a standard of living often far better than they are used to at home."⁵⁴ Observations such as these provide simple answers to questions such as the one posited by Lowe: "What makes Aborigines so apparently eager to return to prison?"⁵⁵ Nowhere is the irrelevance of the white criminal justice system more vividly illustrated. While the idea that the prospect of imprisonment may actually encourage Aborigines to commit minor crimes "makes mockery of the two pillars of justice, protection and deterrence,"⁵⁶ the real danger is, as Hazlehurst points out, that "arrest, fines and imprisonment will become a way of life"⁵⁷ for Aboriginal people.

This is not to deny that, as Carmel Barry has pointed out, imprisonment can be a particularly traumatic experience for many Aboriginal people.⁵⁸ Indeed, the argument that imprisonment is not a deterrent including the suggestion that some Aborigines deliberately set out to commit offences which will allow them to enter prison, does little to weaken the evidence which shows that most Aborigines find imprisonment to be a negative experience.⁵⁹ Alexander has described a more philosophical rationale for the fact that many Aboriginal people do not see gaol as a deterrent: the feeling they are already imprisoned by white society.⁶⁰

Other factors which exacerbate the Aboriginal prison experience include the fact that sentences must often be served long distances from local communities, making contact with friends and relatives

⁵³ K.M. Hazlehurst, "A Summary of Issues" in Hazlehurst, ed., *supra* note 49, 227.

⁵⁴ C. McDonald, "Australia's Most Jailed Citizens" *Australian Society* (1 February 1984) 6 at 7.

⁵⁵ Lowe, *supra* note 49 at 34.

⁵⁶ Hazlehurst, *supra* note 53 at 227.

⁵⁷ *Ibid.*; and see R. Midford, "Imprisonment: The Aboriginal Experience in Western Australia" (1988) 21 A.N.Z. J. Crim. 168 at 174.

⁵⁸ Barry, *supra* note 49 at 37.

⁵⁹ C. Alexander, "From Dreamtime to Nightmare: The Voices of 168 Aboriginal (ex-) prisoners in NSW" (1987) 23 A.N.Z. J. Soc. 323 at 336. 94% of ex-inmates and 96% of inmates surveyed indicated that they actually dislike or hate being imprisoned.

⁶⁰ *Ibid.*

very difficult. Imprisonment also threatens the special relationship which Aborigines share with their land. Further, Barry has raised the particular difficulties faced by Aboriginal women in custody in these respects:

Like white women in custody, the main concern of Koorie women while in custody, is their ability to receive visits and maintain contact with their children and family. However, Koorie women are usually extremely isolated, due to the geographic spread of their families. As a result, their children are frequently placed in foster care with a non-Koorie family. There still seems to be a reluctance by agencies to make foster arrangements with other Koorie families.⁶¹

Midford has described the range of cultural factors which affect Aborigines' experience of imprisonment.⁶² For example the maintenance of kinship obligations is obviously very difficult for an Aboriginal prisoner who may be isolated from family, or forced to co-habit with other prisoners with whom he or she shares an "avoidance relationship."⁶³

Once again, these problems which Aborigines face during imprisonment highlight the working of a system which has failed to take account of Aboriginal cultural differences, and which persists in relying on a philosophy of social responsibility, based on retribution and rehabilitation, which is culturally irrelevant to many Aborigines.

D. Deaths in Custody

The catalyst for the recent Royal Commission into Aboriginal Deaths in Custody⁶⁴ was growing national⁶⁵ and international⁶⁶ publicity

⁶¹ Barry, *supra* note 49 at 35.

⁶² Midford, *supra* note 57 at 174. See further A. Gorta & R. Hunter, "Aborigines in NSW Prisons" (1985) 18 A.N.Z. J. Crim. 25.

⁶³ Midford, *supra* note 57 at 176.

⁶⁴ The *National Report of the Royal Commission into Aboriginal Deaths in Custody* will be discussed below in Section IV part C.

⁶⁵ For a discussion of the build up to the Prime Minister's announcement of the Royal Commission see M. Hogan, "Aboriginal Deaths in Custody: Some Comments," in M. Hogan, D. Brown & R. Hogg, eds., *Death in the Hands of the State* (Redfern: Redfern Legal Centre Publishing, 1988) 40.

⁶⁶ See J. Burger, *Land and Justice: Aborigines Today* (London: Anti-Slavery Society, 1987); National Committee to Defend Black Rights, "Statement to the United Nations Working Group on Indigenous Populations," reported in (1988) 53/54 *IWGLA Newsletter* 19; K.D. Suter & K. Stearman, *Aboriginal Australians* (Report No. 35) (London: Minority Rights Group, 1988); Amnesty International, *Amnesty International Report*

over the extent to, and circumstances in which Aboriginals were dying while in state custody. However, extensive research carried out by the Commission's Criminology Research Unit⁶⁷ appeared to support the conclusion that "... there are not major differences between the rates at which Aborigines and other people die when they are in custody."⁶⁸ On the basis of these findings, Goldney and Reser have argued that while the fact of Aboriginal over-representation at all stages of the criminal justice system is undeniable, Aborigines and non-Aborigines in custody face "equal risks" of death.⁶⁹

Broadhurst and Maller have expressed concern about this analysis on the basis that for many people "'equal risks' implies there is 'no problem' in the administration of custody, at least regarding the issue of Aboriginal and non-Aboriginal deaths."⁷⁰ They conclude that "when time at risk is accounted for, ... Aborigines do indeed ultimately die in custody more often than non-Aborigines."⁷¹ They estimate that in Western Australia, for example, the probability of an Aborigine ultimately dying in prison, having once entered it, is in the order of three times that of a non-Aboriginal prisoner.⁷² Even accepting the methodology which was employed by the Criminology Research Unit, the fact is that, based on relative populations in the general community, between 1980 to 1988, "Aborigines were 23 times more likely to die in custody than were non-Aborigines."⁷³

The point of this debate is that Aboriginal deaths in custody cannot be considered in the abstract, but must be seen in their wider context. They must be seen as a fundamental feature of the criminal justice

1988 (London: Amnesty International Publications, 1988) 148; and K.D. Suter, "Australian Aborigines: The Continuing Crisis" (1989) 13:1 Hum. Rts. Int'l Rep. 11.

⁶⁷ See D. Biles, D. McDonald & J. Flemming, *Australian Deaths in Custody 1980-1988* (Research Paper No. 7) (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989).

⁶⁸ *Ibid.* at 280.

⁶⁹ R.D. Goldney & J.P. Reser, "Aboriginal Deaths in Custody" (1989) 151 Med. J. Austl. 181.

⁷⁰ R.G. Broadhurst & R.A. Maller, "White Man's Magic Makes Black Deaths in Custody Disappear" (1990) 25 Austl. J. Soc. Issues 279 at 280.

⁷¹ *Ibid.*

⁷² *Ibid.* at 287.

⁷³ D. Biles, D. McDonald & J. Flemming, "Aboriginal and Non-Aboriginal Deaths in Custody" (1990) 23 A.N.Z. J. Crim. 15.

system as it impacts on Aborigines. They must also be seen against the historical background of black-white relations in Australia:

The present deaths in custody are not a modern phenomenon, but the latest chapter in an historical continuum. There has always been a grossly differential and discriminatory use of the criminal justice system against Aboriginal people. [The Aboriginal experience of policing and incarceration] is enormously destructive, sometimes devastatingly so, as in the case of deaths in custody.⁷⁴

Also, the institutionalised setting of deaths in custody must be appreciated. It is inadequate to simply measure custodial deaths against death rates in the general community. Australian governments can seek no solace in the fact that living and health conditions for a large proportion of Aborigines are extremely poor, and in general, that community death rates are simply mirrored in custody. On the one hand, this approach fails to take account of self-inflicted, violent and other "non-natural" causes of deaths in custody. On the other, it ignores the fact, as Temby has noted, "that the state has a special responsibility to prevent avoidable deaths of those whose liberty it takes away."⁷⁵

The death rates and general deprivation of social and economic human rights of Australian Aborigines is a cause for grave concern and requires urgent attention. But the death of Aboriginal people in the context of an imposed system of criminal justice administration which systematically discriminates against them at every level is deserving of very special attention. Only in recent years has this official attention genuinely been forthcoming.

III. CONVENTIONAL RESPONSES TO THE PROBLEM OF ABORIGINAL CONTACT WITH THE JUSTICE SYSTEM

A. "Special Treatment" For Aborigines

Strategies designed to "alleviate" the harshness of the operation of the criminal justice system have traditionally proceeded on the presumption that while the established procedures and law were, for the most part, effective, the circumstances of some Aborigines were such that

⁷⁴ Hogan, *supra* note 65 at 41. See also J. Reser, "Aboriginal Deaths in Custody and Social Construction: A Response to the View That There is No Such Thing as Aboriginal Suicide" (1989) 2 *Austl. Aboriginal Stud.* 43 at 49; and D. Brown, "Deaths in Australian Prisons: A Review" in Hogan, Brown & Hogg, eds., *supra* note 65, 51 at 53.

⁷⁵ I. Temby, "Preventing Custodial Deaths: A Systematic Approach" (1989) 22 *A.N.Z. J. Crim.* 193 at 201.

special rules might be needed to protect them from the harshness of the criminal law. Significantly, these approaches involved no substantial criticisms of the criminal justice system but rather, reflected a paternalistic notion that Aborigines were something of a "special case" in need of "special care."

This is not to say that reforms of this type — which include: the introduction of the Anunga Rules; modifications of rules of substantive law (e.g. "the test of reasonableness"); treating Aboriginality as a factor in mitigation of sentence; and the imposition of special codes of conduct on police⁷⁶ — have not improved the chance that Aborigines will gain a "higher" level of "justice" during their passage through the criminal justice system. But they in no way challenge the relevance of criminal laws and procedure to Aboriginal people. Consequently, their capacity for genuinely reducing the level of discrimination within the system is severely limited.

1. *The Anunga Rules*

In the course of his decision in the case of *R. v. Anunga*,⁷⁷ Foster J. of the Northern Territory Supreme Court formulated guidelines for police to follow when interrogating Aborigines. These included: the presence of a "prisoner's friend" and/or an interpreter (where necessary), special care to ensure the suspect understands the standard caution, efforts to obtain corroborating evidence, provision of food and clothing and access to legal representation, and a requirement that suspects not be interrogated while drunk or otherwise disabled.⁷⁸ The "Anunga Rules" were not designed to replace the common law rules governing the admissibility of confessional evidence,⁷⁹ but were intended to assist judges in deciding whether to exercise the discretion to exclude involuntary evidence.

Similar rules have been adopted in a number of other Australian jurisdictions, most commonly in the form of police departmental guide-

⁷⁶ This recommendation was made by Commissioner Muirhead in the *Interim Report of the Royal Commission into Aboriginal Deaths in Custody*, which is discussed below at the text accompanying notes 110–116.

⁷⁷ (1975) 11 A.L.R. 412.

⁷⁸ *Ibid.* at 415–416.

⁷⁹ See Rees, *supra* note 35 at 43–44. Rees discusses a number of cases in which the Anunga Rules have been judicially interpreted and applied in the Northern Territory: *ibid.* at 44–48.

lines.⁸⁰ Also, recent amendments to the *Crimes Act 1914*⁸¹ which are designed to formally regulate the procedures for detaining and questioning suspects in relation to all Commonwealth offences, contain provisions dealing specifically with the questioning of Aboriginal persons.⁸²

However favourable rules of this type are considered, their impact on the large numbers of Aborigines who come into contact with the police can only be minimal. Further, the relevance of the Anunga guidelines to many urban-dwelling Aborigines must be questioned.⁸³

2. Judicial Notice of "Aboriginality"

Many judges have demonstrated a willingness to take the defendant's Aboriginality into account when applying Anglo legal concepts and principles, and when determining an appropriate sentence.

In the former case, this tendency has been most common in relation to the availability of various defences and mitigating factors such as self-defence, duress and provocation. In this area of the criminal law, assessments of "reasonableness" play a major part, and therefore it is important to identify the "reasonable person" against whom the defendant's action will be measured. A good illustration of the law's flexibility in this respect is the decision of Kriewaldt J. in *R. v. Mudda-*

⁸⁰ H. McRae, G. Nettheim & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Company, 1991) at 256. In *R. v. Williams* (1976) 14 S.A.S.R. 1, Wells J. interpreted a Police Circular as equivalent to the Anunga Rules, in that a failure to follow the rules might result in the exclusion of any confession subsequently obtained: see A. Ligertwood, "The Trial of Sydney Williams" (1976) 1 Legal Serv. Bull. 136.

⁸¹ *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth.).

⁸² Sweeney has suggested that "though the amendments are restricted to the investigation of Commonwealth offences [of which there are relatively few in Australia where criminal laws are primarily a matter of state jurisdiction] they are likely to have an impact on the manner of investigation of non-Commonwealth offences." In fact, he predicts that the safeguards specified in the amended legislation "are likely to become the benchmark against which conduct by State police is judged": D. Sweeney, "Police Questioning of Aboriginal Suspects for Commonwealth Offences — New Laws" (1992) 54 A.L.B. 10 at 12.

⁸³ In *Willie Gudabi v. R.* (1984) 52 A.L.R. 133 at 145, the Full Court of the Federal Court of Australia observed that the Anunga Rules were formulated in a particular social context. The Court questioned the application of the guidelines in the very different conditions which existed in the Northern Territory in the 1980s. See McCorquodale, *supra* note 45 at 46.

*rubba*⁸⁴ in which he directed that the jury should measure the defendant's loss of self-control and subsequent killing of the victim, against the average members of the defendant's tribe.⁸⁵

While it is important that tests involving objectivity should be adapted to the circumstances of the case in this way, courts have failed to adopt a particular uniform approach. Further, such defences are only available in relation to very serious offences of violence which constitute only a very small proportion of charges brought against Aborigines. Therefore, only a small number of Aborigines actually receive the "benefit" of this approach.

The fact of Aboriginality is more frequently taken into account at the sentencing stage, particularly where judicial notice is taken of the serious doubts which exist about the constructiveness of a prison sentence for Aborigines.⁸⁶ Sentencing practice in relation to Aboriginal offenders is a serious and complicated problem which raises a whole range of social, economic and cultural factors. However, mitigating factors which have been recognised as peculiar to traditionally oriented Aborigines include:

- (i) where the defendant has acted in accordance with tribal customs,⁸⁷
- (ii) where the defendant's conduct will attract "pay-back" or some other sanction from his/her community,⁸⁸ and
- (iii) where the offence involves over-use of alcohol.⁸⁹

While there may be quite specific instances where the defendant's level of culpability or severity of sentence is reduced by the court because of factors relating to his/her Aboriginality, it is important to note that these individual "reprieves" occur within the context of institutionalised judicial racism. As McCorquodale concludes:

⁸⁴ [1956] N.T.J. 317, cited in Daunton-Fear & Frieberg, *supra* note 47 at 52. See also C. Howard, "What Colour is the 'Reasonable Man'?" [1961] Crim. L. Rev. 41.

⁸⁵ Daunton-Fear & Frieberg, *supra* note 47 at 52. This case and several others which dealt with issues of Aboriginal customary law both in relation to the availability of criminal law defences, and as a mitigating factor in sentencing were discussed by the Australian Law Reform Commission, *The Recognition of Customary Law* (Report No. 31) (Canberra: Australian Government Publishing Service, 1986) [hereinafter *ALRC Report*] at, respectively, para. 420-453, and para. 490-522.

⁸⁶ See McCorquodale, *supra* note 45 at 48.

⁸⁷ Daunton-Fear & Frieberg, *supra* note 47 at 65-69.

⁸⁸ *Ibid.* at 69-73.

⁸⁹ *Ibid.* at 73-74; also McCorquodale, *supra* note 45 at 49.

