CHAPTER 6

FAMILY COUNSELLING AND CUSTOMARY LAW

6.1 The Committee paid particular attention to two recommendations of the Royal Commission which, in the Committee's view, had not been adequately responded to by the Commonwealth or state and territory governments. The responses to Recommendations 5 and 219 were seen as indicative of the lack of progress and the lack of urgency in the implementation of the recommendations of the Royal Commission. These two recommendations were quite specific in the outcomes that were required. Recommendation 5 involved family counselling, with Recommendation 219 relating to the recognition of Aboriginal customary laws. The responses to these Recommendations will be considered below.

Family Counselling

6.2 Although the *Interim Report* of the Royal Commission did not specifically recommend that families of those who died in custody should receive counselling, Commissioner Muirhead did consider that Aboriginal people with skills in this area could possibly assist affected family members:

> *I have spoken of the devastating effect of custodial deaths, the perpetuation of grief and other consequences. This is due in some measure to the fact that the deceased dies within the 'system', but the system continues to exercise control over the body in the exercise of post-death statutory procedures. Families excluded from participation often do not know where to turn. Aboriginal Legal Services do not always have the presence or facilities to assist in this situation. Aboriginal welfare officers, with access to the authorities and with understanding of procedures, could do much to alleviate anxiety. So also I consider the availability of Aboriginal people with some skills in counselling and familiarity with the techniques of grief counselling could make a valuable contribution in assisting close family members to readjust.*[1]

6.3 Recommendation 5 of the Royal Commission's Final Report stated:

> *That governments, recognizing the trauma and pain suffered by relatives, kin and friends of those who died in custody, give*

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1 RCIADIC, *Interim Report*, AGPS, Canberra, 1988, p62

sympathetic support to requests to provide funds or services to enable counselling to be offered to these people.[2]

6.4 While the Royal Commission used the past tense, the Committee believes that the availability of counselling to relatives of those who die in custody is an ongoing one for as long as indigenous people are dying in custody. The Committee believes this to have been the intent of the Royal Commission. While some states have looked at establishing ongoing counselling services others have sought only to make counselling services available to those whose relatives died during the period investigated by the Royal Commission. With the passing of each year, the need and the effectiveness of counselling services to these people diminishes.

6.5 There is a very obvious need for appropriate counselling and support to be available to relatives immediately after a death is notified and for whatever period that it is further needed.

6.6 The Commonwealth Implementation Annual Report states that:

The funds initially allocated were intended to be the Commonwealth's full commitment and additional funding is not anticipated. All States are being encouraged to fully implement the program. To ensure that the remaining allocation is spent on family counselling, the status of each project will be reviewed. ATSIC will consult with States where there are unspent funds, with a view to concluding this program in 1993-94, consistent with its original objectives.[3]

6.7 This gives the impression that the counselling was only to be provided to the families of those people who had a relative die in custody in the period covered by the Royal Commission.

6.8 Support for families of post Royal Commission deaths is a serious omission. These people have very recently suffered from losing a loved one in custody and it appears that there is still no support structures in place to adequately assist these people in their grief.

6.9 For example, the Northern Territory Government's response is only concerned with the relatives of those who died in custody in the period covered by the Royal Commission. There is no mention of support for the families of the four people that have died in custody since the conclusion of the Royal Commission.[4]

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2 RCIADIC, *National Report*, Vol 1, p100

3 *Commonwealth Implementation Annual Report*, Vol 1, p141

4 Advice provided by the Australian Institute of Criminology

6.10 The Committee recommends that:

there be established in each state and territory, as a matter of urgency, a services support system to provide legal advice, trauma support and necessary material support to assist families to deal with the circumstances of a death in custody. Services support teams should be available immediately following notification of a death in custody and would include expertise from Aboriginal and Torres Strait Health and Legal Services. (Recommendation 31)

6.11 The Commonwealth's Implementation Annual Report stated that funds allocated to implement this recommendation were in response to Commissioner Muirhead's *Interim Report* and were December 1991 initiatives.[5] This would indicate that the implementation of this recommendation was considered a high priority.

6.12 During the course of the Committee's inquiry there was widespread criticism of the progress made to date in implementing this Recommendation. It is of serious concern that limited progress has been made in the development of programs and services to assist those people who may need counselling. The Commonwealth's Implementation Annual Report, and state and territory implementation annual reports do not indicate the number of people who have been counselled. Instead they only outline the programs that governments have instituted in attempting to implement this Recommendation. In a number of jurisdictions counselling is yet to be provided.

6.13 The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson was concerned about the lack of urgency in the implementation of the recommendations in general, and was particularly critical of the implementation of this Recommendation. He made the following comments:

> *In my view there seems to be an insufficient sense of urgency amongst the bureaucracy. ..... The classic example which I use in my submission is the recommendation that dealt with counselling for families. I mean absolutely nothing has been done. ..... There was $2 million allocated to ATSIC and to the state and territory governments. We were solemnly told that the program had necessarily involved a long lead time. It appears that in June 1993, two years after the Royal Commission report, not a single family had been counselled in New South Wales, Victoria, South Australia or Queensland, although there was high level bureaucratic activity and that was going on in all states.*

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5 *Commonwealth Implementation Annual Report*, Vol 1, p139

It is not clear from the report as to whether any family had actually been counselled in Western Australia, but a consultant had been paid $30,000 to examine the need for counselling, and a range of other activities had been funded out of the grant.[6]

6.14 The following allocations were made to each state and the Northern Territory to provide counselling and support for the families of those who died in custody, to extend and improve services which address family disintegration, and to enhance resources for affected communities.[7]

Table 6.1 Commonwealth funding to states and territories to provide counselling

STATE / TERRITORY	AMOUNT
	$
Victoria	60,000
Tasmania	20,000
Western Australia	650,000
South Australia	250,000
Northern Territory	200,000
New South Wales	300,000
Queensland	500,000
TOTAL	$1,980,000

6.15 Although the Commonwealth's Implementation Annual Report states that a total of $1.98m had been allocated only $1.795m had been spent. The Committee examined whether this money been used to provide counselling to families as intended.

6.16 The Commonwealth's Implementation Annual Report gives a summary of the measures that have been taken by the states and the Northern Territory to implement this recommendation. These responses are considered below in conjunction with evidence provided to the Committee on the measures that state and territory governments have taken to implement this recommendation. Information is taken from the Commonwealth Implementation Annual Report as in most cases this provides more detailed descriptions than state and territory implementation reports.

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6 Evidence p847

7 *Commonwealth Implementation Annual Report*, Vol 1, p139

Western Australia

> *The sum of $185,000 was released to the Aboriginal Affairs Planning Authority. It used $30,000 to engage a consultant to examine the need for additional counselling for families of those who died in custody, and $155,000 to establish and fund the first year of an Aboriginal counselling course at Curtin University. Funds were released on 23 October 1992. The remaining $465,000 was released to fund the following projects:*
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> - *a Perth based Aboriginal counselling service;*
> - *Aboriginal counselling in Broome;*
> - *establish pilot community initiatives; and*
> - *support for Marr Mooditj, an Aboriginal Health College, to provide specialist counselling training for Aboriginal people.*[8]

6.17 The Committee did not receive sufficient evidence in Western Australia to address this recommendation in detail. It does appear, however, that there has been limited consultation with Aboriginal and Torres Strait Islander people in that state on the proposals to implement this recommendation. Both the Commonwealth and Western Australian implementation reports fail to outline specific outcomes for relatives, friends and kin of those who have died in custody.

South Australia

> *The South Australian Health Commission applied for the full allocation in September 1992. In February 1993, $125,000 was released for family monitoring and support with the remaining allocation to be released in 1993-94. The project is being supervised by the Aboriginal Health Council of South Australia.*[9]

6.18 Volume 2 of the Commonwealth's Implementation Annual Report states:

> *in South Australia, the Family Counselling Project is still in development. A State co-ordinator was appointed on 8 November 1993 to work with Aboriginal health organisations;*[10]

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8 *Commonwealth Implementation Annual Report*, Vol 1, p140

9 *Commonwealth Implementation Annual Report*, Vol 1, p140

10 *Commonwealth's Implementation Annual Report*, Vol 2, p11

6.19 From the evidence presented in South Australia it would seem that no family members had been counselled, although $222,072 had been released from ATSIC to the State Government. The following evidence was provided by Mr Martin Paxton, State Monitoring Officer, from the South Australian State Office of ATSIC:

> *The Aboriginal Health Council, which is the peak Aboriginal health organisation under the South Australian Health Commission, drew up a strategy to employ a network of mental health counsellors across the state; which is part of their overall mental health strategy. They were going to use the family counselling money to kick-start it, so they took the $125,000. Their program met our objectives for the family counselling program. They had some severe difficulties in recruiting an adequate state coordinator for the program, and that held off the implementation for a very long time. That coordinator was appointed in November 1993, and she commenced consulting with the families of the deaths in custody victims and the recruitment of the counsellors.*
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> *At this stage of the game we have agreed to advance them an additional amount of money to see that program through until the coming September. We are giving them $97,072 to implement that program. That is in addition to the $125,000 that they have already had. Because of the fact that this was, again, coming up to the end of the financial year and they were not able to commit the full expenditure, we sought permission from the ATSIC Chairperson to use leftover funds from that, to the tune of $27,928, to fund the Aboriginal Link-Up project here in South Australia, which has received no Commonwealth funding yet.*[11]

6.20 The South Australian Implementation Annual Report states that:

> *The Commonwealth has provided funds specifically for this purpose. In South Australia this assistance has been provided direct to the Aboriginal Health Council for their negotiation with relatives and friends of those who died in custody. A community consultation is being planned at Camp Coorong.*[12]

6.21 There is no mention of any negotiations with family members in the response or the number of people who had been counselled. This is another unacceptable omission.

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11 Evidence, p903

12 *Royal Commission into Aboriginal Deaths in Custody - 1993 Implementation Report - South Australian Government*, Department of State Aboriginal Affairs, April 1994, p70

Northern Territory

The Department of Health and Community Services received $200,000, to fund the following organisations for family counselling services:

1	*Central Australian Aboriginal Congress Inc.*	*$80,000*
2	*Belyuen Community Council Inc, Belyuen via Darwin NT*	*$40,000*
3	*Milikapiti Community Council Inc. Via Darwin*	*$40,000*

The remaining $40,000 was set aside for project evaluation.[13]

6.22 The Committee was told by representatives of the Northern Territory Government that the money provided by the Commonwealth, specifically for the purpose of counselling the relatives, families and friends of those who had died in Custody have not been used for that purpose. Mr Symons, from the Northern Territory Department of Health and Community Services made the following comments:

> *What I should say is that the services primarily have not targeted the relatives, families and friends of people who have died in custody. As Neville [Jones] pointed out, there is quite a small number of people involved in the Territory. At the time that we set that program up, it was in response to an offer of funding from ATSIC of $200,000. I think it was based on a Queensland program, actually, and ATSIC then approached other state governments to see if they were interested in setting it up.*
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> *At the time, I think the last person to die in custody in the Northern Territory had been five years ago. I have actually spoken myself with the wife of that person who died, and she made it very clear to me that she did not want counselling; she wanted compensation. So we felt that counselling of relatives of people who have died in custody specifically, given the small number and the feelings of the families involved, was not what we should be targeting. What we primarily set out to target was communities where injury or death or violence or general trauma in the community was a very important issue.*[14]

6.23 Mr Jones, Director, Office of Aboriginal Development, also outlined the processes in the development of agreements:

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13 *Commonwealth Implementation Annual Report*, Vol 1, p140

14 Evidence, p1045

> *..... the question of how these funds were going to be used, which in fact had not been requested by the Territory but were offered by ATSIC, and the model of the program were agreed with ATSIC. There are a number of reasons. First of all, most of the relatives of the people that had died–of nine people that had died over the period of the review, as Graham [Symons] was noting, the most recent death by the time had already been five years prior–had been counselled in one form or another. Some indications were found from some people that they did not actually require any counselling. The agreement with ATSIC over the use of these funds was not revisiting the past but to develop pilot programs of how to better handle the issue in the future, should a particular death in custody arise.*[15]

6.24 On the evidence presented it would appear that there was limited discussion and negotiation with the families of those people who died in custody. It also appears that the decision not to provide direct counselling to those people affected was made after consultation with the wife of the last person to have died in custody in the period examined by the Royal Commission.

6.25 If the Northern Territory Government was developing programs of how to 'better handle the issue in the future, should a particular death in custody arise' it would seem appropriate to involve the families and communities of those four people who had died in custody in the Northern Territory since the conclusion of the Royal Commission. From the evidence to the Committee it would appear that these four families were not consulted or considered for counselling services.

New South Wales

> *The NSW Government Office of Aboriginal Affairs was funded in April 1993. As a result of new administrative procedures, there were no developments prior to June 1993.*[16]

6.26 The New South Wales Government Office of Aboriginal Affairs negotiated with the National Committee to Defend Black Rights (NCDBR) to implement this recommendation. The following evidence was given by Mr Tom Whelan at a public hearing in Sydney:

> *In February 1992, the Director of the Office of Aboriginal Affairs and some of his staff met with the Chairperson of the National Committee to Defend Black Rights, who argued, most persuasively, that the funds should be provided to the National Committee to Defend Black Rights–I will refer to it from now on as NCDBR. Her organisation was made up of the families themselves. It had all of their names and*

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15 Evidence, p1046

16 *Commonwealth Implementation Annual Report*, Vol 1, p140

addresses, and had previously brought the families together for the purposes of sharing their grief, supporting one another, lobbying governments and planning for the future. It was most appropriate, she claimed, for NCDBR to be provided with the opportunity to reunite the families, allow for a collective grieving process to take place, but also to explain the outcomes of the Royal Commission, advise on government responses and make recommendations on how the families could be further supported.[17]

6.27 There have been a number of difficulties to date, as explained by Mr Whelan:

The Office of Aboriginal Affairs [OAA] has itself faced a serious dilemma throughout this exercise. First, it had a contract with ATSIC in regard to the funds provided for counselling. Second, it had a parallel contract with NCDBR to actually deliver the counselling program. Third, there is a commitment to the process of self-determination, and a commitment to ensure that, where possible, appropriate Aboriginal organisations and not a government agency deliver a service. This, of course, is in line with other recommendations throughout the Royal Commission report. This commitment must allow for mistakes and misfortune.

Both the Office of Aboriginal Affairs and NCDBR accept that the delay in providing support for families of those who have died in custody is a tragedy. We are now working together, in that staff of OAA will directly assist NCDBR to contact families wherever possible. If they wish to come together, or would prefer direct counselling, or recompensate for past counselling they arranged themselves, or tombstones to honour their dead, then we will try to establish a mechanism to do that.

What may look like a simple program to implement became terribly difficult due to the pain, the hurt, the anger and the frustration felt by the very families NCDBR sought to assist. We must remember that NCDBR is an organisation made up exclusively of the families themselves. It is a precondition of membership. Finally, as our submission points out, OAA is negotiating with various government agencies and Aboriginal community organisations to ensure that in the future Aboriginal families affected by a death in custody can be provided with immediate and appropriate counselling and services. As I said earlier, it is hoped that this will never have to be activated.[18]

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17 Evidence, pp1251-2

18 Evidence, pp1253-4

6.28 The approach taken by the New South Wales Government deserves favourable comment. There were negotiations with an Aboriginal organisation to implement the recommendation. However, certain circumstances have prevented implementation. The Committee notes the efforts of the New South Wales Government to address the difficulties experienced in implementing this recommendation and urges the New South Wales Government to proceed with its implementation as a matter of urgency.

Queensland

> *The Department of Family Services and Aboriginal and Islander Affairs was allocated $500,000 in July 1992. Preliminary community consultations were held, primarily in Cairns. The Department spent about $80,000 of its own funds on them.*[19]

6.29 Mr Gooda, from the Queensland State Office of ATSIC stated that funds for this project were released to the State Government in June 1992. To date only $28,000 of the $500,000 had been spent by the Queensland Government. Mr Gooda also stated at a public hearing on 23 June 1994 that:

> *It is an issue that we intend to take up with the State about their slow rate of expenditure of it. It is an issue that the community generally raises with us in our dealings with the State Government.*[20]

6.30 Mr Wauchope, from the Queensland Department of Aboriginal and Islander Affairs told the Committee at a public hearing in Brisbane, that they had had particular difficulties in negotiating with the community and organisations to work out guidelines that were acceptable to everyone.[21] Mr Wauchope also stated that:

> *There was a lot of argument about the nature of the program, the scope of the program, who should have access to the program, how the funds should be administered; and it is only in recent times that we have been able to sort those guidelines out and go to organisations seeking expressions of interest in operating those services. Certainly I would agree that there has been an unacceptable delay, but ATSIC made similar funding available to other states as well; and what we had hoped was that between the states we would be able to work out a means of expediting the program .....*

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19 *Commonwealth Implementation Annual Report*, Vol 1, p141

20 Evidence, p769

21 Evidence p825

It has certainly taken, I accept, a long period of time, but, as I said, no other agency has been able to deal with it effectively, either. I think you have to accept that it is a very difficult and sensitive area.[22]

6.31 Mr Bell, from the Department of Family Services and Aboriginal and Islander Affairs added:

The period of time is difficult to defend, but all states have had difficulty with finding qualified culturally sensitive staff who had the potential to be organised to provide this service. It has been a difficulty, not only in developing guidelines that clarify the division of responsibility between mental health services generally and the grief loss type function. While I am not expert in the area, there is a distinction that is made in practice, and the grief loss people generally differentiate themselves from mental health services generally. The organisational resources on the ground to deliver either mental health services or grief loss services in the Aboriginal communities are fairly thin and we have had to spend a lot of time simply with outreach work with Aboriginal medical services interesting them in the concept to get developed submissions in. We are now at the stage, having developed guidelines and having invited submissions, where we are working in each region to identify organisations that would have the capacity to deliver this service.[23]

6.32 In informal discussions with the Aboriginal and Islander Community Health Service in Brisbane, the Committee was told that the Health Service had been dissatisfied that the Queensland Government had not provided sufficient funds to the Health service for it to adequately plan and deal with the provision of counselling services.

6.33 The Committee was told that although the Queensland Government had been provided with funding from ATSIC of $500,000 in July 1992 for this program, these funds were slow to be delivered to the Health Service. The Health Service, therefore, had been left to carry the costs for the program from its own budget. At the time of the meeting only $15,000 had been allocated to the Health Service but they were carrying a further $30,000 in costs incurred by the program. They were awaiting reimbursement from the Queensland Government.

6.34 It is unacceptable that a Commonwealth funded organisation such as the Health Service, has had to wait for such a long time for funds from the Queensland Government, which were originally provided by the Commonwealth.

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22 Evidence, pp825-26

23 Evidence, p826

6.35 The expenditure of this ATSIC funded money by the State Government is subject to normal performance requirements that are imposed on all recipients of funds from ATSIC. That there has been both insufficient follow-up from ATSIC and a lack of reporting and a delay in expenditure by the State Government, shows serious deficiencies in the process to date.

Victoria

> *Aboriginal Affairs Victoria and families of those who died in custody discussed which organisation would be responsible for arranging counselling, and alternative means of spending the funds.*[24]

6.36 Volume 2 of the Commonwealth Implementation Annual Report states that:

> *Aboriginal Affairs Victoria has met families of those who have died in custody. A package of measures to meet the need of these families has been developed.*[25]

The Victorian Government's Implementation Annual Report had not been finalised at the time of writing. As a result the Committee was unable to meet with representatives of the Victorian Government.

6.37 From the responses, however, it is not clear if families had actually received counselling.

Tasmania

> *The government has consulted the Aboriginal community and people close to the family concerned, and advised that further counselling for this purpose would be inappropriate.*[26]

6.38 In Volume 2 of the Commonwealth's Implementation Annual Report it states that:

> ..... *the Tasmanian allocation of $20,000 funded a 'Prison and Police Officer' cross-cultural project.*[27]

6.39 The Committee did not receive sufficient information to examine the Tasmanian Government's implementation of Recommendation 5 in detail.

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24 *Commonwealth Implementation Annual Report,* Vol 1 p139

25 *Commonwealth Implementation Annual Report,* Vol 2, p11

26 *Commonwealth Implementation Annual Report,* Vol 1, p139

27 *Commonwealth's Implementation Annual Report,* Vol 2, p11

6.40 Overall, the states and the Northern Territory implementation reports provide limited information on the outcomes to date for those families who should have benefited from the implementation of this recommendation. In many instances these reports provide less detailed information than the Commonwealth's Implementation Annual Report.

6.41 Notwithstanding the difficulties experienced by governments in implementing this recommendation, the limited progress in addressing the immediate needs of the families in the provision of culturally appropriate counselling services is unacceptable. It is of serious concern to the Committee that three years after the allocation of funds, little has been done to implement this recommendation. In addition, there is limited information on the extent to which the family, friends and kin of those who died in custody have been involved in the implementation of this recommendation.

6.42 The Committee notes that within hours of other tragedies in mainstream Australian society grief or trauma counsellors are available. While some small delay to allow for consultations and the development of culturally appropriate services would be understandable, the huge delay is an indictment of all levels of government. Despite the Royal Commission Recommendation, the people to supposedly benefit from its implementation have become even more marginalised than they were before the Royal Commission's Report. Their neglect by governments has become much more obvious.

6.43 The Aboriginal Legal Service of Western Australian (ALS of WA), also expressed concerns in relation to the implementation of this recommendation:

> *The tardiness of government action in relation to the implementation of this recommendation is unforgivable, given the long standing and long overdue need of families of those who have died for support and counselling.*[28]

6.44 A range of views was presented to the Committee on this issue. Some Aboriginal and Torres Strait Islander people had no desire to have counselling. This was expressed in the following evidence from members of the Deaths in Custody Watch Committee in Sydney. Mrs Murray stated:

> *I do not need counselling. My family does not need counselling. We only want justice in this country. That is the only counselling we need.*

Mr Murray, also from the Deaths in Custody Watch Committee, advised the Committee:

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[28] *Striving for Justice - Report to the Western Australian Government on the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Aboriginal Legal Service of Western Australia (Inc.), 1994, p12

Madam Chairman, if I may say so, I definitely can speak for each and every family that has lost someone in custody. I feel that a word like 'counselling' to that family is insulting.

I do not want some psych coming into my mind. I am not a mentally ill black fellow. All I want is one thing: justice. All around Australia, particularly in Adelaide, they have got mental units. Do you know where they want us to go to counselling? Into a mental unit. When you go into the mental unit, they are going to declare you mentally insane. I am not mentally insane. Even after all that has happened, I am not mentally insane. None of the other families are mentally insane. All we want is justice. We want the same that everybody else has being getting. There are all these murders that have gone on around Australia and that have been solved. You get families coming out and saying, `Oh geez,' after three or four years. You see their relief and they sing out, `But he got seven years for it,' or `He got two years for it,' and they complain about that. But we are still in mourning. We cannot sit down there and let someone counsel us. For what? Counsel me, yes, I want to get away from it after it is all over and go back to what I was. I could chuck everything, and the same with all the other families; those who protested, not the ones who sat on their backside and waited for the Royal Commission to go through but the ones who put their heads on the block. One should get away so that we could get all that out of us. We cannot do that because it is still in us. Even if you get it out, even if you get counselled, what good is it going to do us? It is still on our mind that we want justice. Justice has got to be served and you are the people who have got to give it to us.[29]

6.45 The Committee also received evidence from the National Committee to Defend Black Rights in relation to this issue. Part of the submission was a tape recording of people who had a family member who had died in custody. It was mentioned in this tape that people still wanted justice. There was concern expressed that no one had been charged with any offence as a result of the Royal Commission report. They also spoke of the need for a family counselling conference where people could come and express their grief to bring out the hurt, pain and frustration of losing someone as a result of a death in custody.

6.46 The expectations of the Royal Commission by some people were not met. The Royal Commission dealt with this question in Section 3.5 of its Report which is reproduced in Appendix 5.

6.47 The Committee did not receive sufficient evidence to examine these 'justice' and 'compensation' issues in detail. However, it is of concern to the Committee that there were some people who felt that justice had not been served. The Committee

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[29] Evidence p1089-1091

therefore urges all levels of government to address these issues, particularly to the family members who have lost someone as a result of a death in custody. Particular attention should be paid to Section 3.5.10 of the *National Report* which states that:

> *However, I strongly suggest that the reports of all ninety-nine deaths should be carefully studied with a view to the appropriate authorities deciding whether any action should be taken against any person.*

Recognition of Aboriginal Customary Laws

6.48 The Australian Law Reform Commission (ALRC) released its report on the Recognition of Aboriginal Customary Laws in 1986.[30] The following terms of reference had been given at the beginning of the inquiry in February 1977.

> *To inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:*
>
> *a* *whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;*
>
> *b* *to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and*
>
> *c* *any other related matter.*
>
> *In making its inquiry and report the Commission will give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane.*

6.49 In reporting, the ALRC made numerous recommendations on a range of issues relating to Aboriginal customary laws. These included the distribution of real or personal property to accommodate Aboriginal ways of transfer; Aboriginal child custody, fostering and adoption; the relevance of Aboriginal customary laws in sentencing; and the protection of Aboriginal suspects when being interrogated by the police to help ensure the reliability and voluntariness of confessions or admissions made.