The Northern Territory provides numerous examples of judicial willingness to depart from a negative Aboriginal stereotype only in individual cases and then on the question of penalty rather than guilt. In the other states the overall impression gained ... is that Aboriginality is a judicial perception working to the disadvantage of Aboriginals.⁹⁰

B. Decriminalisation of Public Drunkenness

In 1979, after a long debate on the inappropriateness of the criminal justice response to public drunkenness,⁹¹ the offence of public drunkenness was decriminalised in New South Wales by the repeal of the *Summary Offences Act 1970*. In March 1980 the *Intoxicated Persons Act 1979* came into operation, setting up "a welfare scheme for the care of public drunks."⁹²

In 1970 Tomasic reported that one third of all arrests and a slightly smaller proportion of the prison population in New South Wales related to public drunkenness.⁹³ In theory, then, this reform appeared to represent a positive development: a conscious attempt to "shrink" the area over which the criminal justice system operated.

The new legislation promised to be particularly constructive in relation to reducing Aboriginal contact with the criminal justice system. For as Elizabeth Eggleston concluded after extensive research in this area, "[t]he Aboriginal offence par excellence is drunkenness."⁹⁴ This statement reflects not only the enormous problems of alcohol abuse in Aboriginal communities, but also, as discussed earlier, the public nature of much Aboriginal drinking.

Cornish has described the motivation for decriminalisation legislation in Australian states as "bourgeois humanitarianism."⁹⁵ In the context of a history of government "paternalism" towards Aboriginal

⁹⁰ McCorquodale, *supra* note 45 at 51; also see generally J. McCorquodale, *Aborigines and the Law: A Digest* (Canberra: Aboriginal Studies Press, 1987).

⁹¹ S.J. Egger, A. Cornish & H. Heilpern, "Public Drunkenness: A Case History in Decriminalisation" in Findlay, Egger & Sutton, eds., *supra* note 24, 29 at 32.

⁹² A. Cornish, "Public Drunkenness in New South Wales: From Criminality to Welfare" (1985) 18 A.N.Z. J. Crim. 73.

⁹³ R. Tomasic, "Court Based Referral Programmes for Alcoholic and Drug Dependent Persons" (1977) 7 J. Drug Issues 377. See Egger, Cornish & Heilpern, *supra* note 91 at 31.

⁹⁴ Eggleston, *supra* note 40 at 14.

⁹⁵ Cornish, *supra* note 92 at 73. Public drunkenness is not a criminal offence in New South Wales, South Australia, the Northern Territory and the Australian Capital Territory. In Victoria, Western Australia and Tasmania, state governments have considered in recent years abolition of the offence, although decriminalisation legislation is yet to be enacted. See McDonald, *supra* note 20 at 16.

people, this philosophy takes on a particular significance. For by introducing a "welfare-management" scheme⁹⁶ based on the power to detain intoxicated persons in a "proclaimed place" (frequently, the local police station), the *Intoxicated Persons Act* maintained a level of discriminatory intervention into the lives of Aboriginal people. Indeed, while "public drunkenness" is no longer deemed to be criminal,⁹⁷ it is still the behaviour which most frequently leads to Aboriginal contact with the criminal justice system.⁹⁸ According to Munro and Jauncey

The reason is quite simple: decriminalisation has not been complemented by funding. In a large number of country towns in New South Wales there are simply no places proclaimed under the *Intoxicated Persons Act* to place intoxicated persons and thus, they are kept in police cells.⁹⁹

In the *Report of the Inquiry into the Death of Edward James Murray*, Commissioner Muirhead commented:

In a town like Wee Waa, where the only proclaimed place was the police station, the *Intoxicated Persons Act* made little real change and public drunkenness was likely to result in incarceration in a police cell for up to eight hours.¹⁰⁰

Commissioner Muirhead referred in some detail to submissions made by counsel for the National Committee to Defend Black Rights (NCDBR) and the National Aboriginal and Islander Legal Services Secretariat (NALSS), which included calls for the repeal of the *Intoxicated Persons Act* on the basis that it "has failed to provide a non-criminal mechanism for dealing with the situation of public drunkenness."¹⁰¹ NCDBR proposed the enactment of new legislation to deal with public drunkenness which would be based on the "de-pro-

⁹⁶ Egger, Cornish & Heilpern, *supra* note 91 at 35.

⁹⁷ Although, even this assumption may no longer be valid. Cunneen has suggested that the recently enacted *Local Government (Street Drinking) Amendment Act 1990* (N.S.W.) may have the effect of supporting the recriminalisation of public drunkenness: C. Cunneen, "Moves to Recriminalise Public Drunkenness in NSW" (1991) 49 A.L.B. 2.

⁹⁸ See Milne, *supra* note 29 at 195; McDonald, *supra* note 20 at 20-24; and the discussion above at the text accompanying notes 20-26.

⁹⁹ Munro & Jauncey, *supra* note 51.

¹⁰⁰ J. H. Muirhead, *Report of the Inquiry into the Death of Edward James Murray* (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989) at 139.

¹⁰¹ *Ibid.* at 140.

clamations" of all police stations, cells and lock-ups, and the provision of adequate funds for the establishment of detoxification units, particularly in the north-west region of New South Wales.¹⁰²

Apart from the failure of the *Intoxicated Persons Act* to reduce the level of contact between Aborigines and the criminal justice system, the theoretical legislative intention of decriminalising public drunkenness, has been subverted in many areas, largely through the use of Local Government by-laws which prohibit the consumption of alcohol in public, except in designated "drinking areas."¹⁰³ As Cunneen has noted, "[f]ines under the Local Government by-laws are up to \$2000 — far in excess of penalties available under earlier State legislation which criminalised drunkenness."¹⁰⁴

Doubts about the legislative basis of such regulations were removed in December 1990 by the enactment of the *Local Government (Street Drinking) Amendment Act, 1990* (N.S.W.) which clarified the power of local governments to create "alcohol-free zones."¹⁰⁵ In the *Report of the Inquiry into the Death of Clarence Alec Nean*, Commissioner Wootten noted that the use of Local Government regulations had "the potential to negate to some extent the decriminalisation of public drunkenness, and ... to do so in a racially discriminatory way."¹⁰⁶

As an attempt to reduce the problem of Aboriginal contact with the criminal justice system, the decriminalisation of public drunkenness must be seen as a failure. As Bird commented in relation to the equivalent South Australian legislation,¹⁰⁷ it is "unlikely to change the status of Aborigines as objects of policing."¹⁰⁸ The failings of the *Intoxicated Persons Act*, the use of local government by-laws and regu-

¹⁰² *Ibid.* at 140–141.

¹⁰³ Cunneen (1990), *supra* note 13 at 40.

¹⁰⁴ *Ibid.* at 41.

¹⁰⁵ Cunneen (1991), *supra* note 97 at 2.

¹⁰⁶ Cited *ibid.* In May 1991 South Sydney City Council announced its intention to establish an alcohol-free zone in streets near the Redfern railway station under the new "street drinking" legislation. The New South Wales Office of Aboriginal Affairs has expressed its concern that such a move would have a discriminatory impact on Aborigines in the area: see C. Sutton, "Drink-free Zone in Redfern" *The [Sydney] Sun-Herald* (2 June 1991) 20.

¹⁰⁷ *Public Intoxication Act 1984* (S.A.).

¹⁰⁸ G. Bird, "Field Work in South Australia" in *Ivory Scales*, *supra* note 44, 60 at 68; see also G. Bird, *The "Civilising" Mission: Race and the Construction of Crime* (Clayton: Faculty of Law, Monash University, 1987).

lations to prohibit public drinking, and the re-introduction of the *Summary Offences Act*, have ensured the accuracy of this prediction in New South Wales.¹⁰⁹

C. The Interim Report of the Royal Commission into Aboriginal Deaths in Custody

In January 1989 Commissioner Muirhead released the *Interim Report of the Royal Commission into Aboriginal Deaths in Custody*.¹¹⁰ The report's major recommendations will be discussed here¹¹¹ because they were directed primarily at issues relating to police and custodial "systems and practices."

In particular, Commissioner Muirhead recommended:

- (i) the decriminalisation of public drunkenness in those jurisdictions where it was still an offence. He indicated that this reform must be accompanied by adequately funded programs to support treatment facilities for intoxicated persons, along with the imposition of statutory obligations on police officers to utilise alternatives to the detention of intoxicated persons in police cells;
- (ii) that all jurisdictions adopt procedural changes in relation to the use of police custody, the recruitment of police and prison officers, and in the delivery of medical attention to detainees; and
- (iii) that police cells be modified and upgraded in design, including the installation of alarm and intercom systems, so that the opportunity for death by suicide is substantially reduced.¹¹²

To a large extent, Commissioner Muirhead's recommendations refined and expanded upon the Draft Code of Practices and Procedures which was adopted by the state governments in May 1988. While the recommendations were seen generally as a positive development, their

¹⁰⁹ The new *Summary Offences Act 1988* (N.S.W.) commenced operation in July 1988: see Bonney, *supra* note 26.

¹¹⁰ J.H. Muirhead, *Royal Commission into Aboriginal Deaths in Custody — Interim Report* (Canberra: Australian Government Publishing Service, 1988).

¹¹¹ The 11 volume final report of the Royal Commission into Aboriginal Deaths in Custody was tabled in Federal Parliament on 9 May 1991. A number of Chief Commissioner Elliot Johnston's major findings and recommendations are discussed below in Section IV, part C.

¹¹² See J.P. Reser, *The Design of Safe and Humane Police Cells: A Discussion of Some Issues Relating to Aboriginal People in Custody* (Research Paper No. 9) (Canberra: Royal Commission into Aboriginal Deaths in Custody, 1989).

focus was considered by Aboriginal groups to be extremely narrow.¹¹³ More specifically, a response issued by NAILSS suggested that

the continued reliance on police and prison officer discretion with no suggestion of counterbalancing systems of monitoring the effectiveness of the implementation of the recommendations, can leave only one conclusion; at the end of a year's hearings Aboriginal people are being offered no guarantee of better treatment nor a higher standard of care whilst in custody.¹¹⁴

It is difficult to determine the extent to which these recommendations have been implemented in a meaningful way. In his recent regional report dealing with Aborigines in south-eastern Australia, Commissioner Wootten indicated that during the life of the Royal Commission, deliberate steps had been taken towards improving the conditions surrounding Aboriginal detention.¹¹⁵ However, a recent study by NAILSS suggested the funds which had been made available by the Commonwealth and state governments to implement the recommendations contained in Commissioner Muirhead's *Interim Report* had been spent on the upgrading of police cells in north-west New South Wales despite a NAILSS proposal that the promotion of alcohol rehabilitation services in these areas be given funding priority.¹¹⁶

This example, arising out of the *Interim Report of the Royal Commission into Aboriginal Deaths in Custody*, provides a good illustration of the way in which many non-Aboriginal responses to the problem of Aboriginal contact with the criminal justice system have failed to address the fundamental conflict which lies at the core, and which exposes Aboriginal people to human rights violations, and in particular, to discrimination at every stage of the criminal justice system. Well-intentioned but relatively minor changes to the various agencies of criminal justice administration are simply inadequate as

¹¹³ NAILSS, "An interesting and informative chat is not what I had in mind ..." (1989) 36 A.L.B. 12 at 14.

¹¹⁴ *Ibid.*

¹¹⁵ J.H. Wootten, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania — Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991) at 19. Although, Commissioner Wootten also commented that "there is still much room for improvement," and noted that "[a]ttitudes embedded in police culture are very resistant to change and it seems difficult to get police even to read new Instructions [relating to the care of prisoners]": *ibid.* at 11, 19.

¹¹⁶ Munro & Jauncey, *supra* note 51.

a means of dealing with what is a basic human rights problem. Aboriginal people will continue to suffer unnecessarily and in large numbers until non-Aboriginal Australia is forced to recognise as a general policy, the importance of recognising Aboriginal rights to control their own lives.

IV. THE VALUE OF AUTONOMY: CONSTRUCTIVE "SOLUTIONS" FOR A REDUCTION IN THE VIOLATION OF ABORIGINAL HUMAN RIGHTS

DURING THE LAST DECADE, there have been several initiatives at the local, state and national levels which attempt to address this basic human rights issue. Many of these are particularly relevant to the task of addressing Aboriginal human rights violations in the context of the administration of criminal justice. Proposals for the recognition of Aboriginal customary law, and the expansion of constructive community justice mechanisms are examples of an approach which recognises the value of empowering Aboriginal people.

Significantly, the *National Report of the Royal Commission into Aboriginal Deaths in Custody* identifies Aboriginal "autonomy" supported by a policy of self-determination, as central to addressing the specific issue of deaths in custody, and the general problem of massive over-representation of Aboriginal people within the criminal justice system. The formal identification of a connection between the criminal justice experience and the history of Aboriginal oppression and powerlessness, represents a major development. While there may be strong reasons for expressing concern over the limited self-governing power which the Royal Commission has endorsed in relation to Aboriginal people,¹¹⁷ the identification of self-determination as a fundamental prerequisite to lasting achievements in this area are encouraging, particularly in light of international law developments where the recognition of indigenous rights, including the right of self-determination, may be achieved in the near future.¹¹⁸

This section of the paper will discuss some of the proposals for confronting Aboriginal suffering under the criminal justice system which have been seen as drawing, to a lesser or greater extent, on the strategy of developing Aboriginal, and community-based alternatives to the demonstrably unsuccessful and discriminatory criminal justice system.

¹¹⁷ See discussion below at the text accompanying notes 216–223.

¹¹⁸ See discussion below in Section V, part D.

A. The Recognition of Aboriginal Customary Law

In 1986 the Australian Law Reform Commission released a detailed two-volume report: *The Recognition of Aboriginal Customary Law*.¹¹⁹ The Commission's wide-ranging recommendations were based on the conclusion that Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system, and that this recognition must occur against the background and within the framework of the general law.¹²⁰ It recommended that Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these was clearly demonstrated.¹²¹ Having taken this basic position, the Commission made a number of more specific recommendations relating to Aboriginal customary law and the criminal justice system.

Unfortunately, those recommendations that related to the substantive criminal law and the sentencing of Aboriginal offenders offered little advance on the extent to which the law already accords some recognition to Aboriginality and the relevance of tribal laws and customs. The Commission did recommend that a partial customary law defence be created which, in the same way as diminished responsibility, would reduce murder to manslaughter.¹²² The defence would apply if the defendant could establish, on the balance of probabilities, that the act which caused the death of the victim was done because of a well-founded belief that the customary laws of the Aboriginal community to which the defendant belonged, required the act to be done.¹²³ The Commission also recommended that customary laws may be relevant to the exercise of prosecutorial discretions, particularly where the Aboriginal community in question has resolved the matter through its own processes.¹²⁴

In relation to sentencing, the Commission recommended that a number of propositions be recognised but these were formulated

¹¹⁹ ALRC Report, *supra* note 85.

¹²⁰ *Ibid.* para. 194-195.

¹²¹ *Ibid.* para. 196.

¹²² *Ibid.* para. 453.

¹²³ *Ibid.*

¹²⁴ *Ibid.* at 478.

largely on the basis of the existing judicial experience in recognising Aboriginal customary laws when sentencing Aboriginal offenders.¹²⁵

The Commission also made several recommendations relating to police investigation and interrogation which were essentially a modified version of the "Anunga Rules."¹²⁶ In relation to rules of evidence and court-room procedure, the Commission proposed, *inter alia*, minor amendments to the hearsay rule and the privilege against self-incrimination. It was also recommended that courts should have express power to protect information which is confidential under Aboriginal customary laws.¹²⁷

The Commission's failure to recommend any major changes to the way in which criminal law and the formal criminal justice system treats Aboriginal people on account of customary law, is disappointing, but not surprising. Indeed, any recognition within the existing structure was likely to be minimal, when measured in terms of its capacity to achieve justice for Aboriginal people. On the other hand, the question of local justice mechanisms for Aboriginal communities held a great deal more promise in this regard. The very notion of seeking alternatives to a criminal justice system which has consistently failed to respect the human rights of Aboriginal individuals and communities, represents a fresh approach to the problem and a major advance on the inadequate "solutions" which have generally been adopted to date. The Commission undertook a detailed study of dispute settlement processes in Aboriginal communities, proposals for special Aboriginal courts and justice schemes, and the experience of other nations which have recognised various indigenous justice mechanisms.¹²⁸

In considering the appropriateness of local justice mechanisms, the Commission identified this approach or "solution" as only one of the many which could be applied to the "problems of law and order" in Aboriginal communities.¹²⁹ Indeed, the Commission took the position that "there is only limited scope or demand for new official local justice mechanisms in Aboriginal communities" and that "there should

¹²⁵ *Ibid.* para. 504-515.