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30 *The Recognition of Aboriginal Customary Laws*, Report No. 31, The Australian Law Reform Commission, AGPS, Canberra, 1986

6.50 Royal Commissioner Elliott Johnston referred to the Australian Law Reform Commission's report in the following terms:

> *Whilst I am unable to make any national recommendations about implementation of the ALRC report it is clearly unsatisfactory that government has not reported back to those Aboriginal people who participated in the ALRC investigations as to the current status of its recommendations.*[31]

6.51 Recommendation 219 of the Royal Commission into Aboriginal Deaths in Custody stated:

> *The Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law was a significant, well-researched study. The Royal Commission received requests from Aboriginal people through the Aboriginal Issues Units regarding the progress in implementation of the Recommendations made by the Australian Law Reform Commission and in some cases from communities which had made proposals to the Law Reform Commission. This Commission urges government to report as to the progress in dealing with this Law Reform Report.*[32]

6.52 The Council for Aboriginal Reconciliation, in their report *Responding to Custody Levels*[33], drew attention to the importance of Aboriginal customary laws.

> *To maintain order, Aboriginal and Torres Strait Islander peoples over thousands of years developed elaborate, complex and well-established mechanisms and procedures within their societies.*
>
> *Since the arrival of European colonists in Australia, indigenous Australians have been the subject of discrimination, exploitation, genocide and over-representation in various forms of institutions, including prisons. Indigenous systems of customary law have been gravely interfered with by the imposition of an alien legal system with which Aboriginal and Torres Strait Islander peoples must comply.*[34]

6.53 It is clear from the evidence to the Committee that the progress to date in the implementation of the recommendations of this important report on law reform, both before and especially since the Royal Commission report, is far from

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31 RCIADIC, *National Report*, Vol 4, p102

32 RCIADIC, *National Report*, Vol 4, p102

33 *Responding to Custody Levels: A Greater Community Response to Addressing the Underlying Causes*, Key Issue Paper No. 6, Council for Aboriginal Reconciliation, AGPS, Canberra, 1994,

34 *Responding to Custody Levels*, p16

satisfactory for two basic reasons. Firstly, the Australian Law Reform Commission's report has not been responded to by the Commonwealth Government and secondly, there has been no feedback to those Aboriginal and Torres Strait Islander people who contributed to the report, on the progress made in implementing its recommendations.

6.54 In the entire Commonwealth response to Recommendation 219 there is no mention of any feedback to those Aboriginal and Torres Strait Islander people who made contributions. That this issue has not been so far addressed is a further insult to the Aboriginal and Torres Strait Islander people who made contributions to the ALRC's report.

6.55 The Committee would also emphasise that many older Aboriginal and Torres Strait Islander people made contributions to the ALRC inquiry and report. With each passing year the likelihood of those people being alive gets slimmer.

6.56 It is a serious denigration of Aboriginal and Torres Strait Islander people and their beliefs that this report remains unresponded to and Recommendation 219 remains unimplemented.

6.57 Two agencies are primarily responsible for the implementation of this recommendation, ATSIC and the Attorney-General's Department. The Department of the Prime Minister and Cabinet, through the Office of Indigenous Affairs has recently taken on a co-ordination role in the implementation of this recommendation, working with ATSIC and the Attorney-General's Department to ensure that a consistent and coherent approach is taken to implement the ALRC's recommendations.[35]

6.58 The Commonwealth Attorney-General's Department's response to this recommendation, both in its submission to the inquiry and evidence given at a public hearing is unsatisfactory. It outlines a frustrating bureaucratic process that has been established to deal with the Commonwealth's response to the ALRC report.

6.59 The following is an extract from the Attorney-General's Department's submission and provides some of the history of dealing with the recommendations made by the Australian Law Reform Commission and responding to its report.

> *It is not the responsibility of this portfolio to respond to the Report of the Australian Law Reform Commission (the ALRC). Following the tabling of the Report in 1986, it was agreed between the then Attorney-General and the then Minister for Aboriginal Affairs that the then Department of Aboriginal Affairs (DAA) would have primary carriage for the examination and development of policy considerations arising from the ALRC report. The portfolio was to assist with legal*

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35 Department of the Prime Minister and Cabinet, evidence, p739

and legal-policy considerations. The Standing Committee of Attorneys-General approved of this arrangement in November 1987.

In the context of responding to the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the Aboriginal and Torres Strait Islander Commission (ATSIC) agreed that, as DAA's successor, it had primary responsibility for responding to the ALRC report.

This decision stemmed from the fact that ATSIC had to determine, as a matter of policy, which of the ALRC Report's recommendations were to be pursued and which, if any, were not. The recommendations are controversial in varying degrees, and different views could be taken on several of them within and between the diverse Aboriginal and Torres Strait Islander communities affected by policy decisions in this area and also in the wider community. Apart from the question of knowledge of the content of Aboriginal customary law, the portfolio lacks the consultative capacity to allow the requisite participation by Aboriginal and Torres Strait Islander communities in the policy development process. In contrast, ATSIC has been specifically designed to provide for the advancement of Aboriginal and Torres Strait Islander interests, with full national and regional representation. It possesses the necessary machinery for consultation with Aboriginal and Torres Strait Islander communities and the power to employ staff and consultants to assist in that exercise.

To date ATSIC has only sought advice from the portfolio on some aspects of the Report's recommendations.[36]

6.60 Attorney-General's also commented on the recognition of Aboriginal customary laws at a public hearing in Canberra:

And the fact is that it is one of these areas where, while there is a lot of legal expertise in it, there is also fundamental expertise from the Aboriginal side too as to what will be appropriate for different communities. I think you probably recognise from travelling around that the communities are very different and the customary law is very different between these. So it is one of these issues, just like many others in the Commonwealth sphere, where the lead department has policy expertise in a lot of respects and the Attorney-General's Department has the legal expertise of probably more European law than the Aboriginal law.[37]

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[36] Evidence, pS80

[37] Evidence p42

6.61 The Committee's report *Access and Equity, Rhetoric or Reality?*[38] drew attention to the Attorney-General's Department's failure to provide a submission to that inquiry.

> *The Committee has dealt with some shortcomings of the Attorney-General's Department in paragraphs 2.19-2.22 and 4.36. These concern human rights and the provision of interpreters. The Committee is concerned at the lack of commitment to the Strategy by the Department. The broad question of human rights, which are a fundamental basis to any attempt to gain access and equity, should have been addressed in a submission. The Committee notes that the Government, through the Department, has not responded to the Law Reform Commission's report on the Recognition of Aboriginal Customary Laws presented as long ago as 1985.*[39]

6.62 In this regard, the Committee again reminds the Attorney-General's Department of its responsibilities under the Access and Equity Strategy, namely that all departments and agencies have a duty to respond to the needs of all their clients, including Aboriginal and Torres Strait Islander people. Although the agreement was that ATSIC was to respond to the ALRC report, the Attorney-General's Department should be developing expertise within their organisation to deal with issues in relation to Aboriginal and Torres Strait Islander customary laws, not relying on ATSIC to provide expertise. ATSIC was not established to deal with all matters concerning Aboriginal or Torres Strait Islander people. Its programs are intended to address the disadvantage faced by Aboriginal and Torres Strait Islander people. This disadvantage is due in no small part to the neglect by mainstream government departments in providing services to Aboriginal and Torres Strait Islander citizens. The failure of the Attorney-General's Department to develop any expertise in indigenous law matters since the ALRC report, even earlier in view of the evidence being given to the ALRC, is yet another example of the marginalisation and denigration of indigenous people, their beliefs and their laws. The assimilation policy has been discredited and abandoned by the Commonwealth for some time. It should be discontinued within the Attorney-General's Department and replaced with some substantial commitment to the Commonwealth's Access and Equity Strategy.

6.63 The Committee believes that Attorney-General's could have been far more proactive in dealing with this issue and not relied solely on ATSIC to take the initiative, which, incidently, it has not done.

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38 *Access and Equity - Rhetoric or Reality?*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, AGPS, Canberra, 1993

39 *Access and Equity*, pp83-4

6.64 The Attorney-Generals submission to the inquiry also outlined the steps that are being taken to address the ALRC report. These are being co-ordinated through the Office of Indigenous Affairs. This included:

- preparation of a comprehensive report of action already taken by the Commonwealth, for publication;
- seeking information from the states and territories on progress in implementing the ALRC's recommendations in their jurisdictions;
- a review of the ALRC's recommendations to assess their continuing relevance and a review of other issues concerning recognition of customary law which have arisen since 1986; and
- preparation of a discussion paper for publication on options for further discussion.[40]

6.65 The submission by the Department of the Prime Minister and Cabinet also made reference to the compilation of a report documenting the Commonwealth's implementation of the ALRC recommendations to date. It was further stated that:

> *the report will provide a platform for facilitating and coordinating further implementation of the ALRC's recommendations.*[41]

6.66 The Committee wrote to the Department of the Prime Minister and Cabinet seeking clarification on the status of this report, in particular the four points mentioned above. The following reply was received:

> *You indicate that the Committee has been informed by the Attorney-General's Department that responsibility lies with this Office for a number of activities connected with implementation of the recommendations of the Australian Law Reform Commission (ALRC) on recognition of customary law. It would be more accurate to attribute responsibility for these matters to the Commonwealth generally, although the Office of Indigenous Affairs has recently assumed responsibility for the preparation of a report on action taken by the Commonwealth to implement the ALRC Report. Up until earlier this year responsibility for the report rested with the Aboriginal and Torres Strait Islander Commission (ATSIC) in conjunction with the Attorney-General's Department. We are not aware of any change to these overall responsibilities.*

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40 Evidence ppS80-1

41 Evidence pS739

The report being prepared by this Office is very close to completion. It is expected that it will be disseminated primarily through the 1993-4 Annual Report on the implementation of RCIADIC recommendations currently being prepared by ATSIC. The report will document the progress made by Commonwealth departments and agencies since 1986 in implementing the ALRC's recommendations.[42]

6.67 As outlined in paragraph 6.57, the Department of the Prime Minister and Cabinet has recently taken on a co-ordination role in the implementation of this recommendation and is working with ATSIC and the Attorney-General's Department to ensure that a consistent and coherent approach is taken to implement the ALRC's recommendations.

6.68 The response by PM&C highlights the continuing bureaucratic buck-passing of the responsibilities for implementation of this recommendation. If PM&C has undertaken a coordination role this should mean that rather than attributing responsibilities elsewhere, the Department should be taking a more proactive approach to expediting the response to both the ALRC report and advising Aboriginal and Torres Strait Islander people who made contributions to the ALRC of the outcomes.

6.69 Similarly, ATSIC's lack of action in the implementation of this recommendation is inexcusable. One of the objectives of ATSIC is to empower Aboriginal and Torres Strait Islander people. By failing to advance the recognition of customary law, ATSIC has hindered the empowerment of indigenous people.

6.70 The Committee recognises that dealing adequately with the recommendations of the ALRC report, which covered such a wide range of issues, is a difficult task. However, this does not justify the inordinate delay that has occurred. This delay has largely occurred because of the shirking of responsibility and a lack of commitment to addressing the issues involved.

6.71 According to the Attorney-General's Department, there has not been any incorporation of any element of Aboriginal customary law at the federal level, apart from the Native Title legislation.[43] It is also of concern to the Committee that the responsibility for responding to the ALRC Report was given to the Department of Aboriginal Affairs, subsequently ATSIC, as it was considered the most appropriate agency to deal with this issue. Although ATSIC does have some legal expertise, it would seem that the Attorney-General's Department, with its more substantial legal resources, is the more appropriate agency to deal with the issues contained in the report. The Attorney-General's Department main function is to provide legal services to Commonwealth agencies.

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42 Letter dated 18 October 1994 from Mr M Dillon, First Assistant Secretary, Office of Indigenous Affairs, Department of the Prime Minister & Cabinet

43 Evidence p44

6.72 The lack of implementation of this recommendation received considerable criticism. Mr Michael Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner provided the following comments in relation to this issue:

> *The Royal Commission into Aboriginal Deaths in Custody noted that, particularly in the Northern Territory, there was criticism and widespread disenchantment amongst Aboriginal people arising from the failure to implement the recommendations of the Law Reform Commission. Quite apart from the merits of the Law Reform Commission, the failures of government to react to a well-researched paper and report, to which so much importance was attached by Aboriginal communities in Northern Territory, worked seriously to undermine Aboriginal confidence in the government.*[44]

6.73 In his working paper, Mr Dodson was even more critical:

> *In my view the failure to treat this seminal report seriously is not only an insult to the Australian Law Reform Commission which worked so extensively on the area, but is a rebuff to the Aboriginal people of the Northern Territory who have so continuously sought its implementation.*[45]

6.74 The ALRC report was released in 1986 after a long inquiry and considered many important issues affecting the lives of Aboriginal and Torres Strait Islander peoples. The Royal Commission found it to be clearly unsatisfactory that in 1991 governments had not reported back to those Aboriginal and Torres Strait Islander people who participated in the ALRC investigations as to the current status of the recommendations. The Committee finds it contemptible that in 1994 still no feedback has been given to those people and that limited progress has been made in dealing with the recommendations contained in the ALRC report.