¹²⁶ *Ibid.* para. 561-573.

¹²⁷ *Ibid.* para. 661.

¹²⁸ See generally, P.K. Hennessy, *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals* (Research Paper No. 11/12) (Sydney: Australian Law Reform Commission, 1984).

¹²⁹ *ALRC Report, supra* note 85, para. 838.

be no general scheme of Aboriginal courts established in Australia."¹³⁰ It did conclude however, that Aboriginal courts or similar official bodies might be appropriate in certain circumstances. The Commission laid down a number of basic principles for their operation, but stressed the need for local input into, and acceptance of, any scheme. Local by-laws would be the source of any rules relating to alternative justice mechanisms.

Finally, the Commission concluded that there was considerable scope for administrative recognition at the level of policing. Strategies to be investigated and encouraged included improved communication between police and local Aboriginal communities (via, for example, police liaison committees), forms of self-policing (as an adjunct to regular police) and regular police training on Aboriginal issues.¹³¹

In general therefore, the Australian Law Reform Commission took a conservative position in relation to the recognition of Aboriginal customary law. With respect to issues surrounding the administration of criminal justice, the Commission was at pains to distinguish what recognition could achieve, from the autonomy rights which Aboriginal people are increasingly seeking to assert. In the Commission's view:

The recognition of Aboriginal customary laws is not part of a negotiated and independent settlement of claims, nor is it as such a matter of self-government or autonomy. The recommendations are primarily, a response to the legal system's search for justice in dealing with Aboriginal people of Australia ...¹³²

The approach of "searching for justice" within the current criminal justice system reflects a failure to grasp the nature of the Aboriginal experience with non-Aboriginal law enforcement structures. As Roberta Sykes has commented, "[t]he Black community sees the white legal system as part of their oppression. That legal system did not (in 1788) and does not (in 1988) protect the interests of the Black community."¹³³

Viewed in this light, the Australian Law Reform Commission's rather limited recommendations in relation to policing, criminal law, court procedure and sentencing, along with its cautious discussion of various community justice proposals, are disappointing. What is even

¹³⁰ *Ibid.* para. 1009.

¹³¹ *Ibid.* para. 844-877.

¹³² *Ibid.* para. 1037.

¹³³ R. Sykes, *Black Majority* (Melbourne: Hudson Books, 1989) at 118. See also M. Mansell, "Can White Law Accommodate Black Demands" (1986) 23 A.L.B. 10.

more disappointing is the Federal Government's response to the 1986 Report. As Brennan and Crawford have observed, the Law Reform Commission's relatively modest proposals "have disappeared in a morass of inter-Departmental consultation, with increasing emphasis on the difficulties of implementation."¹³⁴ While this reflects a disappointing government response, it is revealing of the Commission's failure to identify an obligatory or even compelling reason for recognition of Aboriginal customary law.

The Law Reform Commission also considered the relevance of international human rights law in relation to the recognition of Aboriginal customary law. After discussing a number of international instruments considered relevant to indigenous people,¹³⁵ the Commission concluded that "Australia is neither required to recognise Aboriginal customary laws in any general way ... by any international obligations on minority or indigenous rights."¹³⁶ Whether this statement is entirely accurate may be debatable, but it does focus attention on the capacity of international law to support Aboriginal assertions for greater control of their lives, particularly in light of recent developments at the United Nations level, including the drafting of a Universal Declaration on the Rights of Indigenous Peoples.¹³⁷ By implication, it also highlights the importance of identifying the source of, and motivation for, initiatives designed to alleviate the Aboriginal criminal justice system experience, such as the recognition of customary law.

At the domestic level, Chisholm has compared the paternalistic "demonstrated benefit" approach to recognising Aboriginal customary law, with an approach based on a potentially more constructive policy of "self determination."¹³⁸ While the parameters of this concept need to be fully explored before it is endorsed,¹³⁹ the idea that Aboriginal people should be in a position to determine the application of laws across a range of issues, including those which are currently inadequately dealt with by the criminal justice system, represents a much more promising way of dealing with the current problems of injustice

¹³⁴ F. Brennan & J. Crawford, "Aboriginality, Recognition and Australian Law: The Need For a Bipartisan Approach" (1990) 62 *Austl. Q.* 145 at 153.

¹³⁵ *ALRC Report*, *supra* note 85, para. 171-178.

¹³⁶ *Ibid.* para. 1005.

¹³⁷ See the discussion below at the text accompanying notes 306-314.

¹³⁸ R. Chisholm, "Aboriginal Law in Australia: The Law Reform Commission's Proposals for Recognition" (1988) 10 *U. Haw. L. Rev.* 47 at 63.

¹³⁹ See discussion below in Section V, part A.

and discrimination, and is more consistent with the claims which Aboriginal people have been advancing recently in international forum.

Chisholm has attempted to explain the conservative position taken by the Law Reform Commission in relation to these issues, by suggesting that perhaps it was not the task of the Commission to address these underlying issues,¹⁴⁰ which it accurately perceived as strongly connected to broader Aboriginal claims for self-government.¹⁴¹ However, the Commission's refusal to recognise that Aborigines in Australia have any right to have customary laws recognised, nor any right to autonomy, even in the specific area of dispute resolution and local justice mechanisms, is perhaps the most disappointing aspect of the Australian Law Reform Commission Report. For while the formulation of government policy on recognising the Aboriginal right of self-determination was clearly beyond the mandate of the Commission, a firm recommendation that community justice mechanisms should be encouraged in the interest of achieving justice for, and protecting the human rights of, Aboriginal people, where the criminal justice system has failed in this respect, would have been the most useful contribution that the Australian Law Reform Commission could have made in this vital aspect of the Aboriginal struggle.

B. Community Justice Mechanisms

Aboriginal initiatives for the creation or elaboration of informal or formal local justice mechanisms are worthy of more serious consideration than they have tended to receive in Australia for a number of reasons. First, they are in many ways an alternative to the formal criminal justice agencies, and represent a constructive response to the inadequacies of the white criminal justice system as a means of dealing with disputes and conflicts involving Aboriginal people. Second, in contrast with the imposed criminal justice system, community justice mechanisms are generally initiated by Aborigines themselves, and provide a greater opportunity for Aboriginal control. Third, they complement, and indeed, gain credibility, from broader Aboriginal assertions regarding the need for autonomy, and their entitlement to self-determination.

Perhaps motivated, at least in part, by mounting evidence of the devastating consequences of Aboriginal contact with non-Aboriginal

¹⁴⁰ Chisholm, *supra* note 138 at 79.

¹⁴¹ See J. Crawford, P. Hennessy & M. Fisher, "Aboriginal Customary Law: Proposals for Recognition" in *Ivory Scales*, *supra* note 44, 190 at 217-223.

police, courts and prisons, the potential of community justice mechanisms has attracted greater attention in the last decade.¹⁴²

Community justice mechanisms were the subject of considerable investigation by the Australian Law Reform Commission, and also figured prominently in discussions relating the "improvement of the criminal justice system" in the *National Report of the Royal Commission into Aboriginal Deaths in Custody*.¹⁴³ Some of the existing and proposed schemes will be discussed here. The aim of this analysis will be to identify those features of this particular form of alternative dispute resolution which, in response to the unacceptable experience of Aboriginals within the criminal justice system, should be encouraged because of their genuine capacity for achieving Aboriginal justice. These programs will be assessed in terms of their capacity for achieving justice for Aboriginal people, and in terms of their compatibility with Aboriginal aspirations generally.

In the context of a discussion of her work with the Yolgnu community at Yirrkala on the Gove Peninsula in north-eastern Arnhem Land, Nancy Williams has stated:

In the process of introducing alien institutions of governance and public order, white Australia appears to have proceeded on the assumption that comparable political institutions were lacking in Aboriginal societies. Recent experience no longer allows that to be a tenable assumption.¹⁴⁴

Given the destruction which imposed mechanisms such as the criminal justice system have wrought on Aboriginal communities, the debunking of this particular presumption takes on an even greater significance.

1. *The Yirrkala Scheme*

This particular model for a community justice system was developed over a number of years by a group of elders at Yirrkala, and was considered in detail by the Australian Law Reform Commission in relation to its reference on *The Recognition of Aboriginal Customary*

¹⁴² See K.M. Hazlehurst, "Resolving Conflict: Dispute Settlement Mechanisms for Aboriginal Communities and Neighbourhoods?" (1988) 23 *Austl. J. Soc. Issues* 309 at 310.

¹⁴³ See generally, *supra* note 4, vol. 4, c. 29.

¹⁴⁴ N.M. Williams, "Local Autonomy and the Viability of Community Justice Mechanisms" in *Ivory Scales*, *supra* note 44, 227.

Law.¹⁴⁵ It has been described by one of the scheme's main advocates, H.C. Coombs, as "a contemporary Aboriginal reaction to over 100 years of social control by outsiders."¹⁴⁶ According to Coombs, the aim of these proposals was to work towards

defining a place for Aboriginal customary law within the Australian legal system ... They are essentially modifications of traditional Aboriginal processes of organised social pressure to conform to accepted norms of behaviour and of dispute settlement.¹⁴⁷

The structure of this form of community justice is based on using local councils, and in particular, a "Law Council" to exercise the primary responsibility for local justice.¹⁴⁸ The Law Council, which would consist of senior leaders from each constituent clan, would select the appropriate community members to deal with the particular dispute or breach of community rules which arises for resolution.¹⁴⁹ These people would constitute the "community court" in individual cases.¹⁵⁰

Under the Yirrkala scheme the Law Council and the community court would operate as an independent entity. However, there would be a "considerable degree of interaction with the general legal system."¹⁵¹ For example, in a submission to the Australian Law Reform Commission,¹⁵² Coombs proposed that where a Yirrkala community member came before a judge or magistrate, the latter should authorise the Law Council to set up a community court for the purposes of seeking to resolve the matter via a form of "preliminary hearing" or intervention. Alternatively, it was proposed that community representatives could sit with the magistrate or judge to offer advice on a range of issues on which local knowledge would be helpful.

Significantly, under the Yirrkala proposals, the Council would exercise a level of involvement in all matters ranging from simple disputes

¹⁴⁵ *ALRC Report*, *supra* note 85, para. 819-832.

¹⁴⁶ H.C. Coombs, "The Yirrkala Proposals for the Control of Law and Order" in Hazlehurst, ed., *supra* note 49, 201 at 205.

¹⁴⁷ *Ibid.* at 201.

¹⁴⁸ *ALRC Report*, *supra* note 85, para. 821; and Williams, *supra* note 144 at 234.

¹⁴⁹ Williams, *ibid.*

¹⁵⁰ *ALRC Report*, *supra* note 85, para. 822.

¹⁵¹ *Ibid.* para. 823.

¹⁵² H.C. Coombs, Submission No. 262 (29 April 1981), cited *ibid.*

or public order offences, to serious crimes.¹⁵³ This jurisdiction would include both white laws, and rules formulated by the community based on customary laws and current concerns amongst the community about social order and the regulation of unacceptable behaviour.¹⁵⁴ The community court would have the power to impose a range of sanctions, with emphasis on the provision of compensation. Other possible punishments would include compulsory residence at a homeland centre, temporary banishment, or even overnight imprisonment in a "lock-up" situated at the community.¹⁵⁵

After considering numerous submissions made on behalf of the clan leaders at Yirrkala, the Australian Law Reform Commission made the following recommendations:

1. That the Northern Territory authorities investigate through local discussion and consultation whether the Yirrkala community seeks implementation of the scheme;
2. If so, that the scheme be implemented, with appropriate legislative backing, for a sufficient trial period (at least three years); and
3. That the Yirrkala people be given independent advice and such other support as they may require in carrying out the scheme.¹⁵⁶

Given the generally modest nature of the recommendations contained in *The Recognition of Aboriginal Customary Law*, the Australian Law Reform Commission's endorsement of this particular initiative was an encouraging sign that a constructive change in direction in relation to problems encountered by Aborigines in the criminal justice system might be possible. As Williams concluded in 1987, the proposed Yirrkala community justice system "is most likely to succeed in enabling effective social control because it embodies Aboriginal mechanisms of authority and dispute settlement, and supports rather than impedes their operation."¹⁵⁷

Unfortunately, the Yirrkala scheme has suffered the fate of almost all of the Law Reform Commission's recommendations. In the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Commissioner Johnston noted that a submission by H.C. Coombs revealed that the community justice scheme had failed to gain the

¹⁵³ *Ibid.* para. 824. In the case of serious offences, it was anticipated that the general law and procedure would be more likely to be involved: Coombs, *supra* note 146 at 215.

¹⁵⁴ *Ibid.* at 210–211.

¹⁵⁵ *ALRC Report*, *supra* note 85, para. 826; Coombs, *supra* note 146 at 213.

¹⁵⁶ *ALRC Report*, *supra* note 85 para. 832.

¹⁵⁷ Williams, *supra* note 144 at 237.

support of the Northern Territory Government, and, therefore, had not been effectively implemented.¹⁵⁸

Hazlehurst has challenged "the tardiness and conservatism of governments in developing community justice options for Aboriginals throughout Australia."¹⁵⁹ Given the overwhelming evidence which shows that the formal criminal justice system is routinely inadequate in dealing with Aboriginal people, the failure to support constructive alternatives such as the Yirrkala proposal is difficult to comprehend.

What can be taken from the Yirrkala experience, and used as a measure for all other reforms within (or alternatives to) the criminal justice system, which purport to be community based, is that the fundamental characteristic which must be present before it will be genuinely constructive for, and acceptable to Aboriginal people, is that they must attribute to Aboriginal people the power to control their own lives. As Williams has concluded, "[t]he viability of Aboriginal community justice mechanisms depends on Aboriginal autonomy."¹⁶⁰ Using this requirement as a yardstick, several other initiatives or proposals which have been advanced as "solutions" to the problem of Aboriginal contact with the dominant criminal justice system, using the rationale of "community-based" as the "saving element," will be examined.

2. *The Aboriginal Justice of the Peace Scheme*

While serving as the Magistrate at Broome during the 1970s, Terry Syddall devised an Aboriginal Justice of the Peace Scheme to operate in the Kimberley region of Western Australia.¹⁶¹ In 1971 he adopted the practice of inviting local elders to sit with him in the courtroom, mainly for the purpose of facilitating community input on sentencing options for Aboriginal defendants, but also in order to explain court procedures and points of law to both defendants and advisers.¹⁶²

In 1977 Syddall was requested by the Western Australian Government to conduct an inquiry into Aboriginal laws, and into the extent to which Aboriginal communities understood the general law. On the

¹⁵⁸ *Supra* note 4, vol. 4 at 94.

¹⁵⁹ *Supra* note 142 at 309.

¹⁶⁰ Williams, *supra* note 144 at 237.

¹⁶¹ T. Syddall, "Aboriginals and the Courts I and II" in Hazlehurst, ed., *supra* note 49, 157.