6.75 From the responses by state and territory governments it is apparent that the issue of Aboriginal customary laws has not been adequately addressed. In most instances the responses are not significantly different from the responses reported by governments to the Royal Commission Report in 1992. These are summarised below:

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[44] Evidence p839

[45] Evidence, pS2282

Northern Territory

In the process of implementation. Being considered as part of the Attorney General's general Aboriginal law reform program.[46]

New South Wales

Supported. Customary Law is generally not a major issue in New South Wales but the issues are being reviewed under the auspices of the Australian Aboriginal Affairs Council.[47]

Western Australia

In addition, in developing the new Sentencing Act, the Western Australian Government is considering the Recommendations of the ALRC in regard to the legislative recognition of Aboriginal Customary Law.[48]

South Australia

The ALRC report was referred to the Aboriginal Affairs Ministers for comment, which was expected by the end of 1992. To date no response has been received. The Attorney-General is now considering this report in any event.[49]

Queensland

Lead Agency: *Department of Family Services and Aboriginal and Islander Affairs*

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46 *Implementation of Northern Territory Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody - 1992-93 Annual Report*, Office of Aboriginal Development, Northern Territory Government, Government Printer of the Northern Territory, p118

47 *Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody - New South Wales Government Report 1992-93*, 1994, p164

48 *Royal Commission into Aboriginal Deaths in Custody - Government of Western Australia Implementation Report 1993*, Aboriginal Affairs Planning Authority, December 1993, p122

49 *Royal Commission 1993 Implementation Report - South Australian Government*, Department of State Aboriginal Affairs, April 1994, p154

Progress to December 1993

Department of Family Services and Aboriginal and Islander Affairs

Consideration of the Australian Law Reform Commission's (ALRC) recommendations has taken place primarily in the context of specific law reform initiatives. This means of advancing traditional or customary law recognition is preferred over the enactment of specific legislation on recognition generally.

Traditional or customary law recognition has been facilitated by the enshrinement in Queensland legislation of certain 'fundamental legislative principles'. The ***Legislative Standards Act 1992*** *provides that legislation must have sufficient regard to Aboriginal tradition and Island custom. Traditional and customary matters are now taken into account as a matter of course in the development of Queensland legislation and policy.*

The ALRC's report is consulted for guidance in this area, although the report provides only limited information on customary practices in Queensland. A need has been identified for more extensive community consultation on customary law issues to establish what traditional or customary practices exist and to ascertain community views on the options for recognising these, where appropriate. The Government is considering ways of improving opportunities for such consultation.

In terms of issues addressed to date, a joint community government project on Torres Strait Islander customary 'adoptions' is now at an advanced stage. Traditional marriage and property sharing, the adequacy of criminal defences, customary practices bearing on rental housing arrangements, native title and hunting and gathering practices are among other matters which have been closely examined in the context of recent law reform initiatives. A new Child Placement Principle ensuring maximum community involvement in care arrangements for children has also been developed and consideration is being given to legislative recognition.

Department of Justice and Attorney-General

No further comment.[50]

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50 *Royal Commission into Aboriginal Deaths in Custody - Queensland Government Progress Report on Implementation to December 1993*, Vol 3, *Implementation of the Recommendations*, 1994, pp233-4

Australian Capital Territory

The Domestic Relationships Bill will give effect to most of the Recommendations of the ALRC's report. An education package on customary law is being prepared for use in ACT schools. Both these measures will be referred to the ACT Aboriginal and Torres Strait Islander Advisory Council for its consideration.[51]

6.76 In most cases the issue of Aboriginal customary laws is reported as being 'considered' by various governments or is being reviewed by the Australian Aboriginal Affairs Council (AAAC). The extent to which the issue of customary law is addressed by the AAAC is not known, as the Commonwealth Implementation Annual Report provides no comment on the progress of negotiations between the Commonwealth and state/territory governments. This is of considerable concern to the Committee as many of the state and territory responses indicated that implementation was dependent on the AAAC discussing this issue.

6.77 The ALRC Report outlined a number of areas where Commonwealth, state and territory legislation has recognised aspects of Aboriginal customary laws and traditions. The following examples were given:

- *in conferring land rights on the basis of traditional claims or associations;*
- *in the protection of sites which are sacred or significant as a matter of Aboriginal tradition;*
- *in making special provision to permit forms of traditional food gathering;*
- *in limited provisions recognising traditional Aboriginal marriages;*
- *in recent initiatives recognising Aboriginal child care practice;*
- *in allowing a distribution of property on death which is more in accordance with Aboriginal family and kin relationships;*
- *in establishing local courts or other machinery staffed by Aborigines, which may be more aware of local circumstances and better able to take issues of Aboriginal tradition and custom into account.*[52]

6.78 The ALRC took the following approach in the consideration of their report:

- *Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system (para 194).*

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51 *Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody - 1992-93 ACT Government Implementation Report*, ACT Government, 1994, p140

52 *The Recognition of Aboriginal Customary Laws*, p61

- *The recognition of Aboriginal customary laws must occur against the background and within the framework of the general law (para 195).*
- *As far as possible, 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 is clearly demonstrated (para 196).*
- *The issues of the extent and method of recognising Aboriginal customary laws need to be considered separately from any arguments about the federal system (para 197).*[53]

6.79 The Council for Aboriginal Reconciliation in their report *Responding to Custody Levels* summarised some state and territory legislation in this area in the following terms.

> *No State confers general recognition on customary laws or the right for indigenous communities to be fully self-determining, but some legislation enable partial implementation of customary laws and self-determination. For example, the* ***Community Services (Aborigines Act) 1984 (Qld)*** *and the* ***Community Service (Torres Strait) Act 1984 (Qld)*** *provide for the establishment of community councils with by-law making powers which are to ensure good government in accordance with custom. Aboriginal and Torres Strait Islander courts can be established. In Western Australia, the* ***Aboriginal Communities Act 1979*** *gives Aboriginal community councils by-law making powers but does not refer to custom and tradition. In the Northern Territory, community governments can be established under the* ***Local Government Act.*** *In South Australia there are limited provisions for tribal assessors to assist in dispute resolution under the* ***Pitjantjatjara Land Rights Act 1981*** *and the* ***Maralinga Tjarutja Land Rights Act 1984.***[54]

6.80 Some of the state and territory responses will be considered below.

New South Wales

6.81 As noted above, the NSW Government responded by stating that:

> *Customary Law is generally not an issue in New South Wales but the issues are being reviewed under the auspices of the Australian Aboriginal Affairs Council.*

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53 *The Recognition of Aboriginal Customary Laws*, p160

54 *Responding to Custody Levels*, p16

6.82 This is identical to the NSW Government's initial response to the Recommendations of the Royal Commission which reported in 1992.

6.83 From discussions the Committee held in NSW it was apparent that some issues of customary law are important for many Aboriginal and Torres Strait Islander people in that state. In addition the response does not indicate to what extent, if any, Aboriginal and Torres Strait Islander people or community organisations were consulted in the preparation of this response.

6.84 Inmates at the Bathurst Correctional Centre in NSW were also critical that the recommendations of the ALRC's report had not been implemented. Members of the Aboriginal Inmates Committee advised the Committee that there is a need to bring back tribal law into New South Wales because Koori kids do not respect white man's law. There was general agreement from the inmates that Koori juveniles should be handed over to elders for appropriate tribal sentencing or punishment.

6.85 The Aboriginal Medical Service in Sydney told the Committee in relation to this issue, that elders would have a very important part to play, but counsellors and other people are also needed. This would be most useful with youths to prevent them becoming hardened criminals. The Service said that customary law should not be available for those who have committed indictable offences. The Service told the Committee that there would be problems instituting customary law practices in major urban areas but that it would be possible in more rural and remote areas.

6.86 The Doonooch Self-Healing Aboriginal Corporation in Nowra, NSW, offers a program that evolved from the idea of Aboriginal people coming to terms with their spiritual, cultural, physical and mental identity. A major factor in this was that Aboriginal people were caught between two different cultures. The program that Doonooch runs seeks to teach people Aboriginal values in today's society. These values help men regain their identity in society. This is especially needed as they do not believe that the prison system is effective in dealing with core problems.

6.87 The report *Towards Social Justice? Compilation Report of First Round Consultations*[55] also outlines important issues in relation to the recognition of Aboriginal customary laws Australia wide, including New South Wales. These include discussions with Aboriginal and Torres Strait Islander people in Dubbo, Tamworth and Sydney, who all believed that various aspects of Aboriginal customary laws were important in New South Wales.[56]

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55 *Towards Social Justice? Compilation Report of First Round Consultations*, AGPS, 1994. A report produced by ATSIC, the Council for Aboriginal Reconciliation and the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner after consultations with Aboriginal and Torres Strait Islander people and communities on matters those people and organisations wished included in social justice measures for indigenous peoples.

56 *Towards Social Justice?* p20-21

Western Australia

6.88 In their submission to the inquiry, the International Commission of Jurists, Australian Section, Western Australian Branch, stated that:

> *The respect accorded Aboriginal customary laws in Western Australia remains inadequate. Respect and recognition are dependent on the attitudes and understanding of individual police officers and judicial officers. In the absence of statutory sanction, the latter, in particular, may feel inhibited by discouraging judicial statements on the subject. When Aboriginal customary laws are ignored or their relevance denied, the individual's rights to enjoy his or her own culture and to practice his or her own religion (ICCPR article 27) are undermined.*[57]

6.89 The Committee was told by Mr Archer, from the Aboriginal Legal Service of Western Australia in Broome, that in some communities payback was almost always dealt out and this was not taken into account by the courts. There were also a lot of Aboriginal people who had done something wrong who went to the police station and gave themselves up so they could be taken into custody and avoid payback for the time being. A significant problem was that traditional punishment is usually swift. Consequently, many Aboriginal people did not associate the delayed punishment imposed by a court with what they had done wrong. It was recommended that if someone had received tribal punishment then this should be the first thing the court looked at. This is not unusual as the Committee heard of courts taking into account punishment meted out to an offender by the armed services in relation to a civil offence.

6.90 There were other instances where the issue of customary law was of great importance to Aboriginal and Torres Strait Islander people in Western Australia.

6.91 Mr Dwyer from the Aboriginal Legal Service of Western Australia, at a public hearing in Karratha referred to the role of traditional law in implementing court ordered custodies:

> *What we have de facto is a court saying, 'This is a very serious offence but we think that this person could benefit if he is placed in a remote community with his community, where he is still part of the customary law'. I have to say that this area is an area where the practice of customary law and the law business goes on. People sometimes try to think that it is only those in the communities that do it. It is not. People in the towns are very much committed to it and it is very much alive and very well in this area.*
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> *So when we get a placement out there it is done de facto through the court system, through the skills of the advocate who is appearing and*

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57 Evidence pS266

through the good offices of the community based corrections, whom I have had nothing but cooperation from, through the communities making themselves available. They have to do certain work. If they take someone they have got to do paperwork, they have got to supervise, they have got to do all those things. So it is a joint effort; it is everybody cooperating for it.

What I would rather see is more legislative recognition of that. I have not struck one yet but I am told I will strike a judge that will not listen in the same way. Perhaps I will have the power of persuasion, who knows? But it is a question that we fight hard on all the time and we do have placements.[58]

6.92 The Committee notes however, that it is up to the discretion of the court whether or not customary law is taken into account when sentencing.

6.93 As Mr Dwyer indicated, there needs to be some legislative recognition of Aboriginal customary law and the ability and desirability of the court to take it into account in sentencing. The Western Australian Implementation Annual Report indicated that the government is considering legislative changes to take into account Aboriginal customary laws. The Committee welcomes this approach and would encourage the Western Australian Government to pursue this matter further.

6.94 The Committee recommends that:

- the Attorney-General should, as a matter of urgency, table in Parliament a response to the Australian Law Reform Commission's 1986 report on the *Recognition of Aboriginal Customary Laws* including a detailed account of the progress to date in implementing the recommendations contained in that report; (Recommendation 32) and

- the Attorney-General take immediate steps to report on the current status of the Australian Law Reform Commission report on the *Recognition of Aboriginal Customary Laws* to those Aboriginal and Torres Strait Islander people who made contributions to that inquiry. (Recommendation 33)

[58] Evidence, pp149-50

CHAPTER 7

POLICE RESPONSE TO PUBLIC INTOXICATION

7.1 The following recommendations of the Royal Commission concerning public drunkenness are dealt with in this chapter:

Recommendation 79

That, in jurisdictions where drunkenness has not been decriminalized, governments should legislate to abolish the offence of public drunkenness.

Recommendation 80

That the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons.

Recommendation 81

That legislation decriminalizing drunkenness should place a statutory duty upon police to consider and utilize alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.

Recommendation 84

That issues related to public drinking should be the subject of negotiation between police, local government bodies and representative Aboriginal organizations, including Aboriginal Legal Services, with a view to producing a generally acceptable plan.

Recommendation 85

That:

a Police Services should monitor the effect of legislation which decriminalizes drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;

b *The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and*

c *The results of such monitoring of the implementation of the decriminalization of drunkenness should be made public.*

7.2 In dealing with the over-representation of indigenous people in custody, Commissioner Elliott Johnston outlined the need for diversion:

> *It has been established .... that the high number of deaths in custody of Aboriginal people in relation to the size of their population is explained, primarily, by their disproportionate detention rates. It is a matter of fundamental importance to address the reasons for this disproportion. Some of these reasons (ultimately the most important of them) are, in the opinion of Commissioners, related to what have been referred to in the work of the Commission as the 'underlying issues', that is, the social, cultural and legal factors which the Letters Patent authorise me to consider. But others of them are more immediately related to the processes of the criminal justice system itself, starting at the point of policing and carrying through to sentencing in those cases where a person has been charged with an offence and a finding of guilt made.*

He went on to say:

> *The disproportionate rate of Aboriginal detention has been clearly demonstrated. A point must be reached at which that distressing observation is accepted as a definitive finding and attention is focused industriously on the task of righting such inequity. If that point has not already been passed, then the evidence provided to this Commission should put the question beyond doubt. The highest possible priority needs to be placed by governments and correction authorities on measures to significantly reduce the number of Aboriginal people in custody.*[1]

7.3 The Committee has examined both the extent to which governments have given the highest priority to reducing the numbers in custody and the effectiveness of these measures.

7.4 The Royal Commission found that the largest number of indigenous people in police lock-ups were in protective custody having been found very drunk in public, in jurisdictions where drunkenness had been decriminalised. Further significant

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1 RCIADIC, *National Report*, Vol 3, p3

numbers were in police lock-ups for drunkenness, in jurisdictions where this had not been decriminalised.[2]

7.5 The Commission saw public drunkenness as the most potentially significant area in which diversion from custody might occur. The statistics underlining this finding were summarised in the Commission's Report:

> *The National Police Custody Survey [1988] report indicates that a total of 8536 cases of public drunkenness leading to custody occurred, making up, nationally, 35% of the cases for which the reason for custody is available. (This proportion varied between the jurisdictions, with the Northern Territory having the highest proportion: 70%). Overall, some 46% of the public drunkenness cases were Aboriginal people and more than three-quarters of the female drunkenness cases (78%) were Aboriginal. Drunkenness cases made up 57% of the Aboriginal custodies compared with 27% of the non-Aboriginal custodies. These data indicated that, throughout Australia, a substantial proportion of the work of police officers involved in community policing and lockup supervision was that of handling public drunkenness cases. This applies in all jurisdictions regardless of the legal status of public intoxication.*[3]

7.6 The Commission was highly critical of the senselessness associated with policing the offence of drunkenness and other alcohol related offences. The waste of resources involved and the ineffectiveness of the policing effort were highlighted in its Report.[4] Commissioner Elliott Johnston pointed out that the police have not acted alone in this area. He was also critical of the attitudes in the broader Australian society which supported the laws making it an offence to be drunk in public and which expected the police to enforce those laws and arrest offenders.[5] Commissioner Johnston pointed to the senselessness of such policing in his report on the death of Keith Karpany:

> *Keith's life illustrates another lack of compassion and (I would say) commonsense in the society. This is not a matter which relates only to Aborigines. Keith had some 450 convictions—an endless and useless procession of convictions for alcohol-related offences. Putting aside altogether what that meant for him and his parents, the waste is phenomenal. His convictions would represent thousands of hours out of the time of police officers for arresting and reporting, watch-house keepers, prosecutors and other police personnel; magistrates, justices*

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2 RCIADIC, *National Report*, Vol 3, p6

3 RCIADIC, *National Report*, Vol 3, p6

4 RCIADIC, *National Report*, Vol 3, p8

5 RCIADIC, *National Report*, Vol 3, pp8-9

of the peace, clerks of court, clerical workers in the court system who filed, recorded and issued warrants, those who supervised Keith in custody: and this is to leave aside the cost of the hospitalisation and medical treatment for alcohol-related health problems which afflicted Keith.

It seems to me that not only compassion but commonsense compels a different approach.[6]

7.7 Both the Interim and Final Reports of the Royal Commission recommended the abolition of the offence of public drunkenness.[7] The Commission found that: 'the labelling of such behaviour as "criminal" and dealing with it as part of the criminal justice process is unjustifiable'.[8] Law reform in a number of jurisdictions has sought to avoid court appearances on drunkenness charges where people may be convicted and fined, or in some cases, imprisoned. The Commission pointed out that frequently people are fined but later imprisoned for non-payment of the fine and court costs.

7.8 Commissioner Johnston concluded:

....legislation governing public drunkenness .... should require the apprehension and detention of a person only in those circumstances where the person is intoxicated to the extent that he/she is incapable of taking proper care of himself or herself, is behaving in a manner which is likely to cause harm to others or likely to cause damage to property. A reasonable belief that a person is intoxicated should not, of itself, be sufficient to warrant police intervention.[9]

7.9 The Royal Commission did not believe that police cells were the appropriate place to accommodate those detained for their own protection, nor those detained for drunkenness where that was still a criminal offence. The establishment of sobering-up shelters, run by agencies other than police or other custodial authorities was recommended in the *Interim Report* of the Royal Commission. The Final Report noted that while some shelters had been established, many more were needed.[10]

7.10 In its Final Report, the Royal Commission noted that the decriminalisation of drunkenness did not necessarily result in a reduction in police interventions or

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6 RCIADIC, *National Report*, Vol 3, p8

7 RCIADIC, *Interim Report*, Vol 3, p31, (Recommendation 3), *National Report*, Vol 3, p28

8 RCIADIC, *National Report*, Vol 3, p14

9 RCIADIC, *National Report*, Vol 3, p14

10 RCIADIC, *National Report*, Vol 3, p13

the detentions of intoxicated people in police cells. Experience in South Australia, outlined in a 1986 study, showed that there was a 46% increase in police apprehensions of intoxicated people in the six months following decriminalisation compared with the six months before. When additional alternative sobering-up facilities were provided the number detained in police cells dropped but was still considered to be too high.[11]

7.11 The Commission noted that institutional care was not the only option available for those found heavily intoxicated in a public place and that South Australian and New South Wales provisions allowed discharge into the care of a relative or friend, although these options were little used. The problems of family disruption where a heavily intoxicated person is returned to the family home were also acknowledged.

7.12 While seriously ill or unconscious people should be taken directly to hospital, the Commission indicated that, in most cases, the most appropriate place for intoxicated Aboriginal people to be taken, was a sobering-up shelter operated by an Aboriginal organisation with Aboriginal staff. This breaks down the considerable apprehension that drinkers have in being detained. A major source of apprehension is that of being picked up by the police. The historically-determined hostile attitude to police of most Aboriginal people, together with impaired judgement due to intoxication, gives rise to considerable apprehension.[12] Commissioner Elliott Johnston found:

> *In many parts of the country the arrest or detention of Aboriginal people for being drunk and their detention in cells is a constant irritation to Aboriginal people (and I believe to many or most police officers) and is a daily exacerbation of police and Aboriginal relations. I think that putting to an end, or greatly diminishing this factor would be a powerful impetus to improved relations.*[13]

7.13 Commissioner Johnston also stated:

> *It is my view that positive efforts must be made to move public drunkenness outside the realm of the criminal justice system. This should involve not only dissuading police from using police cells for the detention of intoxicated persons but also in developing civilian alternatives to police apprehensions of intoxicated persons.*[14]

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11 RCIADIC, *National Report*, Vol 3, pp14-15

12 The Committee deals with Aboriginal attitudes to police and the likelihood of more serious charges following out of arrests for minor charges, in greater detail in Chapter 10

13 RCIADIC, *National Report*, Vol 3, p25

14 RCIADIC, *National Report*, Vol 3, p17

7.14 Commissioner Johnston went on to discuss the effectiveness of night patrols, also referred to as street patrols, where Aboriginal organisations operate mobile patrols which assist intoxicated people, check on their welfare and transfer them to appropriate care facilities. These services often work with police and in some places police notify the patrol when there are Aboriginal people intoxicated in public who need to be picked up. The effectiveness of alternative arrangements is highly dependent on the relationship between police and those providing the alternative care. The Commission stressed the importance of a positive and co-operative relationship between these parties.[15] The Committee deals further with the importance of street patrols in the next chapter.

7.15 While applauding the use of community run services for dealing with intoxicated people, the Royal Commission was concerned that police officers be thoroughly trained in the exercise of their powers of apprehension and in the use of diversionary facilities.[16] As alternative facilities were not always used by police the Commission believed that:

> *.... police should establish systems for monitoring the use by their officers of alternative facilities for the care of intoxicated persons to ensure that persons who would be more appropriately accommodated at such alternative facilities, are not being detained unnecessarily in police cells.*[17]

7.16 Concern was also expressed by the Commission about the use of protective custody provisions as part of policing operations. This was seen to be unacceptable.[18] The Commission also called for a more integrated approach to the control of alcohol misuse with a greater concentration on its causes rather than its symptoms.[19]

7.17 In discussing the continuing high rates of detention of Aboriginal people following decriminalisation of drunkenness the Commission raised the possibility:

> *.... that decriminalisation results in fact in the search for alternative means of criminalising public drinking, either through the operation of laws which restrict or prohibit public drinking in specified areas, or through the use of alternative charges such as disorderly behaviour and other 'street offences '.*

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15 RCIADIC, *National Report*, Vol 3, pp17-19

16 RCIADIC, *National Report*, Vol 3, pp17-18

17 RCIADIC, *National Report*, Vol 3, p18

18 RCIADIC, *National Report*, Vol 3, pp19-20

19 RCIADIC, *National Report*, Vol 3, p21

The Royal Commission found:

> *In a number of jurisdictions it has become clear that decriminalisation may be accompanied or followed by laws and/or regulations which effectively re-criminalise public drinking or drunkenness. Such measures have included the following:*
>
> - *the use or enhancement of local government by-laws to prohibit alcohol consumption in public places and empower police interventions accordingly;*
> - *the declaration of 'dry areas', where the availability of alcohol is prohibited or strictly controlled; and*
> - *the declaration of restricted areas where consumption of alcohol is prohibited in public.*[20]

7.18 The Royal Commission concluded that:

> *.... it is a matter of importance that police services should address this issue and establish appropriate monitoring mechanisms to ensure that persons who might otherwise have been apprehended for intoxication are not instead being arrested and charged unnecessarily with other offences.*[21]

7.19 The Royal Commission outlined some of the major considerations in regulating drunkenness or alcohol consumption as they affect Aboriginal people.

> *Any discussion of the current forms of regulation of public drunkenness or alcohol consumption must recognize that these measures have in some cases been sought by Aboriginal communities themselves. In other cases, however, the effective re-criminalization of public drunkenness has taken place in a context which continues to construe Aboriginal people as a threat to the sensibilities of the local non-Aboriginal communities. This is an issue which cannot be dismissed lightly. Aboriginal people and non-Aboriginals alike are entitled to the observance of certain standards of behaviour in places frequented by the public (Aboriginals and non-Aboriginal). What is entirely unacceptable is that decisions should be made in accordance with non-Aboriginal perceptions over the heads of Aboriginal people and without reference to their perceptions. This is an area for*

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20 RCIADIC, *National Report*, Vol 3, p25

21 RCIADIC, *National Report*, Vol 3, p26

discussion and negotiation conducted in good faith to seek solutions which are acceptable to both sides and conducted as between equals.[22]

7.20 The Committee found in a number of places that decisions directly affecting Aboriginal people were still being made by non-Aboriginal people based on non-Aboriginal perceptions. For example, in evidence to the Committee claims were made that Aboriginal and Torres Strait Islander people congregating in parks in Roebourne and Cairns were seen by some non-Aboriginal people as being unsightly and a hindrance to tourism.[23] In Wiluna in Western Australia, community negotiated hotel hour reductions were overridden by a non-elected sergeant of police.[24] This clash of cultural perspectives has led to decisions affecting Aboriginal people being made in accordance with non-Aboriginal perspectives. The Committee was told that Aboriginal people were consequently harassed by authorities in these places and in some cases relocated, despite them having long term special relationships with some of these places.[25] As the Royal Commission said, this is entirely unacceptable. Had discussions been held with the appropriate Aboriginal groups, more acceptable and consequently more effective solutions might have been reached.