¹⁶² *Ibid.* at 158. On the role of Aboriginal advisers/assessors, see Daunton-Fear & Freiberg, *supra* note 47 at 87-9.

basis of this research, the government enacted the *Aboriginal Communities Act 1979* (W.A.), which according to the preamble, was designed to “assist certain Aboriginal communities to manage and control their community lands.” This objective was to be achieved via two basic strategies. The Act:

- (i) authorised community councils to make and enforce by-laws covering a range of specified subject matters; and
- (ii) established “Aboriginal courts,” consisting of Aboriginal Justices of the Peace, Bench Clerks and Probation Officers.¹⁶³

The scheme was initially introduced on a pilot basis at two Kimberley communities: the Bidyadanga Aboriginal Community Incorporated at La Grange, and the Bardi Aborigines Association Incorporated at One Arm Point; and was later extended to three other communities, with several other communities also applying for inclusion.¹⁶⁴

Syddall has described the scheme, with particular reference to its operation in the La Grange community, as a major success. According to Syddall, this was evidenced by “a reduction in the incidence of anti-social behaviour, ... a marked improvement in Aboriginal and police relations” and a trend towards “synthesis of customary law and by-laws.”¹⁶⁵ Syddall has also placed these developments within the context of a general movement towards independence for Aboriginal communities:

... [N]ow that the traditional social control methods have been supplemented by the by-laws administered very largely by themselves, community autonomy in the not too distant future is a distinct possibility.¹⁶⁶

Despite Syddall’s optimism, and the favourable comments of other observers¹⁶⁷ doubts have been raised about the effectiveness of the Justice of the Peace Scheme. In particular, Hoddinott argued that the scheme, “whilst promising in its inception, has developed serious difficulties in application [which] ... urgently need to be rectified if the

¹⁶³ Syddall, *supra* note 161 at 168–169.

¹⁶⁴ *Ibid.* at 169; *ALRC Report*, *supra* note 85, para. 748.

¹⁶⁵ Syddall, *supra* note 161 at 169.

¹⁶⁶ *Ibid.* at 170.

¹⁶⁷ See *ALRC Report*, *supra* note 85 para. 756.

scheme is to continue.”¹⁶⁸ Hoddinott reported during the mid-1980s that it has become apparent to elders of several communities participating in the scheme that the superimposition of a second value system on top of Aboriginal values and laws raised serious difficulties. Both in relation to questions of liability for particular behaviour, and appropriate sanctions, there is a conflict between tribal law and the *Aboriginal Communities Act*.¹⁶⁹ As a result, Aboriginal kinship structures were being undermined. Further, instead of fostering Aboriginal autonomy, the community courts were operating in such a way that Aboriginal Justices of the Peace felt themselves to be little more than advisers, even five years after the introduction of the Justices of the Peace Scheme.¹⁷⁰

On the basis of her observations, Hoddinott concluded that the operation of the *Aboriginal Communities Act* should not be expanded “without taking into account the level of community acculturation and the degree of committal a community may have to its own value system.”¹⁷¹

In its discussion of the Western Australian *Aboriginal Communities Act*, the Australian Law Reform Commission noted in 1986 that a review of the Justices of the Peace Scheme was then being undertaken by the state government. The Commission stressed that “careful consideration should be given to provisions which would assist local communities to achieve a more substantial degree of autonomy ...”¹⁷² In 1986 this review was carried out by John Hedges, formerly a solicitor with the Aboriginal Legal Service.¹⁷³ He investigated the effectiveness of the Act in relation to whether:

(i) community behaviour conformed to by-laws;

¹⁶⁸ A. Hoddinott, “Aboriginal Justices of the Peace and ‘Public Law’ ” in Hazlehurst, ed., *supra* note 49, 173.

¹⁶⁹ *Ibid.* at 176–177.

¹⁷⁰ *Ibid.* at 177.

¹⁷¹ *Ibid.* at 179. For a more detailed account of Hoddinott’s observations and recommendations, see A. Hoddinott, *That’s Gardia Business: An Evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (Canberra & Perth: Australian Institute of Criminology and the Western Australia Prison Department, 1986).

¹⁷² *ALRC Report*, *supra* note 85, para. 758.

¹⁷³ J.B. Hedges, *Community Justice Systems and Alcohol Control: Recommendations Relating to the Aboriginal Communities Act and Dry Area Legislation in Western Australia* (Perth: Report Prepared For the Minister with Special Responsibility for Aboriginal Affairs, 1986).

(ii) communities have taken responsibility for the operation of by-laws.¹⁷⁴

After consultations with each of the five Kimberley communities then participating in the Aboriginal Communities Act, Hedges made a number of recommendations¹⁷⁵ designed to improve the effectiveness of the scheme. While his impressions of the operation of the community justice system differed among communities,¹⁷⁶ he concluded generally that

the practical implementation of the Community Justice System has been hindered by the absence of funding of educational, programmes for court officers and 'broader' community, and the absence of participation by the Probation and Parole Service.¹⁷⁷

Hedges reported that as well as expressing a desire for greater sentencing options, Justices of the Peace indicated that they sought greater independence from visiting magistrates. These findings verified, to some extent, Hoddinott's criticisms about the absence of autonomy for Aboriginal community courts. However, Hedges did recommend that the *Aboriginal Communities Act* be extended to three further communities in the Kimberley region, and that consultations be continued with other Aboriginal communities interested in participating in the scheme.¹⁷⁸

Despite this relatively optimistic evaluation, the minimal level of autonomy which characterises the Western Australian Justices of the Peace Scheme, seriously weakens the viability of this particular scheme as a model for Aboriginal community justice. It fails to offer a genuine and constructive alternative to the "processing" of Aboriginal offenders through the formal criminal justice system. Unfortunately, this weakness is shared generally by the various other community-based schemes which operate in various parts of Australia.

3. *Aboriginal Courts in Queensland*

¹⁷⁴ *Ibid.* at 3.

¹⁷⁵ *Ibid.* at 43-65.

¹⁷⁶ For example, in the Bidyadanga community the scheme was considered to have operated with "mixed success," while at One Arm Point the *Aboriginal Communities Act* was considered to be "operating successfully": *ibid.* at 7, 10.

¹⁷⁷ *Ibid.* at 2.

¹⁷⁸ *Ibid.* at ii.

The court system which has operated on Aboriginal reserves or "trust areas" in Queensland, originally under the *Aborigines Act 1971* (Qld.) and the *Torres Strait Islanders Act 1971* (Qld.), and more recently under the *Community Services (Aborigines) Act 1984* (Qld.) and the *Community Services (Torres Strait) Act 1984* (Qld.), has been widely criticised.¹⁷⁹ The major criticisms which have been made of the Queensland Aboriginal court system include:

- (i) that the courts are inferior or "second-class" institutions;
- (ii) the lack of real Aboriginal influence or control;
- (iii) the courts' inability, or failure, to take into account local customs and traditions; and
- (iv) the courts' location within the reserve system as a whole, which has been seen as an imposition of alien structures and values.¹⁸⁰

McRae, Nettheim and Beacroft have concluded that prior to the legislative changes in 1984:

The Courts operated as an integral part of the notorious reserve regime. Oppressive by-laws ... were enforced by invidiously-placed Aboriginal Justices. The courts did not reflect Aboriginal laws and aspirations. Rather, they were instruments of oppression and control wielded by the white authorities, operating without respect for basic human rights.¹⁸¹

Miller has concluded that despite the introduction of new legislation in the mid-1980s, along with more recent reforms, the Queensland system has improved little in many of these respects.¹⁸²

In 1991 a Legislation Review Committee completed an assessment of the legislation relating to the management of Aboriginal and Torres

¹⁷⁹ For a critical discussion of the circumstances which existed on Queensland's Aboriginal reserves under the now-repealed *Aborigines Act 1971* (Qld.), see G. Nettheim, *Out Laid: Queensland's Aborigines and Islanders and the Rule of Law* (Sydney: Australia and New Zealand Book Company, 1973); and G. Nettheim, *Victims of the Law: Black Queenslanders Today* (Sydney: George Allen & Unwin, 1981).

¹⁸⁰ For an elaboration of these criticisms see *ALRC Report*, *supra* note 85, para. 741-746.

¹⁸¹ H. McRae, G. Nettheim & L. Beacroft *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Company, 1991) at 229.

¹⁸² B. Miller, "Crime Prevention and Socio-Legal Reform on Aboriginal Communities in Queensland" (1991) 49 A.L.B. 10 at 12. For a more optimistic appraisal, see J. MacDonald, "Community Service Projects on Aboriginal Communities in Queensland" in Hazlehurst, ed., *supra* note 49, 153.

Strait Islander communities in Queensland.¹⁸³ The Committee recommended that

Aboriginal and Torres Strait Islander people and their communities should have the autonomy to decide the important questions themselves, and so to be 'self-determining' about our future.¹⁸⁴

The Committee explained the requisite level of autonomy as "self-government."¹⁸⁵

Consistent with this approach, the Committee recommended that "the Aboriginal and Island courts remain unless individual communities agree to dismantling of the community court in their area."¹⁸⁶ Several areas where improvements and assistance from the Government of Queensland might be needed were identified by the Committee. It recommended that the Queensland Government should

[u]ndertake a comprehensive study of the jurisdiction, powers and procedures of the Aboriginal and Island courts. Communities need to be advised through community education programs of the conclusions of this study, in order for communities to decide what changes, if any, are required to improve the aboriginal and Island courts.¹⁸⁷

The Committee further recommended that the courts be empowered to operate in a manner more consistent with Aboriginal and Islander customary law,¹⁸⁸ and the court structure be available to communities which seek to develop and expand community justice schemes.¹⁸⁹

4. *Community-based Policing and Sentencing*

Other community oriented approaches in Australia have tended to take much less autonomous forms than independent indigenous

¹⁸³ Queensland, Legislation Review Committee, Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, *Final Report* (Brisbane, November 1991).

¹⁸⁴ *Ibid.* at 8.

¹⁸⁵ *Ibid.* See Queensland, Legislation Review Committee, Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland, *Towards Self-Government: A Discussion Paper* (Brisbane, 1991).

¹⁸⁶ *Supra*, note 183 at 34.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.* at 34-35.

courts.¹⁹⁰ As Keon-Cohen observed in the context of a comparative study of native justice in Australia, Canada and the USA, "there remains a deeply ingrained reluctance in all three countries to cut the Gordian knot and allow separate, parallel native justice systems to develop."¹⁹¹ This attitude has, for the most part, placed major limitations on the emergence of potentially effective community justice mechanisms for Aboriginal people. In the result, apart from the schemes discussed above, along with similar proposals in isolated parts of the Northern Territory,¹⁹² "community-based" initiatives have tended to be located within the context of the formal policing structure, or as an added component of sentencing options for Aboriginal offenders.

Under the umbrella of "community policing"¹⁹³ is included a range of initiatives such as police aide schemes,¹⁹⁴ Aboriginal/police liaison units,¹⁹⁵ and the employment of Aboriginal police officers. While these strategies may well be genuine (and in the short term, perhaps even necessary) attempts to deal with the poor state of Aboriginal

¹⁹⁰ The Australian Law Reform Commission discussed in some detail the overseas experience with indigenous justice mechanisms (particularly tribal courts) before recommending that Australia not develop a general system of Aboriginal courts: *ALRC Report*, *supra* note 85, Ch. 30. See generally, B.A. Keon-Cohen, "Native Justice in Australia, Canada and the U.S.A." (1981) 7 *Monash U. L. Rev.* 250; Daunton-Fear & Freiberg, *supra* note 47 at 89-99; and R.L. Misner, "Administration of Criminal Justice on Aboriginal Settlements" (1974) 7 *Sydney L. Rev.* 257.

¹⁹¹ Keon-Cohen, *supra* note 190 at 253.

¹⁹² *ALRC Report*, *supra* note 85, para. 764. For a discussion of the Aboriginal Communities Justice Project which was introduced by the Northern Territory Government in 1982, see S. Davis, "Aboriginal Communities Justice Project: Northern Territory" in Hazlehurst, ed., *supra* note 49, 187. In the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Commissioner Johnston noted that while initially hailed as a success, the pilot schemes at Galiwinku and Groote Eylandt no longer operate: *supra* note 4, vol. 4 at 94.

¹⁹³ For an overview of this area see K.M. Hazlehurst, "Widening the Middle Ground: The Development of Community-based Options" in *Ivory Scales*, *supra* note 44, 241.

¹⁹⁴ For example, the potential effectiveness of police-aide schemes on Pitjantjatjara lands in the north-west of South Australia is discussed in D. Hope, "Policing in Aboriginal South Australia: A Transcultural Problem" in *Ivory Scales*, *supra* note 44, 92; also M. Pathe, "Police/Aboriginal Relations in South Australia" in Hazlehurst, ed., *supra* note 49, 41; and M. Little & P. Trezise, "Policing in South Australia — As It Affects Aboriginal People" (1991) 49 *A.L.B.* 18.

¹⁹⁵ The origins of the Aborigine Police Liaison Unit within the New South Wales Police Force are outlined in B. Galvin, "Bridging the Gap: Practical Application and Obstacles to Change and Co-operation, New South Wales" in Hazlehurst, ed., *supra* note 49 at 47.

police relations in many areas of Australia, this approach fails in any significant way to seriously confront the inappropriateness of formal criminal justice agencies for Aboriginal communities. Further, on the indicator of "autonomy" they simply do not qualify as, nor are they likely to provide a step towards, genuine community justice mechanisms. In fact, they may actually confound, rather than complement, Aboriginal aspirations to self-determination in the area of justice administration.

The point is not to reject all programs which purport to be community-based simply because they do not immediately create an independent Aboriginal structure for law enforcement, dispute resolution and social control. To adopt such a position, particularly in a political climate where assertions of autonomy rights by Aboriginal people are treated with considerable trepidation by white governments, would be both foolish and counter-productive. What is important is to analyse the philosophy which underlies any community policing proposal, and in particular, to determine whether it empowers the Aboriginal community concerned, or instead, increases the level of Aboriginal dependence on the state and the police, and thus, Aboriginal subservience to the discriminatory operation of the formal criminal justice system.

For example, the system which has been developed by the Julalikari Council in Tennant Creek — including a program of council patrols and a commitment to Aboriginal-police cooperation — illustrates the value of initiatives which challenge in some way, the generally subordinate position of Aboriginal people in relation to law enforcement strategies.¹⁹⁶ An Aboriginal Issues Unit report to the Royal Commission into Aboriginal Deaths in Custody described the Julalikari Council program in the following way:

The Aboriginal community at Tennant Creek has attempted to overcome a number of problems with police and policing by establishing council patrols which attend disturbances in the camps at night and which attempt to resolve conflicts at morning meetings in the camps. The Julalikari Council insists that people should bring their complaints to the Councillors on patrol, rather than the police, and that the police should not attend at disturbances without the presence of Councillors to explain the problem to them.

... They are attempting to resolve conflicts in an Aboriginal way rather than having the police simply arrest a person or persons, sometimes the wrong person, without solving

¹⁹⁶ See M. Edmunds, "The Role of Aboriginal Organisations in Improving Aboriginal-Police Relations" (1991) 49 A.L.B. 13. Other positive initiatives include the work of the Tangentyere Council in Alice Springs, and the Community Justice Panels which operate in Echuca, Victoria. All three programs are discussed by Commissioner Johnston: *supra* note 4, vol. 4 at 85-108.

the problem. Councillors are able to speak to Aboriginal people and reprimand them with success.¹⁹⁷

Community involvement needs also to be encouraged at the other end of the criminal justice system, in (an obviously somewhat belated) response to the massive over-representation of Aborigines in Australian prisons. Effective diversionary programs may be especially appropriate for Aboriginal offenders given the strong evidence that the formal criminal justice agencies simply do not provide an effective deterrent to Aboriginal crime.¹⁹⁸

As Hazlehurst states:

In the light of the expenditure of public funds in accommodating of Aboriginal offenders in corrective institutions there is clear justification for the investigation of a range of alternative mechanisms which might also incorporate some degree of offender accountability towards his home community or neighbourhood.¹⁹⁹

The existence of informal structures for social order in Aboriginal communities, including the various traditional sanctions discussed in relation to the Yirrkala proposals, may provide an established and functional process to which many Aboriginal offenders could be diverted, thus avoiding to a large extent the experience of routine contact with the formal criminal justice system.