Government Implementation of the Royal Commission Recommendations

7.21 Public drunkenness was decriminalised in the Northern Territory in 1974, in New South Wales in 1979, in the ACT in 1983 and in South Australia in 1984. Following the Royal Commission's *Interim Report* in 1988, Western Australia decriminalised public drunkenness in 1989. Victoria and Queensland have still not decriminalised public drunkenness. Public drunkenness is not an offence in Tasmania but people can be arrested when incapable of taking care of themselves and penalties, including imprisonment, imposed for 'drunk and incapable' or 'drunk and disorderly'.[26]

Victoria

7.22 Following the Royal Commission's 1988 *Interim Report* the Victorian Law Reform Commission recommended in 1989 that public drunkenness be decriminalised. It also recommended that police custodial powers be limited to

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22 RCIADIC, *National Report*, Vol 3, p26

23 Aboriginal Legal Service of WA, Karratha, evidence, pp161-2, and Njiku Jowan Legal Service, Cairns, evidence, p618

24 *Counting the Cost - Policing in Wiluna*, Aboriginal Legal Service of Western Australia, 1994, p5 & 25

25 RCIADIC, *National Report*, Vol 2, p201, informal discussions, Roebourne, Cairns

26 RCIADIC, *National Report*, Vol 3, pp10-13

situations where there was a significant risk of people being unable to look after themselves or risk of injury to others or property damage.[27] The Final Report of the Royal Commission in 1991 confirmed the recommendations on the decriminalisation of public drunkenness and the establishment of diversionary centres.

7.23 At the time of the Committee's visit to Victoria, in late August 1994, the Victorian Government had not made a submission to the Inquiry nor had its Annual Report on implementation of the recommendations for 1992-93 been finalised and tabled in the Parliament. The Victorian Government declined to give evidence to the Inquiry.

7.24 Evidence given to the Committee in Victoria was that public drunkenness remains a criminal offence in Victoria, six years after the *Interim Report* recommendation for its decriminalisation. Worse still, the Victorian legislation still provides for a crime of habitual drunkenness. If a person is arrested for drunkenness on four occasions in a year that person can be charged with habitual drunkenness and can receive a term of imprisonment of one year. The Victorian Aboriginal Legal Service told the Committee:

> *It has been the practice of most police to charge people with habitual drunkenness when they get the opportunity to do so. The reason for this relates to the pressure on police in country towns to attempt to make the towns an attractive tourist venue and to keep Aboriginal people out of the town.*
>
> *In experience of the service it is common for people to not be told that they have been charged with habitual drunkenness. As a result, they will either not attend court or not be represented. In those circumstances it is probably normal for a person to receive a term of imprisonment.*[28]

7.25 The Committee is appalled that such draconian legislation remains in force and that it continues to be used. It is highly inappropriate, as well as being ineffective and a waste of taxpayers' resources, to attempt to treat a behavioural or medical problem through the criminal law with a sentence of up to one year's imprisonment.[29] The Committee was advised that custodial sentences for habitual drunkenness were only sometimes specified to be served in a rehabilitation facility and this usually only after an appeal to the County Court.[30] It is unfortunate that

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27 RCIADIC, *National Report*, Vol 3, p12

28 There are about 10 charges of habitual drunkenness a year, evidence, p1469 & 1476

29 Victorian Aboriginal Legal Service, evidence, p1469

30 Victorian Aboriginal Legal Service, evidence, p1473

the Committee was unable to gain clarification from the Victorian Government on this issue.

7.26 Of the four deaths in custody that have occurred in Victoria since the period examined by the Royal Commission, two have been of people arrested for drunkenness.[31]

7.27 The Committee agrees with the Victorian Aboriginal Legal Service that these deaths would probably have been prevented if Victorian legislation had been brought up-to-date when first recommended by both the Royal Commission and the Victorian Law Reform Commission. The Committee finds this six year delay unacceptable and inexcusable.

7.28 The other major component of the Royal Commission recommendations on dealing with intoxicated people was the provision of diversionary centres. The Committee was told that there were no sobering-up shelter in the Melbourne metropolitan area but that shelters existed in Mildura, Morwell and Bairnsdale.

7.29 There had been a sobering-up shelter in the Melbourne metropolitan area but due to funding and workload problems it had ceased operations. It relied on Aboriginal organisations being notified by police and then picking people up from police custody to take them to the centre. It was impossible to cover the metropolitan area with two people and one car.[32]

7.30 In the absence of a diversionary centre, people arrested for drunkenness are placed in the cells for at least four hours and then released on to the street to find their own way home. Evidence given to the Inquiry casts doubts on the effectiveness of the screening given to people arrested for drunkenness.[33] This was a critical area covered by the Royal Commission and despite Victoria supporting Recommendations 125 and 126,[34] it is not clear that they are being adequately implemented. It is clear from the evidence before the Committee that Recommendations 79, 80 and 81 are not implemented in Victoria despite the Government claiming to support them. They are major recommendations of the Royal Commission and are basic to one of the major thrusts of the Commission. The Royal Commission described the current practices as wasteful of police resources and therefore taxpayers' money.[35]

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31 Victorian Aboriginal Legal Service, evidence, p1462. The fourth death occurred while this report was being written. A woman who was mentally ill was shot dead by police.

32 Victorian Aboriginal Legal Service, evidence, p1473

33 Victorian Aboriginal Legal Service, evidence, pp1473-4

34 *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, AGPS, 1992, Vol 2, pp463-471

35 RCIADIC, *National Report*, Vol 3, pp6-8

Queensland

7.31 Public drunkenness remains an offence in Queensland under s.81 of the *Liquor Act 1912*. The Royal Commission noted that a review of the *Liquor Act* for the Queensland Government in 1990, two years after the Commission's *Interim Report*, largely ignored the decriminalisation of public drunkenness.[36] In its response to the *Interim Report* recommendation the Queensland Government stressed the necessity for alternative facilities to be provided before decriminalisation is effected.[37]

7.32 In its December 1993 report on the implementation of the recommendations, the Government said that it still supported Recommendations 79, 80 and 81 relating to decriminalisation of drunkenness, the provision of diversionary centres and statutory obligations on police to consider alternatives to the cells for intoxicated people. The Queensland Government responded in 1992 to Recommendation 79, on the decriminalisation of drunkenness, by saying:

> *The Liquor Act 1912 is currently being reviewed. The principle of this recommendation is supported subject to provision of powers to appropriate persons (or classes of persons) to remove intoxicated people to places of safety. This 'removal' would only be approved in circumstances where it is in the interests of the affected individual or the community generally.*[38]

7.33 The Royal Commission clearly indicated that this 'removal' was overwhelmingly in the interests of the affected individual and the community generally.

7.34 In its 1992 response to Recommendation 80, on the provision of diversionary centres, the Queensland Government said it was 'seeking the provision of resources' to provide diversionary facilities.[39]

7.35 In reporting progress to December 1993, on Recommendations 79 and 80, the Government said:

> *The Liquor Act 1992 provided for it to be an offence for persons to be drunk in a public place, such legislation having a sunset clause expiring on 30th June, 1993. An Interdepartmental Working Group (IWG), chaired by Queensland Health, was approved by Cabinet to*

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36 RCIADIC, *National Report*, Vol 3, p12

37 RCIADIC, *National Report*, Vol 3, p13

38 *RCIADIC - Queensland Government Progress Report on Implementation to December 1993*, Vol 3, p89

39 *Queensland Government Progress Report 1993*, Vol 3, p89

recommend appropriate alternative non-custodial facilities for the care and treatment of intoxicated persons prior to the expiration of the sunset clause on 30th June, 1993. However, this was not achieved and the sunset clause was extended to 30th June, 1994. The IWG's report on these alternative strategies is soon to be considered. Cabinet had determined that decriminalisation should not take place until such time as the appropriate strategies were in place for the care and treatment of intoxicated persons.[40]

7.36 Witnesses from the Queensland Government advised the Committee, in June 1994, that:

> *.... the Government has made its position very clear: that it is not intending to decriminalise public drunkenness. The minister put out a media release of 9 May 1994 that clarifies that state cabinet has rejected suggestions that public drunkenness be decriminalised in Queensland.*[41]

7.37 The Government told Tharpuntoo Legal Service that it will set up yet another interdepartmental committee, this time to:

> *..... provide recommendations on strategies that ensure jails and watch-houses are places of last resort for the detention of intoxicated indigenous people.*[42]

7.38 The Committee is extremely disappointed and deeply concerned by this decision and its implications. The Royal Commission made it perfectly clear that maintaining drunkenness as a criminal offence was a major contributor to the over-representation of indigenous people in custody and consequently to deaths in custody.[43] It pointed to the inefficient use of police resources, court resources and taxpayers' money because of the ineffectiveness of treating drunkenness as a criminal offence. The Royal Commission found this process to be a phenomenal waste[44] yet the Queensland Government has decided to continue with it. The main reason given for not decriminalising drunkenness is that it should not take place until appropriate alternative strategies were in place. It is a measure of the commitment and effectiveness of the Queensland Government that six years after the *Interim Report*'s recommendation that there be 'adequately funded programs to

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40 *Queensland Government Progress Report - 1993*, Vol 3, p89

41 Evidence, p822

42 Extract from letter from the Health Minister to Tharpuntoo Legal Service, evidence, p551

43 RCIADIC, *National Report*, Vol 3, p6-7

44 RCIADIC, *National Report*, Vol 3, p8

establish and maintain facilities for the care and treatment of intoxicated persons'[45] that only one such centre has been purpose built and fully resourced in all of Queensland.

7.39 The Government claimed in its 1993 Implementation Report that:

> *Diversionary Centres either have been established or are in the process of being established in Cairns, Mt Isa, Brisbane (Murrie Watch), Rockhampton and Townsville.*[46]

7.40 However, evidence to the Committee indicated no diversionary centres were in the process of being established in Rockhampton or Townsville because of objections from sections of the communities.[47] The Bama Healing Centre in Cairns was not a purpose built facility and there were some difficulties in the multiple use of the Alluna Hostel site for a sobering up centre, a hostel for TAFE students and a hostel for medical visitors to Cairns and their families. It is funded as a sobering up or diversionary centre but Bama would like it to be a rehabilitation service as well, in keeping with Bama's objectives.[48] Murrie Watch[49] in Brisbane is not a purpose built facility and is temporarily located in a run down building which is inadequate for the purpose. Funding has been approved in principle to significantly upgrade the temporary facility on the same site.[50] The only fully resourced diversionary centre in Queensland is at Mount Isa.[51] This is an appalling performance after six years, particularly when it is then used as an excuse for not decriminalising public drunkenness.

7.41 The Royal Commission made it quite clear that police cells were not the appropriate place to accommodate those detained for being intoxicated. However, the Queensland implementation of diversionary centres, where they exist, ignores this finding by detaining people in police cells until they can be released into the care of sobering-up shelter staff at the watch-house. This shows a complete lack of understanding of what is the basic thrust of the Royal Commission recommendations. Worse still, police in Cairns were quite emphatic in discussions with the Committee that according to police general instructions people detained for

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45 RCIADIC, *Interim Report*, p31

46 *Queensland Government Implementation Report 1993*, Vol 1, p4

47 Queensland Government, evidence, p818

48 Informal discussions with Bama, and Families and Prisoners Support. Queensland Government, evidence, p499, 816

49 Murrie Watch started as a cell visitor scheme but then began using its premises in Woolloongabba as a sobering-up shelter, for which it is now funded

50 Queensland Government, evidence, p818

51 Tharpuntoo Legal Service, evidence, p551, 564

being intoxicated had to be held for a minimum of four hours in the cells and this practice was rigorously observed.[52] This is directly contrary to Section 8.1 of the Custody Manual which had been in force for 12 months at the time. The relevant page from the Manual is reproduced in Appendix 8. The relevant part provides that:

> *Where a diversionary facility exists and the person agrees to go with a responsible person to that facility, that person may be released on cash bail at any time during the detention.*[53]

7.42 In Brisbane, the Committee was told by Murrie Watch that people were generally released into their care within 30 minutes of arrival at the watch-house. Acting Deputy Police Commissioner Banham appearing for the State Government told the Committee that there was no mandatory four-hour detention period. This is a further indication of a serious communication breakdown within the Queensland Police Service. Procedures to ensure that policies are implemented in practice across the State and down through the ranks are obviously not very effective. It also indicates a lack of adequate monitoring by police managers of what the Service is actually doing. This is dealt with further in Chapter 8.

7.43 Recommendation 81 stated that legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated people in police cells. Alternatives should include the options of taking the intoxicated person home or directly to a facility established for the care of intoxicated people. The Queensland Government indicated that it supported this Recommendation but action was confined to a review by a working group.[54] A senior Cairns police officer said he had never seen anything in writing that people detained for being intoxicated would be taken to a diversionary centre. The Police Custody Manual policy (see Appendix 8) supports the use of diversionary centres for the removal of prisoners arrested for drunkenness from watch-houses. It provides orders for the officer in charge of the watch-house to develop appropriate standing orders and to develop a protocol with the diversionary centre. These provisions have not been followed in Cairns.

7.44 Given the failures to implement the Custody Manual in Cairns, the Committee is concerned that other regional centres in Queensland may also be failing to implement the instructions. There is clearly a need for more effective monitoring by police managers.

7.45 When asked whether consideration was going to be given to clarify what diversion really means, so that people detained for intoxication were not placed in police cells, Mr Jim Wauchope from the Department of Family Services and Aboriginal and Islander Affairs said:

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52 Informal discussions with Cairns Police, and Bama Healing Centre, evidence, p498, 624

53 *Queensland Police Service Custody Manual*, June 1993, p53

54 *Queensland Government Progress Report 1993*, Vol 3, p90

I think that we would hope to do that.[55]

7.46 Another feature of the Queensland diversionary process which the Committee found incomprehensible is that the diversionary centre is frequently called upon to pay the bail for those it takes into care. These monies are almost invariably forfeited due to non-appearance in court and are generally regarded as some kind of fine. While the amounts are generally small it is indicative of the poor implementation process that this ridiculous situation should arise.

7.47 The inconsistency in the application in Cairns of the law concerning drunkenness was outlined by witnesses from Tharpuntoo Legal Service.

> *Mr Lavery–If someone is charged with public drunkenness in Queensland, after the expiration of, I think, a minimum of four hours, they are bailed. It used to be 10c, but I think it could be somewhere around $2 now. And what happens is that they forfeit that bail in a non-appearance. So, for example, a solicitor representing Tharpuntoo down at the Magistrate's Court would tell a person coming before them for public drunkenness to get out of there and forfeit their $2. I do not think any conviction is recorded in real terms. So we do not in fact represent those people. We do collect figures on all the other charges where you do get an actual representation, but on public drunkenness, it is just an administrative thing and the magistrate's clerk will call out the names of the drunks, usually at the end of the Magistrate's Court session. He will call them out three times, non-appearance, bang, bang, bang, bang. It is all written off, and they forfeit bail.*
>
> *Chair–I want to be very clear about this. Here we have a statute on the books which is an offence; people are actually picked up; they may spend up to four hours or longer in a lock-up; they are bailed out for $1 or $2, with a summons to appear in court; and for failing to appear they just forfeit their bail and there is no conviction recorded. Is that what you are saying is the situation?*
>
> *Mr Lavery–Unless somebody turns their attention to the paperwork and formally records that conviction, there would be no conviction formally recorded. It might be noted on a record, so that they can say that, for example, Mr Lavery appeared 30 times last month for public drunkenness, and you hear of cases like that all the time. But no formal conviction is recorded. It does not appear on criminal histories in Queensland, for example.*[56]

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55 Evidence, p819

56 Evidence, pp563-4

7.48 The Committee finds that despite claiming to support Recommendations 79, 80 and 81, Queensland has dismally failed to implement them through a continuing saga of working groups and of management failures. The Royal Commission took less than four years to complete its momentous task. In six years since the *Interim Report* the Queensland Government has achieved very little in this matter. Five of the 14 who have died in custody in Queensland since the conclusion of the Royal Commission were detained for public drunkenness.

New South Wales

7.49 Drunkenness as an offence in New South Wales was abolished in 1979.[57] The *Intoxicated Persons Act 1979* provides that 'a member of the police force or an authorised person' may detain and take to a 'proclaimed place' (which currently includes police stations) an intoxicated person who is found in a public place, behaving in a disorderly manner, behaving in a manner likely to cause injury to people or property, or who is in need of physical protection because of his or her state. The Act permits police to use police cells for such detention for temporary purposes or where another 'proclaimed place' in unavailable.

7.50 The NSW Government advised that proclaimed places are funded through the Department of Community Services and are placed in strategic locations for the purpose of providing an alternative to police cells. Under the *Intoxicated Persons Act 1979* all Juvenile Justice Detention Centres are proclaimed places. As at 5 January 1992 there were 28 proclaimed places operating across NSW.[58]

7.51 The NSW Government acknowledges that there is a need to expand the number of facilities for intoxicated people. The adequacy of current arrangements will be considered as part of the Government's review of the *Intoxicated Persons Act.* The only night patrols that the Committee heard of in New South Wales, were in Bourke and Walgett.

7.52 The Royal Commission commented on the effect of the *Intoxicated Persons Act*:

> *The effect of the Act was to increase the rate of detentions compared with the previous Summary Offences Act, in fact to double them by the mid-1980s. Over these years there was an increasing trend to holding the detainees in places other than police cells. The majority of detainees in New South Wales are now held in a proclaimed place other than a police cell.*

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57 *Implementation of Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody - New South Wales Government 1992-93*, p72

58 *New South Wales Government Implementation Annual Report 1992-93*, pp72-4

According to some writers on the topic, the Act has continued to play a major role in justifying the detention of large numbers of Aboriginal people in New South Wales, especially in the intensively policed Far Western districts where there are few proclaimed places other than police stations.[59]

7.53 The New South Wales Government advised that:

Recommendation 81, which calls for a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated people in police cells, was implemented through Commissioner's Instructions 155-1.05 (page 32) and 155-10.1 (page 6).[60]

7.54 Evidence heard by the Committee in Wilcannia and Dubbo confirmed that the Far Western areas were still intensively policed and that the Act was used to clear Aboriginal people from the streets rather than for their protection. However, the Committee heard that in general, where no proclaimed place was available, people picked up for being intoxicated were taken home rather than to the police cells.

7.55 In Wilcannia, there was no sobering-up shelter and intoxicated people were generally taken home by the Aboriginal Community Liaison Officers (ACLOs). However, the Committee was told that the Chief Superintendent at Broken Hill had reprimanded the former Patrol Commander at Wilcannia, Senior Sergeant Ken Jurotte, for taking intoxicated people home saying that they should be detained, as the police did not operate a taxi service.[61] It would appear that the Commissioner's Instructions referred to in paragraph 7.53 were being countermanded at senior levels.[62] Mr Ken Jurotte told the Committee that when he first arrived as Patrol Commander at Wilcannia, intoxicated people, including juveniles, were being detained in the police cells. He instructed the ACLOs to take intoxicated people home.[63]

7.56 The Committee also heard in Wagga Wagga that those police who take intoxicated people home were berated by other officers for taking a 'soft' approach rather than a 'law and order' one.[64] Again, it appears to the Committee that compliance with the Commissioner's Instructions does not appear to be effectively monitored.

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59 RCIADIC, *National Report*, Vol 3, p11

60 *New South Wales Government Report 1992-93*, p73

61 Mr Ken Jurotte, evidence, p1062

62 Mr Ken Jurotte, evidence, p1062

63 Evidence, p1061

64 Informal discussions

7.57 Recommendation 85 called for the monitoring of the effect of decriminalising drunkenness to ensure people are not being detained in cells when they should have been taken to alternative places of care, that alternative charges were not replacing drunkenness and that the results of this monitoring be made public. The New South Wales Government's response was that it supported the Recommendation, that monitoring occurs at present and that the *Intoxicated Persons Act* was being reviewed. No evidence of the monitoring was given, nor of the results, which the Royal Commission said should be made public. This is an important Recommendation in ensuring a reduction in the number of people in police custody, but the Committee is concerned that it was not being effectively implemented.

Western Australia

7.58 Legislation to decriminalise drunkenness was proclaimed on 27 April 1990 as a consequence of the Royal Commission's *Interim Report*. Sections 53 (drunk in a public place) and 65(6) (habitual drunkenness) of the *Police Act 1982* were repealed in December 1989. The detention provisions of the new section 53 are substantially the same as in the Northern Territory, and there is no provision regarding the place of detention.[65]

7.59 The Royal Commission *National Report* noted:

> *Prior to statutory reform, the Western Australia Police Commissioner had directed in January 1988 that police were not to arrest for drunkenness where alternative arrangements could be made in relation to an intoxicated person. It is possible that this had the effect of reducing the number of police arrests of Aboriginal people, at least in some areas of the State, as indicated by the comparative study of 1987 and 1990 arrests in Kalgoorlie.*[66]

7.60 On Recommendation 80 which recommended the establishment of non-custodial facilities for the care of intoxicated people, the Western Australian Government said:

> *Police support the establishment and use of facilities for the care and treatment of intoxicated people. Where sobering up shelters have been established, drunken persons are conveyed to those shelters by police.*
>
> *Sobering Up Centres are now operational in Perth, South Hedland, Halls Creek and Roebourne. A further two centres, one in Fitzroy Crossing and one in Kalgoorlie will be operational early in 1994.*

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65 RCIADIC, *National Report*, Vol 3, p12

66 RCIADIC, *National Report*, Vol 3, p12

Discussions are presently taking place between the Alcohol and Drug Authority and community groups in Geraldton and the East Kimberley towns of Wyndham and Kununurra about setting up sobering up centres.

Funds for a sobering up facility in Derby have been included in the budget estimates for 1993/94. These funds will complement those already allocated by the Commonwealth to the Garl Garl Walbu group for the establishment of a sobering up facility.[67]

7.61 The Aboriginal Legal Service of Western Australia (ALS of WA) in its report on the implementation of recommendations by the State Government said that:

It is understood that public drunkenness arrest data was used to allocate funds to the centres with highest rates of public drunkenness arrests in 1988-89 (Perth, Fitzroy Crossing and Halls Creek accounted for 44% of arrests). However over half of the arrests took place in centres for which no sobering up facility is proposed. It is therefore likely that there will still be high rates of detention of intoxicated persons in police lock-ups.

In addition the continued detention of Aboriginal people for intoxication albeit decriminalised has an extremely negative effect on Aboriginal/police relations. It has been noted that in South Hedland where one shelter is located, centre staff will apparently only accept drunken persons brought to the centre by police and will not accept self referrals or persons brought in by friends. This has resulted in intoxicated persons engaging in behaviour to attract the attention of police in order to obtain admission to the centre. Such a result is absurd and it is essential that there be adequate facilities to take persons referred by police as well as admissions from the community.

The most recent data available from the WA ADA for January-June 1992 shows there has in fact been a dramatic increase (about 35%) in the number of detentions for intoxication since the offence of drunkenness has been decriminalised. With three sobering up centres operating (in Perth, South Hedland and Halls Creek) only 30% of intoxicated persons are detained in Police lock-ups. Aboriginal people comprise 90% of all persons detained. Clearly more sobering up facilities need to be established.[68]

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67 *RCIADIC - Government of Western Australia Implementation Report 1993*, Aboriginal Affairs Planning Authority, December 1993, p68

68 The Aboriginal Legal Service of Western Australia (Inc.), *Striving for Justice*, p38

7.62 In Broome and Roebourne the Committee heard of large numbers of people being arrested for disorderly conduct and drinking in a public place. Street offences appear to be replacing drunkenness as 'standard' charges'.[69] It was suggested in Roebourne that Aboriginal people drinking in the park were unsightly for tourists, despite Aboriginal people having a long association with that place.[70]

7.63 The Royal Commission dealt with the resentment of Aboriginal people at being excluded from the Harding River Reserve at Roebourne[71], and cited the work of Dr Mary Edmunds. Dr Edmunds observed:

> *In a similar way, the Harding River Reserve represents the place where the dominating power of one society, and its need to coerce the other into conformity, meets the intransigence of the latter. The police presence, the constant patrolling on foot and in cars, under these circumstances acts as a corrective presence, that is, controlling behaviour and pulling it into line with the norm. In the face of Aboriginal resistance however, this action loses its goal and its effectiveness. It becomes petty, repetitive, frustrating for all those involved but perhaps most of all for the police who are required to continue enforcing regulations that meet with passive but intractable opposition. This is perhaps the most galling aspect of police experience and one that focuses on the contradiction at the heart of the policing system.*[72]

7.64 Despite the Royal Commission drawing attention to the gross difficulties with policing in Roebourne, the Committee heard during its visit, three years later, that policing practices were very poor with high levels of over-policing.[73] The Committee will deal further with the poor and inefficient policing practices in Roebourne in Chapter 10.

7.65 There is no sobering-up shelter in Broome but the Committee was told there that a new shelter had just opened in Fitzroy Crossing. While there was a sobering-up shelter in Roebourne there were some difficulties with its operation. The police claimed that it was too restrictive in the categories of people that it would not accept,[74] although the list of exclusions matches closely those of other sobering-up

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69 Aboriginal Legal Service of WA, evidence, p115

70 Aboriginal Legal Service of WA, Karratha, evidence, pp161-2

71 RCIADIC, *National Report*, Vol 2, p201

72 M Edmunds, *They get heaps - A study of attitudes in Roebourne, Western Australia*, Aboriginal Studies Press, Canberra, 1989, p108. Also cited in the Committee's earlier report, *Mainly Urban*, 1992, p28

73 Aboriginal Legal Service of WA, Karratha, evidence, pp160-1

74 Informal discussions, Police Regional Headquarters, Karratha

shelters and the requirements of the Royal Commission recommendations. The Committee also heard that a number of people were unwilling to use the shelter because of religious practices and proselytising at the shelter.[75] This matter should be examined by funding agencies.