The specialised community service program for Aborigines which has been introduced by the South Australian Department of Correctional Services in recent years²⁰⁰ is a practical example of the direction which needs to be pursued in response to the currently unacceptable levels and conditions of Aboriginal incarceration. While such programs are to be encouraged, pre-trial diversionary schemes linked to other community justice strategies would be perhaps the most constructive way in which diversion could be introduced as a major policy within the criminal justice system, particularly where Aboriginal offenders are involved.²⁰¹ In this process, mediation,²⁰² both

¹⁹⁷ *Supra* note 4, vol. 4 at 91-92.

¹⁹⁸ See the discussion above at the text accompanying notes 53-57.

¹⁹⁹ *Supra* note 193 at 265.

²⁰⁰ J. Maloney, "The Aboriginal Community Service Program S.A." (1990) 45 A.L.B. 6.

²⁰¹ *Supra* note 193 at 269-270; also K.M. Hazlehurst, *Aboriginal Incarceration: Pre-Release and Diversionary Programs* (Canberra: Australian Institute of Criminology, 1985).

²⁰² See Miller, *supra* note 182 at 11.

as a way of settling disputes and of determining an appropriate sanction where a breach of the law has been established, can play an important role in injecting community attitudes and values into the justice administration process.

Again, the emphasis must be on encouraging Aboriginal autonomy. As Hazlehurst puts it:

If alternative dispute resolution mechanisms are to be established in Aboriginal communities as a means of diverting relatively minor problems away from the formal justice system and into the hands of the community itself, the principle of self-determination and dispute ownership must be embedded in the structure of such initiatives.²⁰³

While there are strong grounds for asserting a wider scope for community justice programs than Hazlehurst advocates here, her identification of the need to focus on self-determination is absolutely crucial to the success of any such proposals.

During the last decade it has become increasingly apparent that genuine self-determination is the fundamental ambition of many Aboriginal people. The pursuit of this goal at the international level, and the prospects for its achievement in Australia's domestic sphere will be discussed in Section V below. First however, I would like to turn to the recently released final report of the Royal Commission into Aboriginal Deaths in Custody, which in its comprehensive recommendations, provides a significant, if not entirely satisfactory, link between the tragedy of Aboriginal over-representation and suffering within the criminal justice system and the importance of self-determination as the core of all "solutions."

C. National Report of the Royal Commission into Aboriginal Deaths in Custody

In May 1991 the Australian Minister for Aboriginal Affairs, tabled in Federal Parliament the *National Report of the Royal Commission into Aboriginal Deaths in Custody*,²⁰⁴ an investigation of 99 specific cases involving the death of an Aboriginal person while in custody, as well as a comprehensive analysis of the underlying issues associated with Aboriginal contact with the criminal justice system.

²⁰³ *Supra* note 142 at 311.

²⁰⁴ *Supra* note 4.

The 11 volume final report²⁰⁵ of the Royal Commission into Aboriginal Deaths in Custody was released after a process lasting three years during which the Commission conducted investigations and public hearings in relation to more than 120 deaths,²⁰⁶ received numerous submissions from Aboriginal and non-Aboriginal individuals and organizations, and conducted research on a range of issues relevant to Aboriginal contact with the criminal justice system.

In the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Commissioner Johnston produced 339 recommendations for adoption and ultimately, implementation by the federal, state and territory governments.²⁰⁷ The breadth of these recommendations reflects the wide terms of reference which the Royal Commission was given. By Letters Patent,²⁰⁸ the Commission was instructed to:

(i) inquire into all deaths considered to fall within its jurisdiction and to enquire also into "any subsequent action taken in respect of each of those deaths including ... the conduct of coronial, police and other inquiries and any other things that were not done but ought to have been done"; and

(ii) "... for the purpose of reporting on any underlying issues, associated with those deaths, you are authorised to take account of social and cultural and legal factors which, in your judgment, appear to have a bearing on those deaths."

Chief Commissioner Elliott Johnston devoted five volumes to confronting, explaining, and mapping a chart for altering, the pattern of Aboriginal suffering at the hands of Australian police, courts and prisons. The *National Report of the Royal Commission into Aboriginal*

²⁰⁵ A twelfth summary report was later released. See E. Johnston, *Royal Commission into Aboriginal Deaths in Custody — National Report: Overview and Recommendations* (Canberra: Australian Government Publishing Service, 1991).

²⁰⁶ 99 of those deaths were considered to be within the jurisdiction of the Commission and were the subject of separate reports: *supra* note 4, vol. 5 at 147.

²⁰⁷ Commissioner Johnston's final report consisted of five volumes. The other six volumes are regional reports prepared by individual Commissioners, which deal with a particular state or states. For example, Commissioner Wootten completed the *Regional Report of Inquiry in New South Wales, Victoria and Tasmania — Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991); and Commissioner O'Dea was responsible for the *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia — Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, 1991).

²⁰⁸ See "Consolidated Letters Patent of Commissioners": *supra* note 4, vol. 5 at 165 (App. A (III)).

Deaths in Custody contains a broad range of recommendations,²⁰⁹ but three primary emphases can be identified:

- (i) the specific issue of deaths in custody;
- (ii) the frequency and circumstances of Aboriginal contact with the various agencies of the criminal justice system, from police intervention to incarceration; and
- (iii) the underlying issues which, according to the Commission, may explain "what it is about the interaction of Aboriginal people with the non-Aboriginal society which so strongly predisposes Aboriginal people to arrest and imprisonment."²¹⁰

In the first category, the Commission made recommendations dealing with procedures for police investigations and coronial inquiries into deaths in custody, the need for uniform collection of statistics on persons in custody, and detailed recommendations relating to custodial conditions and the treatment of detainees, including the delivery of health services.

In the second category, the Commission made a number of recommendations designed to reduce both the rate and impact of Aboriginal arrest and incarceration. Police training and methods received a good deal of attention, particularly in relation to the use of para-military forces.

Several recommendations reflected the aim of diverting Aboriginals — and particularly those that are being held as a result of public drunkenness — from police custody. Specifically, it was recommended that "all Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders."²¹¹ Legislative amendments to facilitate greater access of Aboriginals to bail were recommended. The Commission also encouraged various community policing strategies, particularly those which involve direct participation by Aboriginal people. It recommended that community justice proposals receive adequate funding and that the Australian Law Reform Commission's recommendations on the recognition of customary law be implemented.²¹²

In relation to the sentencing of Aboriginal offenders, the Commission made several recommendations based on "the principle that

²⁰⁹ See generally *supra* note 205.

²¹⁰ *Supra* note 4, vol. 5, "30 March Report" at 147.

²¹¹ *Ibid.* at 87.

²¹² See the discussion above in Section IV, part A.

imprisonment should be utilized only as a sanction of last resort.²¹³ These included proposals for the training of Court and Probation and Parole Service Officers in Aboriginal society, customs and traditions, the consultation of community members before determining sentence in cases where the defendant is from a discrete or remote community, and expansion of the range of non-custodial sentencing options and of pre-release and post-release support schemes, and the encouragement of Aboriginal community participation in community service programs. Other recommendations were aimed at alleviating the particularly damaging impact of imprisonment on many Aboriginals, by stressing the value of detaining prisoners in a prison close to families wherever possible, recognizing the importance of encouraging the maintenance of kinship and other family obligations, providing a more adequate and accessible complaints procedure, and increasing the availability of skills training and general educational facilities.

The third group of recommendations made by the Commission represents an attempt to confront and improve the underlying social, economic and political conditions which are seen as contributing heavily to the level of Aboriginal over-representation in the criminal justice system. The Commission made both broad policy recommendations and particular program proposals designed to improve the prospects of Aboriginal youth (both in relation to the justice system, and in the community generally), and to encourage strategies for dealing with Aboriginal health and the problems of excessive alcohol consumption and drug dependence, educational opportunities and the state of housing and infrastructure in Aboriginal communities.

Significantly, in the context of this examination of "underlying issues," the Commission stressed the importance of Aboriginal political activity and economic management in all areas of what were formerly seen as federal or state governments' "Aboriginal affairs." In particular, it recommended:

That government negotiate with appropriate Aboriginal organizations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that *the self-determination principle* is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.²¹⁴

²¹³ *Supra* note 4, vol. 3 at 64.

²¹⁴ *Ibid.* vol. 4 at 7.

Formal recognition that self-determination is “central to the achievement of the profound change which is required in the area of Aboriginal affairs,” represents, along with the emphasis on “addressing land needs,”²¹⁵ one of the most significant features of the Commission’s recommendations. The difficulty, and the Commission does not fail to recognise this problem, is that “little agreement exists as to the definition of self-determination and the processes available to implement a policy of enhanced levels of self-determination.”²¹⁶ The term “self-determination” has been used to describe a range of situations from the principle (more accurately referred to as self-management) which has informed government policy in relation to “Aboriginal affairs,” at least since the 1970s,²¹⁷ through to the right of self-determination under international law, which gives “all peoples” the right to “freely determine their political status and freely pursue their economic, social and cultural development.”²¹⁸

While describing self-determination as an “evolving concept,” the Commission identifies a “solid core of common ground” on the basis of its consideration of a number of perspectives including a recent report of the House of Representatives Standing Committee on Aboriginal Affairs²¹⁹ and submissions by NAILSS,²²⁰ and the Aboriginal Law Centre, University of New South Wales.²²¹ According to the Commission, this common ground covers three “crucial points”:

(i) that Aboriginal people have the control “over the decision-making process as well as control over the ultimate decisions about a wide

²¹⁵ *Ibid.* vol. 5, c. 37.

²¹⁶ *Ibid.* vol. 4 at 5.

²¹⁷ For a history of the Aboriginal affairs policies applied by federal governments see *supra* note 4, vol. 2 at 510–541; and McRae *et al.*, *supra* note 181 at 9–32. At the state level, see for example, N. Parbury, *Survival: A History of Aboriginal Life in New South Wales* (Sydney: New South Wales Ministry of Aboriginal Affairs, 1986).

²¹⁸ Article 1 of the *International Covenant on Economic, Social and Cultural Rights* 1966 and art. 1 of the *International Covenant on Civil and Political Rights* 1966.

²¹⁹ Australia, House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control Management and Resources* (Canberra: Australian Government Publishing Service, 1990).

²²⁰ National Aboriginal and Islander Legal Services Secretariat, *Stopping the Deaths: A Spectrum of Possibilities for Self-Determination* Submission to the Royal Commission into Aboriginal Deaths in Custody, 1991); also S. Pritchard, *Self-Determination: The Rights of Indigenous Peoples Under International Law* (Submission prepared on behalf of NAILSS for the Royal Commission into Aboriginal Deaths in Custody, 1990).

²²¹ Hookey, *supra* note 6.

range of matters including political status, and economic, social and cultural development ...”;

(ii) that for Aboriginal people “an economic base is provided to the indigenous self-determining people”; and

(iii) that Aboriginal people have the right to make the choice as between the “spectrum of possibilities” in terms of political status.²²²

In its identification of a “common core of agreement” the Commission has attempted to reconcile some quite divergent positions on the degree of political autonomy and capacity for self-government which the principle of self-determination should allow Aborigines. But by its endorsement of a position which limits the political options available to Aborigines, the Commission has failed to take account of the strong evidence which supports the entitlement of Aboriginal people to self-determination, not simply as an enlightened or otherwise desirable form of government paternalism, but as the most fundamental collective human right under international law.

Many Aboriginal people initially expressed disappointment that the Royal Commission failed to recommend that criminal charges be laid against those individuals alleged to be responsible for the deaths of Aboriginal people.²²³ Shortly after the release of the report, Helen Corbett, Chair of the National Committee to Defend Black Rights (NCDBR), stated that “[t]he Commission has failed to bring to justice those responsible for the deaths of our people in custody.”²²⁴ While feeling, in this context, that they have again been denied justice by non-Aboriginal Australia, Aboriginal people have not turned their backs on those recommendations which the Royal Commission has made. For example, NCDBR stated its intention to “initiate a new national and international campaign in order to ensure they are implemented.”²²⁵

On 31 March 1992 the Government of Australia announced its decision to commit \$150 million (AUS) to support its first stage response to the *Report of the Royal Commission into Aboriginal Deaths in Custody*. Consistent with the breadth of the Royal Commission’s recom-

²²² Although the spectrum is limited by the Standing Committee to “within the legal structure common to all Australians”: *supra* note 219.

²²³ M. Paxman, “Suicide or Genocide?” *Vertigo* (May 1991) 10.

²²⁴ Quoted in C. Wockner, “It’s a Disgrace to the Nation” *The [Sydney] Daily Telegraph Mirror* (10 May 1991) 10; also T. Hewett, “Royal Commission Over But Questions Remain” *The Sydney Morning Herald* (10 May 1991) 4; and T. Hewett, “No Action on Cell-Death Findings” *The Sydney Morning Herald* (8 May 1991) 13.

²²⁵ Paxman, *supra* note 223.

mendations, the strategy adopted by the federal, state and territory governments targets a number of areas both within and outside the criminal justice system.²²⁶

Almost half of the financial support allocated will fund programs designed to address Aboriginal alcohol and substance abuse following the model established by the Central Australian Grog Strategy.²²⁷ Funding will also be provided for a range of other initiatives including plans to: assist state and territory governments to increase Aboriginal representation in police departments and other enforcement agencies; support an annual conference of all police services throughout the country to help improve "cross-cultural awareness",²²⁸ and to enable Aboriginal Legal Services to expand their activities into areas identified by the Royal Commission. Funding for the latter initiative has been described as "the central plank in the Government's strategy to reform the justice system and end the over-representation of Aborigines in custody."²²⁹

An Aboriginal Social Justice Unit to be established within the Human Rights Commission will oversee the implementation process, monitor the conditions of Aborigines and Torres Strait Islanders, and release an annual report to be tabled in Federal Parliament.²³⁰ The Minister for Aboriginal Affairs stated:

By providing the annual State of the Nation Report ... the [Human Rights Commission] will be acting as a watchdog over the nation in its achievement of the social justice objective of the process of reconciliation over the coming nine years leading to the centenary of Federation.²³¹

The federal government's Aboriginal justice strategy has been applauded for reflecting a serious commitment to implementing the

²²⁶ See Government of Australia, *Aboriginal Deaths in Custody: Overview of the Response by Governments to the Royal Commission* (Canberra: Australian Government Publishing Service, 1992).

²²⁷ M. Millett, "Drug-Alcohol Misery Targeted" *The Sydney Morning Herald* (1 April 1992) 4.

²²⁸ M. Millett, "\$5 Million To Be Spent on Better Link With Police" *The Sydney Morning Herald* (1 April 1992) 4.

²²⁹ S. Kirk, "Legal Aid Build-Up Central to Reform" *The Sydney Morning Herald* (1 April 1992) 4.

²³⁰ For a discussion of other monitoring arrangements, see *supra* note 226 at 54-58.

²³¹ M. Millett, "Rights Body to Monitor Progress" *The Sydney Morning Herald* (1 April 1992) 4.

recommendations of the Royal Commission. However, a *Sydney Morning Herald* editorial²³² questioned "whether the Federal Government has chosen the right measures" to alleviate the conditions which has tragically resulted in so many Aboriginal deaths in custody?²³³ With specific reference to the government's plan for confronting alcohol abuse, the editorial states:

Empowerment is ... the key to this and many other problems in the Aboriginal community. And, clearly, empowerment is not complete unless backed by adequate funds. But the mere provision of funds is potentially useless unless accompanied by measures that do indeed empower Aborigines to take matters into their own hands. Such measures need not in fact involve money at all, but simply give authority to Aboriginal communities through legislation, for example, to make their own rules excluding the sale and purchase of alcohol within their communities.²³⁴

In the final section of this paper, the broader question of Aboriginal self-determination will be addressed. It should be noted by way of introduction to this discussion that one of the strongest motivations for this direction is the absolute necessity of Aboriginal autonomy in relation to matters which are, for the most part, currently dealt with by the formal justice system with disastrous consequences. In particular, attention will be turned to the international law forum, which appears to have received only limited attention in the *National Report of the Royal Commission into Aboriginal Deaths in Custody*, despite the report's constant references to Aboriginal self-determination as the ultimate solution to the multitude of problems which are currently manifested in the gross over-representation of Aborigines within the criminal justice system.

But self-determination must mean more than mere self-management. It must involve a genuine recognition and exercise of the autonomy rights of Aboriginal people. Only by pursuing this course of action will the fallout from two centuries of oppression under an imposed legal system begin to be confronted and ameliorated.

Claims by Aboriginal people to a right of self-determination are accurately described as a radical response, but the decades of tinkering with the criminal justice system are testimony to the fact

²³² "Aborigines: Not Just Money" (1 April 1992) 14.

²³³ *Ibid.* The article states that a further 25 Aborigines have been found dead in Australian jails since the May 1989 date which bounded the Royal Commission's mandate.

²³⁴ *Ibid.*

that minor adjustments are simply insufficient to protect the basic human rights of Aboriginal people.

V. ABORIGINAL PEOPLES IN AUSTRALIA AND THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW

DURING THE 1980S, AGITATION for constructive solutions in relation to many aspects of Aboriginal life, including the crisis of massive over-representation in the criminal justice system, have been strengthened by the emergence of a new impetus for the political struggle of Australian Aborigines and a new focus in Aboriginal-government relations. This development has taken place not only in Australia, but in many countries where indigenous peoples continue to fight for recognition. At the core of this new strategy is the desire of Aboriginal peoples to assert their right to autonomy: to control their lives in a way that has been consistently denied them since the commencement of the white invasion.

As the Chair Rapporteur of the United Nations Working Group on Indigenous Populations commented during a visit to Australia in 1987, various labels are employed in an effort to describe this desired status, but in essence, "it must mean effective control by the Indigenous Peoples over their own destiny as it relates to their survival and their identity."²³⁵ In relation to the enormous problems that arise in the context of Aboriginal contact with the criminal justice system, these objectives necessarily go far beyond calls for reforms to policing practices, improved court procedures, and greater sentencing alternatives, and reflect aspirations for a level of autonomy that exceeds the recognition of customary law and isolated community justice mechanisms with limited decision-making capacity.

Further, Aboriginal assertions of the right of self-determination reinforce the strategy adopted by the Royal Commission Into Aboriginal Deaths in Custody of addressing the underlying social, economic and political issues which are manifested in the context of Aboriginal contact with the criminal justice system. In particular, they are based on a recognition that no amount of "reforming" the criminal justice system to take account of the various difficulties and forms of discrimination which Aborigines face, will "solve" the basic contradiction of attempting to achieve justice for Aborigines in the context of an

²³⁵ Address by Professor Erica Irene Daes at a reception at the New South Wales Premier's Department (Sydney, 14 December 1987).

imposed legal system. To this end, acceptance of the right of Aboriginal people to develop and implement their own solutions is crucial.

In this respect there is a direct link between the consistent failure of white Australia to come to terms with the overwhelming evidence of Aboriginal suffering within the criminal justice system as described here, and Aboriginal efforts to assert their right of self-determination. This connection was illustrated in a submission to the Royal Commission into Aboriginal Deaths in Custody prepared by Sarah Pritchard on behalf of the National Aboriginal and Islander Legal Services Secretariat:

It is NAILSS' thesis that the phenomenon of deaths in custody is directly linked to the past and continuing denial to Aboriginal and Islander Peoples of their right of self-determination.²³⁶

Attempts by Aboriginal peoples in Australia to assert a broad Aboriginal right to autonomy have traditionally been stifled by the purported prerequisite of first establishing the indigenous peoples' sovereignty as an independent nation. Consequently, in Australia, autonomy claims have tended to be considered as based on something of a "dead-end" argument given both the High Court's position that the question of unextinguished and continuing Aboriginal sovereignty is non-justiciable²³⁷ and the credence which Australian courts generally have, until recently, insisted on giving to the fiction of "*terra nullius*," particularly in the context of Aboriginal land rights at common law.²³⁸ In June 1992 the High Court of Australia issued its long-awaited decision in the case of *Mabo v. Queensland*.²³⁹ By a six to one majority the High Court held that Australian common law recognises a form of native title, which, where it has not be extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.

²³⁶ Pritchard, *supra* note 220 at 2.

²³⁷ *Coe v. Commonwealth of Australia* (1978) 13 A.L.R. 592, (1979) 24 A.L.R. 118.

²³⁸ For more than 20 years the leading Australian authority on this issue was a decision of the Northern Territory Supreme Court. In *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141, Blackburn J. refused to uphold a claim by the Yirrkala people that they held legal title in traditional lands on the Gove peninsula in the Northern Territory. Following this decision the British common law interpretation of *terra nullius*, though widely criticised, continued to stifle Aboriginal claims to sovereignty and/or land title.

²³⁹ (1992) 66 A.L.J.R. 408.

According to Brennan J. (with whom Mason C.J. and McHugh J. agreed)

[T]he common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty ... It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.²⁴⁰

A detailed analysis of this decision is not possible here, but preliminary assessments indicate that the decision in *Mabo* signals a new era for Aboriginal rights in Australia.²⁴¹

A. Indigenous Peoples and Self-Determination

More recently, indigenous peoples have turned, as an alternative foundation for their claims to autonomy, to the human rights which are protected by international law, and in particular, the collective right of self-determination.²⁴² This shift carries some considerable significance because as Russell Barsh has pointed out, a valid exercise of the right to self-determination is not dependent on the recognition of that people's sovereignty. The historical status which white Australia has endeavoured to impose on Aboriginal peoples is irrelevant under international law.²⁴³

²⁴⁰ *Ibid.* at 429.

²⁴¹ See for example, B. Keon-Cohen, "Case Note: *Eddie Mabo and Ors v. The State of Queensland*" (1992) 56 A.L.B. 22.

²⁴² According to art. 1 of the *International Covenant on Economic, Social and Cultural Rights*: "All 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." This paragraph is repeated in art. 1 of the *International Covenant on Civil and Political Rights*.

²⁴³ R.L. Barsh, "Aboriginal Rights, Human Rights and International Law" (1984) 2 *Austl. Aboriginal Stud.* 2 at 4. See also R.L. Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law" in B. Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney: Law Book Company, 1988) 68 at 71. This argument does not, of course, involve a rejection of the validity of Aboriginal claims to sovereignty, but is designed simply to rebut the erroneous presumption that self-determination is inherently synonymous with sovereignty, or that the latter is a precondition for a legi-

While the "sovereignty issue" in Australia does not in itself preclude a valid assertion by Aborigines of a right to self-determination, there are more fundamental obstacles to such a course of action, not the least of which is the narrow interpretation which has traditionally been given to the international law concept of self-determination. Since the international human rights system began to take shape in the post-World War Two era, there has been considerable disagreement on the question of whether the right of self-determination can be asserted by an indigenous people living within the boundaries of a recognised sovereign state. In particular, the scope of self-determination as an international human right has been severely limited by the "salt-water doctrine" (a presumption that only non-self-governing colonial territories, separated by water from the colonial power are entitled to exercise the right of self-determination)²⁴⁴ and the principles supporting the integrity of state boundaries. In 1986 the Australian Law Reform Commission stated that:

The dominant view is that the principle of self-determination in art. 1 [of the Civil and Political Rights Covenant of 1966] has no application to indigenous or other minorities.²⁴⁵

More recently (and the establishment of the United Nations Working Group on Indigenous Populations in 1981 reflects this trend), indigenous groups around the world have begun to argue convincingly for a wider application of the right of self-determination, on the basis that it is, as described in the 1984 Martinez-Cobo Report,²⁴⁶ "the

timate exercise of the former. Indeed, there is strong evidence to support the proposition that Aboriginal sovereignty and title were never surrendered or extinguished. For a summary of this position see H. Reynolds, "A Just Settlement" (1988) 33 A.L.B. 7. The interrelation between the concepts of sovereignty and self-determination is discussed in J.H. Clinebell & J. Thomson, "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law" (1978) 27 Buffalo L. Rev. 669. See Pritchard, *supra* note 220 at 109-110.

²⁴⁴ For a discussion of this particular legal fiction, see P.M. Ditton, *The Aboriginal Way Forward: Reverse Discrimination or Self-Determination?* (LL.M. Thesis, Australian National University) [unpublished] at 90; and Pritchard, *supra* note 220 at 104.

²⁴⁵ ALRC Report, *supra* note 85, para. 172.

²⁴⁶ J.R. Martinez-Cobo, *Study of the Problem of Discrimination against Indigenous Populations*. UN Doc. E/CN.4/Sub.2/1986/7 & Adds 1-4 (1986).

basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."²⁴⁷

A further barrier which Aboriginal peoples have encountered in their attempts to gain international law support for their autonomy claims is a product of the wording of Art. 1 of the 1966 Covenants which asserts that "all peoples" have "the right of self-determination." As Makinson has stated, "[t]he first and most obvious problems faced by [rights attributed universally to peoples] is that there is no reasonably clear and agreed account of what "peoples" are."²⁴⁸

The meaning of "peoples" is likely to continue to be the subject of debate in international jurisprudential circles. The traditional reluctance of recognised states such as Australia to accept that indigenous communities including Australian Aborigines are a "people" for the purposes of asserting international law rights, is also unlikely to be overcome in the short term. However, the "simple premise" on which all discussions and initiatives in relation to Aboriginal political empowerment must be based is, as Paul Coe has asserted, that "two points are very important: one, we are people; two, as people, we are legitimate subjects of international law."²⁴⁹

Increasing acceptance of the entitlement of indigenous peoples to assert their right of self-determination has also been facilitated by an elaboration of the forms which self-determination might take. The creation of the "salt-water" restriction was linked closely to the assumption that a valid exercise of self-determination inevitably meant complete political independence for the indigenous people concerned: a scenario that existing states, not surprisingly, find unacceptable given their concern for territorial integrity. As Hannum has observed:

While it is appropriate to focus on secession as the ultimate expression of the right of self-determination, it is precisely this focus that has led states to reject categorically any

²⁴⁷ Cited in Ditton, *supra* note 244 at 90. The emergence of an international indigenous lobby is described in Pritchard, *supra* note 220 at 24-29.

²⁴⁸ D. Makinson, "On Attributing Rights To All Peoples: Some Logical Questions" (1989) 8 *Law & Phil.* 53. See generally, J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988); and A. Cassese, "The Self-Determination of People" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 92.

²⁴⁹ P. Coe, "We Are People" in J. Ferguson, ed., *Aboriginal Peoples and Treaties* (Seminar Report, 11 February 1989) (Sponsored by the Aboriginal Law Centre and the International Law Association, 1989) at 111.

suggestion of 'self-determination' for minority or indigenous peoples within their jurisdiction.²⁵⁰

While the crucial element must always be that the indigenous people freely chooses its political status, it is being recognised that this status may range from complete independence to various forms of "internal self-determination" including aboriginal self-government within a federal system,²⁵¹ and indeed, may have to be chosen from a more limited "sub-set" of the various forms of political organisation which might otherwise be available. The focus must be on attaining a level of political autonomy that, according to Art. 1 of both major human rights covenants, will allow the people under consideration to "freely pursue their economic, social and cultural development."

Nettheim has recently articulated, in the context of a discussion of the rights of indigenous peoples, a theory first advanced by Pomerance²⁵² which asserts that "self-determination ... is a process, not one particular outcome of that process."²⁵³ On this basis, Nettheim argues that international law should be capable of satisfying the autonomy claims of indigenous peoples by supporting

a concept of self-determination which, while not embracing the possibility of complete independence against the wish of the encompassing national State, does permit as wide a range of other forms of association as the self-determining people might select.²⁵⁴

According to Makinson this "radical reinterpretation of the notion of self-determination" provides a "coherent way out of the impasse" which has developed out of the "head-on contradiction" between the right of all people to self-determination and the "internationally

²⁵⁰ H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 473.

²⁵¹ For a discussion of this form of indigenous political autonomy see B.W. Hodgins, J.S. Milloy & K.J. Maddock, "Aboriginal Self-Government: Another Level or Order in Canadian and Australian Federalism" in B.W. Hodgins *et al.*, eds., *Federalism in Canada and Australia: Historical Perspectives, 1920-1988* (Peterborough: The Frost Centre for Canadian Heritage and Development Studies, Trent University, 1989) 452.

²⁵² M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations* (The Hague: Martinus Nijhoff, 1982).

²⁵³ G. Nettheim, "Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 107 at 119.

²⁵⁴ *Ibid.* at 120.

recognised texts prohibiting secession."²⁵⁵ Further, this focus on the procedural essence of the right of self-determination has helped to clarify the significant differences between sovereignty and self-determination. As Clinebell and Thomson have argued:

Sovereignty and self-determination represent two different categories of legal principles. Sovereignty is a substantial legal status that defines one of the many types of states found in the international community. Self-determination is more in the nature of a procedural mechanism which allows those groups of people who meet certain qualifications to choose among the various international legal statuses, of which sovereignty is one.²⁵⁶

To ascribe the collective right of self-determination with both conceptual flexibility and the practical capacity for adaptation to specific circumstances is, from the perspective of the underlying rationale for the international human rights system, a far more acceptable approach than the artificial interpretation which has traditionally rendered it "off-limits" to aboriginal peoples.²⁵⁷

An alternative basis on which to resolve the "head-on contradiction" identified by Makinson, has been advanced by both Crawford²⁵⁸ and Barsh.²⁵⁹ While recognising the approach as "acutely controversial," Crawford has suggested that it may be possible to characterise "entities" which are part of a metropolitan state (arguably including groups such as Aborigines in Australia) as a "unit" entitled to self-determination. The basis of this entitlement would be — and this involves an extrapolation of Crawford's argument to the context of indigenous minorities — that Aborigines have been so badly governed and consistently denied fundamental human rights by non-Aboriginal

²⁵⁵ Makinson cites as an example, art. 6 of the *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations": *supra* note 248 at 59.

²⁵⁶ *Supra* note 243 at 713. See further, N. Berman, "Sovereignty in Abeyance: Self-Determination and International Law" (1988) 7 *Wis. Int'l L.J.* 51.

²⁵⁷ Suzuki has suggested that in international human rights law generally, the principles of "territorial integrity" and "domestic jurisdiction" are subservient to the overriding concern with human dignity. See E. Suzuki, "Self-Determination and the World Public Order" (1976) 16 *Va. J. Int'l L.* 779 at 848.

²⁵⁸ J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979).

²⁵⁹ Barsh (1984), *supra* note 243.

Australia that they can, in effect, be considered as non-self governing territories.²⁶⁰

In the context of a discussion of the relationship between self-determination and international order, Barsh has advanced a similar thesis which argues that gross violations of human rights (including genocide in Australia, and possibly the institutionalised racism and discrimination which occurs in the context of the criminal justice system) may provide the justification for the dissociation or political separation of a minority people from the sovereign state.²⁶¹

While Aboriginal assertions based on these arguments are likely to meet with fierce resistance from existing states (and particularly those with oppressed indigenous populations), their novelty reinforces the fact that international law is capable of meeting the autonomy claims of indigenous peoples, and that "it is the implementation of the law which blocks them."²⁶²

B. Australian Developments Based on the Policy of "Self-Determination"

The involvement of Australian Aboriginal organisations²⁶³ in the international push for recognition of indigenous rights,²⁶⁴ the transformation of the Federal Department of Aboriginal Affairs into an elected Aboriginal and Torres Strait Islanders Commission (ATSIC)²⁶⁵ and the federal government's recent decision to establish a Council for Aboriginal Reconciliation,²⁶⁶ all point to an increased focus on Aboriginal autonomy claims as Australia moves towards the centenary of federation. However, while these two government "initiatives" have deliberately been structured so as to facilitate the participation of Aboriginal representatives in recommendation and decision-making processes, the source of the power which they purport

²⁶⁰ Crawford, *supra* note 258 at 100-101.

²⁶¹ Barsh (1984), *supra* note 243 at 3.

²⁶² G. Nettheim, "Indigenous Rights, Human Rights and Australia" (1987) 61 *Austl. L.J.* 291 at 297. For an elaboration of the concept of the autonomy rights of indigenous and minority groups, see Hannum, *supra* note 250 at 453-477.

²⁶³ See M. Langton, "The United Nations and Indigenous Minorities: A Report on the United Nations Working Group on Indigenous Populations" in B. Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney: Law Book Company, 1988) 83.

²⁶⁴ See discussion below in Section V, part D.

²⁶⁵ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth.).

²⁶⁶ *Council for Aboriginal Reconciliation Act 1991* (Cth.).

or propose to offer to Aborigines must raise serious doubts about their capacity to contribute to achieving the Aboriginal aim of self-determination. There must be serious doubts as to whether they represent anything more constructive than a decision by the Federal Government to continue to formulate policy on the basis of the "slippery concept of 'self-management' " which has been described by Pritchard as "hopelessly inadequate ... as a theoretical base for Aboriginal aspirations."²⁶⁷

1. The Aboriginal and Torres Strait Islander Commission

In March 1990 ATSIC commenced operations with five interim commissioners appointed by Gerry Hand, the then Minister for Aboriginal Affairs. On November 3, 1990 some 38,000 Aborigines and Torres Strait Islanders participated in elections for representatives to ATSIC. Voters elected members of their own communities to 60 ATSIC regional councils consisting of a total of more than 800 Aboriginal councillors. When the current transitional period comes to an end later this year, ATSIC will have assumed the responsibilities of the Federal Department of Aboriginal Affairs and the Aboriginal Development Commission.

ATSIC has been described as

something rare in the Hawke government — a radical reform ... ATSIC will feature a novelty in Australian political life: special electoral machinery will give Aboriginal people powers not to advise on, but to determine public policy.²⁶⁸

The Royal Commission into Aboriginal Deaths in Custody described the significance of ATSIC in similar terms, commenting that "indigenous people have at last been given executive rather than advisory powers over Commonwealth programs dedicated to their welfare."²⁶⁹

However, some commentators have seen this "latest attempt to establish a national body to speak for black Australia"²⁷⁰ in rather less optimistic terms. For example, while applauding the establishment of community representation for Aboriginal and Islander people as "the most positive aspect of ATSIC,"²⁷¹ critics, including the

²⁶⁷ Pritchard, *supra* note 220 at 108.

²⁶⁸ T. Rowse, "The Revolution in Aboriginal Affairs" *Australian Society* (March 1990) 15.

²⁶⁹ *Supra* note 4, vol. 4, c. 27 "The Path to Self-Determination" at 6.

²⁷⁰ R. Callick, "Power and the Dreaming" *Time [Australia]* (19 November 1990) 36.

²⁷¹ FAIRA, "ATSIC: A Limited Step Forward?" (1990) 43 A.L.B. 7.

Foundation for Aboriginal and Islander Research Action (FAIRA), have expressed concern over the legislation's failure to establish "reasonable powers of Aboriginal and Torres Strait Islander decision-making."²⁷² An editorial in the Aboriginal Law Bulletin summarised the most disappointing aspect of the Commission: "[w]hile ATSIC incorporates a more democratic structure for the administration of Aboriginal affairs, its functions are essentially administrative and bureaucratic."²⁷³

Section 7(1) of the *ATSIC Act* describes the functions of the Commission. They include: formulating and implementing programs and policy proposals at regional, state and national levels to improve the economic, social and cultural status of Aboriginals, and making recommendations to the Minister with respect to the distribution of Commonwealth funding. Under the Act individual councillors assume more specific responsibilities in relation to individuals and communities in the region from which they were elected.

Frank Brennan has observed, that even for these quite limited gains in terms of Aboriginal political participation, there has been a substantial trade off.

Aborigines are to have greater power to set priorities and to administer their affairs but they are to be more closely scrutinised in their expenditure of Commonwealth Government funds. This trade off reveals the underlying philosophy of the legislation which is accountable self-management rather than self-determination.²⁷⁴

The greatest disappointment of ATSIC is that, whatever it might achieve in terms of Aboriginal input at the level of federal expenditure and policy development and genuine representation of local Aboriginal interests,²⁷⁵ its limited powers suggest that Federal Parliament has

²⁷² *Ibid.*

²⁷³ (1990) 43 A.L.B. 3.

²⁷⁴ F. Brennan, "ATSIC: Seeking A National Mouthpiece for Locals" (1990) 43 A.L.B. 4 at 5. In response to allegations of financial mismanagement within the former Aboriginal Development Commission, Mr. Hand told the Parliament in May 1989 that "[t]here is no other department or statutory authority in existence in the Commonwealth which will be as accountable as ATSIC": cited *ibid.*

²⁷⁵ Rowse, *supra* note 268 at 17, comments that: "[t]he most interesting and as-yet-unexplored potential of ATSIC is in the regional councils." However, one interesting criticism which has been made in relation to this aspect of ATSIC's structure is that it may have a negative effect on traditional Aboriginal authority mechanisms: "By its very nature, ATSIC, because it is electoral, plays down the influence of traditional Aboriginal leaders" — see F. Harari, "Black Power Test: Hand's Self-Management Plan For

neglected a major opportunity to display a commitment to the recognition of Aboriginal rights, including the fundamental right of self-determination. This failure is perhaps best illustrated in the gradual demise of the preamble contained in early drafts of the ATSIC legislation which referred to "the aims of self-determination and self-management for the Aboriginal and Torres Strait Islander peoples within the Australian nation" to the point where the Act was finally passed by a majority of the Parliament with no formal preamble and only a few mentions of the importance of encouraging "self-management" and "self-sufficiency."²⁷⁶

The Royal Commission into Aboriginal Deaths in Custody recently concluded that while "it operates within a number of constraints militating against this role, ... ATSIC has the potential to be a key vehicle for enhancing Aboriginal self-determination."²⁷⁷ In light of the criticisms which have been raised briefly here, and those which are discussed in more detail by the Commission,²⁷⁸ it is difficult to justify this optimism, other than on the basis that ATSIC "must be 'given a go'" because it "allows a significant devolving of decision making power to Aboriginal people over a range of issues which would otherwise be determined by non-Aboriginal people."²⁷⁹ Perhaps this type of rationale only serves to reinforce the extent of the Aboriginal need for genuine self-determination, as this concept has developed in international human rights law.

2. Council For Aboriginal Reconciliation

If ATSIC has fallen quite a way short in terms of realising the aspirations of Aboriginal people involved in the struggle for self-determination, the Federal Government's most recent proposal for the preparation of a formal "instrument of reconciliation" must be even more disappointing and indicative of the general refusal of white Australia to treat seriously Aboriginal claims for the recognition of their most fundamental human rights.

Late in 1990 the Prime Minister and the Minister for Aboriginal Affairs issued a joint statement proposing a "process of reconciliation"

Aborigines Runs Into Heavy Flak" *Time [Australia]* (8 May 1989) 52.

²⁷⁶ Callick, *supra* note 270 at 36. For a discussion of the debate over the ATSIC preamble, see Brennan & Crawford, *supra* note 134 at 149.

²⁷⁷ *Supra* note 4 vol. 4 at 5.

²⁷⁸ *Ibid.* at 5-12.

²⁷⁹ *Ibid.* at 9, 10.

between Aboriginals and Australians. In April 1991 the Minister, Mr. Robert Tickner, announced that a Council for Aboriginal Reconciliation would be established to facilitate this process.²⁸⁰ The primary functions of the Council, which will comprise 25 "prominent Aboriginal and non-Aboriginal Australians"²⁸¹ will involve implementing an extensive public awareness campaign, and after a period of community consultation, making recommendations to Parliament as to the appropriate form for an agreement of reconciliation. It is anticipated that the process will be completed by the centenary of Australian federation in 2001.

The central problem with "this proposal is that there are very strong grounds for arguing that a process of "reconciliation" is, by definition, inappropriate for the purposes of realizing Aboriginal aspirations to an exercise of self-determination. As Michael Mansell has recently observed, there is nothing that a process or an instrument of reconciliation could possibly achieve in terms of raising the awareness of non-Aboriginal Australians about the historical and contemporary treatment of Aboriginal people which is not available via public dissemination of the detailed and wide-ranging reports of the Royal Commission into Aboriginal Deaths in Custody.²⁸² The catalogue of woes has now been written, and a number of "reforms" have been recommended. The task now is to give Aboriginal people the opportunity to which they are entitled: to formulate their own solutions as part of an exercise of genuine autonomy. However, it is difficult to see how the signing of an instrument of reconciliation (assuming that the Council is successful in this respect) could contribute in any meaningful way to achieving the autonomy which Aboriginal people seek through their struggle for self-determination, which must be seen as the ultimate solution to the injustice which is currently routinely manifested in the statistics which measure Aboriginal contact with the criminal justice system.

To conceive of the commitment which white Australia must make as reconciliation, as opposed to a genuine recognition of fundamental

²⁸⁰ See R. Tickner, MHR, Minister for Aboriginal Affairs, *Aboriginal Reconciliation: A Discussion Paper* (1991).

²⁸¹ T. Hewett, "Awareness campaign to pave way for Aboriginal reconciliation" *The Sydney Morning Herald* (23 April 1991) 4; see also "Council for Aboriginal Reconciliation Revealed" (1992) 54 A.L.B. 2.

²⁸² M. Mansell, "Reconciliation: The Aboriginal Provisional Government's Point of View." Lecture delivered at the University of New South Wales (3 June 1991).

and existing Aboriginal rights,²⁸³ is to ignore the current international focus of Aboriginal political activities and the legitimacy which their claims are beginning to derive from the trend towards an extension of basic international human rights protections to all peoples including indigenous peoples. Indeed, an "instrument of reconciliation" of the type currently being considered would be incapable of taking account of the need for basic changes in the nature of Aboriginal/government relations in Australia. It would also amount to a refusal to recognise the importance of building major internal political changes, of the type envisaged by Aboriginal claims for autonomy or self-determination,²⁸⁴ on a solid irrevocable foundation rather than on the dangerously unstable platform of Parliamentary licence.²⁸⁵

3. *Identifying the Source of Aboriginal Rights*

One of the most fundamental problems in this area is the task of identifying the source of any proposed Aboriginal power such as the enforcement of autonomy rights. In the context of a discussion of the debate in Canada over the question of Aboriginal self-government, and in particular, the failure of the First Ministers Conference process (1983-1987) which attempted to achieve agreement on a constitutional amendment recognising the right of Aboriginal self-government, Hawkes concluded that few Canadians oppose the aim of encouraging self-sufficiency and greater control for aboriginal people, but

[w]hat is more contentious, however, is the source of these powers. Do they flow from inherent and unextinguished sovereignty, from existing treaty and aboriginal rights, or from federal and provincial governments? It was on this very question that the constitutional reform process on aboriginal rights foundered.²⁸⁶

²⁸³ Frank Brennan and James Crawford proposed in 1990, that an Aboriginal Recognition Commission be established, with the long term aim of presenting a draft "Charter for Aboriginal Recognition" at a conference of Prime Minister and Premiers in 1999, allowing 18 months for a referendum of approval: *supra* note 134 at 162-166.

²⁸⁴ See Pritchard, *supra* note 220 at 122-128.

²⁸⁵ Given the federal Liberal-National Coalition's hardline position on almost all issues Aboriginal, it is difficult to see how the bipartisan Parliamentary support that Brennan has described as essential to the success of any treaty/preamble/charter proposals dealing with Aboriginal entitlements, is going to be achieved within the parliamentary process: see F. Brennan, "Is A Bipartisan Approach Possible?" (1989) 14 *Legal Serv. Bull.* 66 at 67.

²⁸⁶ D.C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) at 365 [hereinafter *Exploring Federal and Provincial Roles*]. See also D.C. Hawkes, *Aboriginal Peoples and*

In Australia the difficult, but vital, task is to confront this dilemma and identify a foundation for Aboriginal powers of self-government which is acceptable to both Aboriginal peoples and state and federal governments, and ultimately, if recognition is to take the form of constitutional amendment,²⁸⁷ the majority of Australians.

The three potential sources suggested by Hawkes appear to be inadequate in the Australian context. First, as discussed earlier, there are substantial obstacles to arguing for autonomy based on unextinguished aboriginal sovereignty in Australia.²⁸⁸ Second, the nature of the white invasion was such that there are no treaty rights or other recognised aboriginal rights from which Australian Aborigines might now derive autonomy rights. Finally, to base a power as fundamental as the right to self-government purely on federal or state legislation is to leave Aboriginal peoples exposed to the possibility that the government may, at some undetermined time,²⁸⁹ withdraw support for what is effectively a revocable "gesture of good will" rather than an obligatory recognition of Aboriginal rights.²⁹⁰ Quite simply, this is

Constitutional Reform: What Have We Learned? (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989).

²⁸⁷ It appears that one of the strongest motivations for many people who advocated creation of the Council for Aboriginal Reconciliation is a genuine belief that a constitutional amendment entrenching some form of recognition of Aboriginal rights in the *Constitution Act 1901* (Cth.) can be achieved before the year 2001: see Brennan & Crawford, *supra* note 134 at 156.

²⁸⁸ Although this is exactly the assertion which Michael Mansell's Aboriginal Provisional Government made when it was established in July 1990. The APG represents the most radical exercise of self-determination so far seen in Australia, although it is probably not entirely accurate to identify the creation of an organisation of this type as a form of "self-determination" in the international law sense: see Australian Provisional Government Council, "Towards Aboriginal Sovereignty" (1990) 62 *Chain Reaction* 38. For a discussion of the steps which have traditionally been seen as necessary for a valid exercise of the right of self-determination see R. Emerson, "Self-Determination" (1971) 65 *AJIL* 459. It should be noted that as the substance of the right of self-determination develops, so too might the required procedure be amended.

²⁸⁹ A change of government is the most obvious scenario where this could occur. The policy of the National-Liberal Coalition is particularly worrying in this respect. For example, according to a recent report the Coalition's position in 1990 was that, if in government, it would "scrap ATSIC, immediately wind up the inquiry into deaths in custody and cut \$100 million from the Aboriginal affairs budget": see Callick, *supra* note 270 at 37.

²⁹⁰ This criticism has been levelled at the form of self-government exercised by the Sechelt Indian Band in British Columbia under the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27. See generally J.P. Taylor & G. Paget, "Federal/Provincial

an approach which is unlikely to be acceptable to Aboriginal people. Indeed, the critical response of many Aboriginal groups and individuals to the Minister's announcement of a draft "instrument of reconciliation" and indeed to the whole notion that "reconciliation" is an appropriate governmental response to contemporary Aboriginal concerns, highlights the importance of identifying an acceptable source for any move towards increased political power for Aboriginal people.

C. Building on an International Law Foundation

When federal government plans to create the Council for Aboriginal Reconciliation were recently announced, the Minister for Aboriginal Affairs commented that "[t]he rights of indigenous people are going to be much more in the international human rights spotlight. I don't have to talk up international concern."²⁹¹ Ironically, while Mr. Tickner's observation is entirely accurate, the manner in which his government appears willing to address Aboriginal grievances reflects a failure to comprehend or accept the pivotal nature of claims for self-determination in the indigenous struggle for internationally legitimated recognition. For it is within the domain of international human rights law that a powerful source for Aboriginal political autonomy might be found.

A comment made by the Canadian Parliamentary Standing Committee on Indian Affairs and Northern Development in its 1983 report, *Indian Self-Government in Canada*,²⁹² is particularly significant in this respect, and is equally relevant to the current situation of Aboriginal peoples in Australia:

The political status of indigenous peoples has already evolved substantially during this century — from colonial dependency to a recognition of human and political rights. Canada can resist this movement or it can offer leadership.²⁹³

While there are strong grounds for arguing that this basis already formally exists in the shape of the right of all peoples to self-determination, it is to be hoped that the efforts of the United Nations Work-

Responsibility and the Sechelt" in *Exploring Federal and Provincial Roles*, *supra* note 286, 297.

²⁹¹ Cited in Hewett, *supra* note 281 at 4.

²⁹² House of Commons, Special Committee on Indian Self-Government, *Report of the Special Committee on Indian Self-Government in Canada* (Ottawa: Supply and Services Canada, 1983).

²⁹³ *Ibid.* at 136.

ing Group on Indigenous Populations can produce an even more concrete, and undeniable basis for the assertion of aboriginal autonomy rights.

D. Developments in International Forums

Given the aspirations which are embodied in Aboriginal assertions of a right to self-determination, it is crucial that international law concepts and instruments be expanded to take account of the legitimate autonomy claims of indigenous peoples. Developments in this area have taken two quite divergent paths.²⁹⁴

International Labour Organization (ILO) Convention No. 107 was, until recently, the only international instrument to expressly address the question of indigenous rights. It was, however, largely unacceptable to Aboriginal groups because of its integrationist purpose.²⁹⁵ In June 1989 the International Labour Conference adopted the new Indigenous and Tribal Peoples' Convention (No. 169).²⁹⁶ Significantly, Convention No. 169 makes a reference to self-government as a form of internal autonomy, based on participation of indigenous people in national decision-making processes.²⁹⁷ However, this "right" seems to be more supportive of bodies such as ATSIC than the forms of genuine self-determination that many Aboriginal people seek. Moreover, the Convention has been widely criticised by indigenous groups for several reasons including its failure to reconcile the positions of state with many of the concerns of indigenous people.²⁹⁸ In 1988 the National Coalition of Aboriginal Organisations of Australia formally withdrew from the ILO revision process largely because of the refusal

²⁹⁴ For a summary of international law developments in relation to indigenous autonomy, see G. Nettheim, "International Law and Indigenous Political Rights: Yesterday, Today and Tomorrow." (Paper presented at the Indigenous Rights in the Pacific and North America Conference, London, 14-6 May 1991).

²⁹⁵ R.L. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 Okla. City U. L. Rev. 209.

²⁹⁶ *Ibid.* at 210-211.

²⁹⁷ Article 7.1 states: "The peoples concerned shall have the right to decide their own priorities for the process of development as it effects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development": *ibid.* at 221-222.

²⁹⁸ See comment on "ILO Convention 169" in (1989) 1 Without Prejudice 68.

of the Committee of Experts to encourage the direct involvement of indigenous people.²⁹⁹

Australian Aboriginal groups have tended to concentrate their efforts for international recognition of indigenous peoples, including the right of self-determination, on the United Nations Working Group on Indigenous Populations which was established by the Commission on Human Rights in 1981. Unlike the ILO review procedure, the Working Group has been described as "one of the most accessible entities in the United Nations ..."³⁰⁰ Aboriginal delegations, headed by NAILSS,³⁰¹ have regularly participated in the Working Group's activities.³⁰²

In January 1989, at the request of ECOSOC, a seminar on "the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and states" was held, during which questions of autonomy and self-determination were amongst the most important issues discussed. Significantly, in a report following the seminar, the current Chair of the United Nations Working Group on Indigenous Populations, suggested that there is a growing recognition at the international level of the flexibility of the concept of self-determination, and in particular, of the validity of indigenous claims for internal self-determination.³⁰³

²⁹⁹ Statement made by Geoff Clark, representing the National Coalition of Aboriginal Organisations, at the ILO Conference 1988, (1988) 34 A.L.B. 13. See generally, Ferguson, *supra* note 249 at 23-49. For a Canadian viewpoint on the failings of ILO 169, see S. Venne, "The New Language of Assimilation: A Brief Analysis of ILO Convention 169" (1989) 2 Without Prejudice 53.

³⁰⁰ Nettheim, *supra* note 262 at 298. See generally D. Sanders, "The UN Working Group on Indigenous Populations" (1989) 11 Hum. Rts. Q. 406; also C. Huntsman, "Experiencing the United Nations: A Perspective from an Indigenous Peoples' Organisation" (1989) 40 A.L.B. 7.

³⁰¹ NAILSS is a non-government organisation which has been granted consultative status with the Economic and Social Council under ECOSOC Resolution 1296.

³⁰² For a summary of the process of the Working Group and of the contents of the draft text up until 1989, see Ferguson, *supra* note 249 at 51-86. See also S. Houston, "Capturing the Clouds: Presentation by the National Aboriginal and Islander Health Organisation to the 7th Session of the Working Group on Indigenous Populations" (1989) 40 A.L.B. 6.

³⁰³ E.-I.A. Daes, "On the Relations between Indigenous Peoples and States" (1989) 2 Without Prejudice 41 at 47-48.

Since 1985 the Working Group has been primarily concerned with drafting a Universal Declaration on Universal Rights.³⁰⁴ Representatives of Canada's indigenous peoples have regularly participated in the Working Group's activities.³⁰⁵ At its ninth session in 1991, the Working Group considered a draft declaration which addresses a range of indigenous concerns including spiritual and religious traditions, control of education systems, the ownership and control of land, the recognition of indigenous laws and customs, social and economic programs and political participation.³⁰⁶ The key part of the declaration is a provision which guarantees the right of indigenous peoples to self-determination, which has long been the primary goal of indigenous organizations.³⁰⁷ Paragraph 1 of the 1991 draft states:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely

³⁰⁴ This followed a request by the Sub-Commission in 1984 that the Working Group "focus its attention on the preparation of standards on the rights of indigenous populations" and "to consider in 1985, the drafting of a body of principles on indigenous rights based on relevant national legislation, international instruments and other juridical criteria": Sub-Comm'n Res. 1984/35B (August 27). At its 4th session in 1985 the Working Group undertook to produce a draft declaration of indigenous rights for eventual adoption by the United Nations General Assembly: UN Doc.E/CN.4/Sub.2/1985-/2, Ann.II.

³⁰⁵ Indigenous non-government organisations which have been granted United Nations consultative status include the Inuit Circumpolar Conference and the Four Directions Council. The Working Group has also encouraged other organizations without formal consultative status to make oral and written contributions. Some 380 persons participated in the Working Group's 6th session in 1988, including representatives from over 70 indigenous organizations. See H. Hannum, *supra* note 250 at 84. One commentator recently observed that "indigenous peoples and their organisations have been extraordinarily successful in claiming the forum provided by the Working Group as their own": S. Pritchard, "UN Working Group on Indigenous Populations" (1992) 54 A.L.B. 13.

³⁰⁶ See *ibid.*

³⁰⁷ At its 6th session in 1988 the Working Group observed that "according to the overwhelming majority of indigenous representatives, self-determination and self-government should be amongst the fundamental principles of the draft declaration ... Many of the speakers underlined that it was essential for the draft declaration to guarantee in the strongest language possible free and genuine indigenous institutions": *Report of the Working Group on Indigenous Populations on Its Sixth Session*: UN Doc. E/CN.4/Sub.2/1988.

pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.³⁰⁸

It is expected that the final draft declaration will be completed by the Working Group in 1993, during the International Year for the World's Indigenous People.³⁰⁹ After obtaining the approval of the Sub-Commission, the draft will likely be considered by both the Human Rights Commission and ECOSOC before eventually coming before the General Assembly for proclamation as a Universal Declaration on the Rights of Indigenous Peoples.³¹⁰

It is difficult to avoid the fact that, within the United Nations system, indigenous groups must accept that member states will ultimately determine both the scope and the actual wording of the Declaration.³¹¹ Clearly, this places limitations on what indigenous people can hope to achieve directly from the Working Group process. For example, the expansive formulation of the right of self-determination contained in the World Council of Indigenous Peoples' Declaration of Principles, is unlikely to be endorsed by the wider international community.³¹² However, the progress which is currently being made towards the formulation of a solid instrument which has the potential to prove acceptable to the majority of the world's indigenous peoples, and the high level of participation of indigenous groups in the Working Group process, are encouraging indicators of the capacity of international law to provide a solid basis for Aboriginal assertions of their fundamental autonomy rights.

³⁰⁸ Report of the Working Group on Indigenous Populations on Its Ninth Session, E/CN.4/Sub.2/1991/40/Rev.1, Ann.IIA.

³⁰⁹ Designated by General Assembly Resolution 45/164 of December 18 1990, UN Doc. E/CN.4/Sub.2/1991/39.

³¹⁰ See D. Sanders, "Draft Universal Declaration on the Rights of Indigenous Peoples" [1992] 2 C.N.L.R. 1.

³¹¹ See T. Simpson, "The United Nations Working Group on Indigenous Populations" (1991) 48 A.L.B. 14. In terms of the likelihood of Australia's acceptance of the Declaration, Simpson reported that at the 8th session the Working Groups Chair expressed her gratitude to the Minister for Aboriginal Affairs, Mr. Tickner "for his active participation and positive contribution to the work of the Working Group."

³¹² See Hannum, *supra* note 250 at 95. WCIP Principle 1 states *inter alia* that "All indigenous nations and peoples have the right of self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference."

E. Prospects for Aboriginal Self-Government in Australia

It is probably fair to say that the concept of formal self-government for Australian Aborigines is still in its infancy in this country. Indeed, formal recognition in Australia of Aboriginal rights under international law may be some way off. Despite its identification of "self-determination" as the requisite feature of all government initiatives in relation to Aboriginal people, the Royal Commission into Aboriginal Deaths in Custody, gave only minimal attention to the potential of developments currently taking place with the United Nations Working Group on Indigenous Populations, describing these as "the development of international law at a very tentative stage."³¹³

While the prevailing political climate in Australia (an indication of which will come from the extent to which the Federal and State and Territory Governments adopt and implement the recommendations of the Royal Commission) will have a major impact on the practicality of any proposed initiatives, in theory, self-government may take any number of forms. It may, for example, take the form of a highly autonomous Aboriginal state forming part of the Commonwealth of Australia.³¹⁴ The transformation of the Northern Territory into a "Black Israel" was proposed under this model during the 1970s.³¹⁵ Alternatively, as the Northern Territory moves toward statehood, one strategy for realising Aboriginal aspirations in that part of Australia might be to formalise Aboriginal political participation in a new Northern Territory Constitution.³¹⁶ More localised forms of self-government may be more attractive to Aboriginal communities in various other parts of Australia, such as in the East Kimberley region or on Pitjanjatjara lands. Ultimately, non-Aboriginal Australia must accept that it is for Aboriginal people to decide which form of political orga-

³¹³ *Supra* note 4, vol. 5, c. 36, "Conforming With International Obligations" 43.

³¹⁴ Hodgins *et al.*, *supra* note 251 at 460. See also P. Jull, "Some Possible Options: A View From Overseas" *Land Rights News* (July 1989) 19.

³¹⁵ See S. Harris, *This Is Our Land* (Canberra: Australian National University Press, 1972) at 38; and K. Gilbert, *Because A White Man'll Never Do It* (Sydney: Angus & Robertson, 1973) at 179-180. See also R. Tonkinson & M. Howard, eds., *Going It Alone? Prospects For Aboriginal Autonomy* (Canberra: Aboriginal Studies Press, 1985).

³¹⁶ Jull, *supra* note 314. See also R. Gibbins, *Federalism in the Northern Territory: Statehood and Aboriginal Political Development* (Darwin: Australian National University North Australia Research Unit, 1988).

nisation they seek from an exercise of the right of self-determination.³¹⁷

A fundamental lesson which may be borrowed from the Canadian experience with self-government is that the most important task at this preliminary stage, is to establish a stable foundation on which the range of options can be rationally discussed. A crucial principle of this platform must be that Australian Aborigines have the right to assert their autonomy. Unfortunately, the Federal Government has consistently refused to appreciate or accept this entitlement. Recent initiatives, both in relation to the criminal justice system, and Aboriginal political activity generally, have tended to continue this pattern of denial. Consequently, Australian Aborigines have been forced to turn to other forums for a recognition of their autonomy rights.

As it happens, this appears to have been a highly constructive strategy which looks likely to come to fruition during the 1990s. Most importantly, current developments in the United Nations hold out the promise of providing indigenous peoples with a solid international law basis for asserting their right of self-determination. Armed with this international recognition, Australian Aborigines will be in a much stronger position to negotiate forms of self-government which will genuinely empower Aboriginal people to control their own lives in a whole range of fields which are currently subject to "management" by Federal, State and Territory Governments.

VI. CONCLUSION

THE EVIDENCE OF ABORIGINAL suffering at the hands of the formal criminal justice system is overwhelming and undeniable. While the discriminatory impact of the system is manifested in a number of ways, it is essentially the product of non-Aboriginal society's continuation of a historical process based on the imposition of alien values, concepts and structures that are fundamentally irrelevant — in cultural and legal terms — to Aboriginal people.

Recognition of the extent of Aboriginal suffering is now relatively widespread, as is the basic conviction that "something must be done!" Indeed, the last two decades have witnessed a range of "reforms" to the various agencies of criminal justice administration, designed to

³¹⁷ Pritchard, *supra* note 220 at 115, 122-128. It is encouraging that this is essentially the position taken by the Queensland Legislation Review Committee, *supra* note 183. See J. Huggins & L. Beacroft, "The Final Report: Recommendations of the Legislation Review Committee" (1992) 55 A.L.B. 8.

alleviate the conditions and frequency of Aboriginal contact with police, courts and prisons. Yet, while attempting to address the "problem," these methods have generally failed to produce any significant change in the destructive experience of Aboriginal people, as individuals and communities. Attempts to combat police racism, the introduction of special rules to "protect" Aborigines being interrogated by the police and examined by magistrates and lawyers, modification of substantive criminal law concepts in limited circumstances, and the decriminalisation of offences such as public drunkenness all represent specific responses to perceived "problem areas."

However, none of these "remedies" confronts the underlying problem which is vividly illustrated when Aboriginal people come into contact with the criminal justice system: Australian Aborigines are routinely denied the power to control their own lives. An acceptance that Aborigines are entitled to this type of autonomy is crucial if this basic human rights denial is to be seriously confronted.

Since the mid-1970s isolated strategies and proposals have been formulated, and occasionally implemented, on the basis that significant improvements in the "justice administration" experience of Aborigines will only result from a broad political acceptance of substantially greater levels of autonomy for Aboriginal communities, in relation to dispute resolution, and the organisation of social control mechanisms. In particular, initiatives based on the concept of "community justice" exhibit the value of seeking autonomy-based alternatives to a non-Aboriginal criminal justice system that is ill-equipped and unqualified for the role which it purports to play in relation to Aboriginal people.

As the Australian Law Reform Commission observed in the course of its detailed recommendations on the recognition of Aboriginal customary law, Aboriginal claims for such forms of autonomy are closely related to broader Aboriginal political aspirations for self-government.

Where the Law Reform Commission was unwilling to advocate and articulate the entitlement of Aboriginal people to genuine political autonomy in Australia, the international indigenous lobby has taken up this cause as the most fundamental issue facing both indigenous peoples throughout the world, and the states which have historically denied them the right of self-determination.

The success of developments currently taking shape within the United Nations is central to the political direction which Australian Aborigines have elected to pursue in recent years.

The focus of this strategy has been to assert a right, under international law, to the forms of autonomy which Aboriginal people consider necessary if the historical and contemporary experience of

subjugation, most painfully illustrated in the context of contact with the dominant criminal justice system, is to be rectified. From a human rights perspective, changes within the non-Aboriginal justice system in Australia have proven to be inadequate remedies. Aboriginal self-determination holds the promise of a providing a more enduring and constructive solution.