7.66 The Committee recommends that:

the Commonwealth funding of sobering-up shelters should be conditional on there being no religious coercion of people who are intoxicated or religious services performed in their presence. (Recommendation 34)

7.67 In discussing police reluctance to use the Roebourne sobering-up shelter the Legal Service in Karratha also raised the influence of the meal allowances payable for the number of people detained in police cells.[76] The Royal Commission recommended that the meal allowance system be abolished as the incentive it offers to private gain to officers in charge of lock-ups, militates against reducing the number of people in custody. The Western Australian Government still had not abolished this system[77] although the Report of the Task Force on Social Justice had also recommended that it be abolished.[78] Criticisms of the meal allowance scheme are dealt with in further detail in Chapter 8.

7.68 During its visit to Roebourne the Committee was told that since the arrival of a new sergeant in Roebourne, police-community relations had deteriorated markedly.[79] The number of people taken directly to the shelter by police had also dropped dramatically with intoxicated people being placed in the cells instead. Policing practices at Roebourne are dealt with further in Chapter 10.

7.69 While the Committee did not visit Wiluna, a recently released report by the ALS of WA raises a number of very serious concerns on policing in Wiluna. The report examined the trends in the numbers of intoxicated people detained compared

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75 Informal discussions, Roebourne and Karratha, and Aboriginal Legal Service WA, Karratha, evidence, p156

76 Evidence, pp153-4

77 WA Government, evidence, p384

78 Government of Western Australia, *Task Force on Aboriginal Social Justice, Report of the Task Force*, April 1994, Vol 2, p571

79 Informal discussions, Roebourne

with the numbers taken home. Since the arrival of a new sergeant in Wiluna there had been:

> *.....a clear reversal of the policy of taking intoxicated persons home, towards a policy of detaining them in custody. For the period since 30/6/94 approximately 5 persons have been detained for every person taken home or elsewhere. This compares with last year when an average of 2 persons were taken home, for every person detained. Whilst intoxicated persons are rarely detained for 24 hours, it is assumed that meal allowance is paid to Police for at least some meals taken by detainees.*[80]

The report also notes:

> *In addition to detention of intoxicated persons, police frequently detain people overnight after charging them with disorderly conduct or refusing to leave licensed premises. They do this by deferring their determination in relation to bail, until they regard the person, sober enough to understand their bail undertaking. There is no specific power under the Bail Act for deferring bail. It is somewhat ironic that a person deemed capable of understanding a request to leave licensed premises, is deemed at the same time incapable of understanding their bail requirements.*[81]

7.70 In respect to Recommendation 81 that there be a statutory duty on police to consider and use alternative facilities, including taking intoxicated people home, the State Government responded:

> *Until a full range of alternative facilities exist that are equipped to receive intoxicated people, it is not feasible to change the section of the Police Act which provided for the placement of intoxicated persons in sobering-up shelters or other alternatives. However, the police procedural guidelines emphasise that detention in police cells is the least preferred option.*
>
> *In Broome and Derby, Kullari Aboriginal organisations and police have worked together to establish the Kullari and Numbud Patrols. These patrols are run by volunteers and aim to reduce the number of Aboriginal people put in custody by picking up intoxicated Aboriginal people and taking them to a safe place, usually home or to a relative.*

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80 Aboriginal Legal Service of Western Australia, *Counting the Cost, Policing in Wiluna 1994*, p14

81 *Counting the Cost*, p14

Negotiations are currently underway in other locations to establish similar patrols. In Geraldton, the Yamatji Patrol has recently been established which has a particular focus on diverting young people, both Aboriginal and non-Aboriginal, from custody.[82]

7.71 The Committee also heard of the success of the recently introduced street patrol in Kalgoorlie which, with good police co-operation, had significantly reduced contact between intoxicated people and police.

7.72 The Committee cannot accept the Government's reason for not imposing a statutory duty on police. The evidence from Wiluna, Roebourne, Broome and Karratha indicated that the police procedural guidelines mentioned were not being implemented, or monitored, even where a sobering-up shelter existed. Some other states have imposed a statutory duty without having 'a full range of alternative facilities' by providing for other options, such as taking someone home or to a friend's place. It may be many years before Western Australia has a full range of facilities, despite making reasonable progress to date.

7.73 The Committee recommends that:

the Prime Minister through the Council of Australian Governments seek the prompt implementation of Recommendation 81 of the Royal Commission through the introduction by Western Australia of a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated people in police cells. (Recommendation 35)

7.74 The Committee is concerned that given the high number of intoxicated people being placed in police cells in the north of the State there do not appear to be adequate assessments being made of those intoxicated people taken into custody as recommended by the Royal Commission.[83]

7.75 An additional concern was raised by the ALS of WA in Broome, that police:

appear to improperly take advantage of the fact that many Aboriginals are affected by alcohol when they come into police custody. When you look at the time at which they are taken into custody and the time at which interviews are conducted, there has been absolutely no time to sober up. There have been instances where Aboriginal people when sober, when confronted by someone from the Aboriginal Legal Service

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82 *RCIADIC - Government of Western Australia Implementation Report 1993*, pp68-9

83 Kimberley Aboriginal Medical Services, evidence, p110

with what they have signed, have no memory of it and now wish to resile from it.[84]

7.76 The Western Australian Government response to Recommendation 85 was:

Partially implemented

a *The Alcohol and Drug Authority keeps a record of persons referred to sobering up centres and lock-ups.*

b *As part of the evaluation on decriminalisation of drunkenness, the preliminary evidence suggests that being picked up for offences other than drunkenness is not occurring.*

c *The Alcohol and Drug Authority has plans in train to conduct public workshops to disseminate the results of its evaluation, consistent with its policy of making such reports public.*

In addition, the Police Monthly Work Study Summary form has been revised to require police stations to record the processing of drunken persons from 1 July 1993. Although the system does not address all aspects of the recommendation, it will provide for some form of monitoring to be undertaken. The system currently operates on a manual basis, but consideration is being given to computerising the information.[85]

7.77 The Committee notes that despite the response to Part (a), effective monitoring by police managers was not occurring. Not even the gross distortions in Wiluna and Roebourne were being detected and remedied. Similarly, the preliminary findings concerning Part (b) do not match with the evidence that came from Wiluna, Broome and Roebourne. The Committee does not believe that effective monitoring of Parts (a) and (b) will occur until police charging procedures and cell management are computerised. The serious failures in monitoring by senior police managers needs to be addressed immediately.

7.78 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek the prompt implementation of Royal Commission Recommendation 85 by Western Australia. (Recommendation 36)

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84 Evidence, p115

85 *Government of Western Australia Implementation Report 1993*, p70

South Australia

7.79 Public drunkenness was decriminalised in South Australia in 1984. Under Section 7 of the *Public Intoxication Act 1984*, police may apprehend and detain a person believed to be under the influence of a drug or alcohol and 'unable to take proper care of himself'.[86] Section 3 of the Act provides four alternatives as to where a detained person should be taken:

- to the person's home;
- to a place approved by the Minister (of Health);
- to a police station;
- to a proclaimed sobering up centre.[87]

7.80 The Royal Commission noted that for a number of years there were practically no 'proclaimed places', so police cells were used for detaining most apprehended persons. There are now a number of sobering up centres 'approved' (for voluntary admission) or 'proclaimed' (for custodial admission) in Adelaide and in some country centres.[88]

7.81 The South Australian Government advised that:

> *There are currently five sobering up centres in South Australia (three metropolitan, including one for youth, one in Port Augusta and one in Ceduna). Additionally, Mobile Assistance Patrols are operated in Adelaide. Murray Bridge, Port Augusta and Ceduna to divert intoxicated persons from police custody.*[89]

7.82 In its response to Recommendation 81 which called for a statutory duty to be placed upon police to consider and utilise alternatives to police cells the State Government claimed to have implemented the Recommendation but avoided the question by referring to the four options provided under section 3 of the Act.[90] It would appear that no statutory duty had been imposed.

7.83 At Yalata, the Committee was told by community representatives that police in Ceduna frequently took homeless Yalata people, who were drunk, straight to the police cells rather than to the sobering-up shelter. However, a witness working with

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86 RCIADIC, *National Report*, Vol 3, p11

87 *Royal Commission into Aboriginal Deaths in Custody, 1993, Implementation Report - South Australian Government*, Department of State Aboriginal Affairs, April 1994, p95

88 RCIADIC, *National Report*, Volume 3, p11

89 *1993 Implementation Report, South Australian Government*, p95

90 *1993 Implementation Report, South Australian Government*, p95

the mobile assistance patrol in Ceduna, said that police have been taking people to the sobering-up unit but the ones who were violent were taken to the police station.

7.84 Recommendation 85 called for the monitoring of the effect of decriminalising drunkenness to ensure people are not being detained in cells when they should have been taken to alternative places of care, that alternative charges are not replacing drunkenness and that the results of this monitoring be made public. The South Australian Government claimed this Recommendation had been partially implemented but the basic elements of monitoring and the publication of the results of the monitoring were not being done. Instead the Government said:

> *Public drunkenness has not been an offence in South Australia since the Public Intoxication Act, 1984 came into operation in September 1984. The Act is administered by the Minister for Health. Arrest criteria and general orders ensure the correctness of arrests and charges laid and audit processes monitor these actions. The review of the Act is yet to be undertaken.*[91]

Australian Capital Territory

7.85 Public drunkenness was decriminalised in the Australian Capital Territory in 1983. A member of the police force may take into custody any person found in a public place and who is behaving in a disorderly manner, behaving in a manner likely to cause injury to themselves, others or property, or who is incapacitated by intoxication to the extent that they are unable to take care of themselves.

7.86 In August 1994, a sobering-up place was opened with four beds opening 3 nights a week. It is not specifically for Aboriginal people.[92] Police now have available the options of taking intoxicated people to either the shelter or to their home. The Australian Federal Police indicated that, given their non-custodial policy, they would seek to use the alternatives, before using the watch-house.[93]

7.87 The establishment of the sobering-up shelter followed a review of the need for detoxification services and places for chronic alcoholics.[94] The Government said that it had agreed to the development of legislation to implement Recommendation 81 by placing a statutory duty upon police officers to consider and utilise alternatives for the detention of intoxicated people.[95] The newly established

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91 *1993 Implementation Report, South Australian Government*, p98

92 ACT Government, evidence, pp1335-7

93 Australian Federal Police, evidence, pp1336-7

94 *Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1992-93, ACT Government Implementation Report*, p54

95 *ACT Government Implementation Report*, p54

computerised charging system should allow Recommendation 85 to now be implemented.

Northern Territory

7.88 The Northern Territory was the first jurisdiction in which drunkenness was decriminalised, in 1974. Section 128 of *The Police Administration Act 1979* provides for police to take into protective custody a person believed, on reasonable grounds, to be intoxicated, who is in a public place or trespassing on private property. Section 129 to 133 include provisions for the release of a detainee into the care of another person and for the protection of the detainee from police questioning, fingerprinting, photographing or charging during the period of detention. There is no statutory guidance governing the place at which apprehended persons should be detained.

7.89 There were sobering-up shelters in the major centres of Alice Springs, Tennant Creek, Katherine and quite recently a shelter had been opened in Darwin. There was a sobering-up shelter in Darwin previously but it was closed in 1987.[96] There was also a number of shelters in remote communities as well as some operated by church groups such as the Uniting Church.[97] Concerning sobering-up shelters in the Northern Territory, the Royal Commission found that:

> *Although substantial numbers of persons apprehended are taken into shelters, police cells have been the location of most protective custodies, except in a few places.*[98]

7.90 Since the Royal Commission's Report the shelter in Darwin had opened. However, witnesses from Aboriginal organisations who gave evidence knew little about the new shelter and its operations.

7.91 The Northern Territory Police outlined the effect on protective custody numbers of opening a sobering-up shelter in Alice Springs:

> *the numbers decreased, and particularly there was a major decrease, almost 50 per cent, in apprehensions in Alice Springs which was our major area of concern, solely because of the sobering-up shelter. We have had discussions with them to extend their hours, which they did. It is now almost on a 24-hour basis there, seven days a week. Of course, that has reduced the figures dramatically but, from time to time, there are prisoners that they will not accept; and they are in our custody as prisoners. There are intoxicated persons who are returned to the cells because they cannot take them or keep them in the*

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96 RCIADIC, *National Report*, Vol 3, p10

97 ATSIC - NT Office, evidence, p1003; NT Government, evidence, p1025

98 RCIADIC, *National Report*, Vol 3, p10

sobering-up shelter. Of course, if the sobering-up shelter becomes full, as it does with big sporting events that might occur in Alice Springs, and those sort of things, then the only alternative is to return them to our custody. I do not keep the figures particularly of what would have been returned from the sobering-up shelter.[99]

7.92 The Northern Territory Police said that protective custody apprehension had decreased from around 31,000 a year in 1991 to under 25,000 a year at present. This had also been accompanied by a reducing number of street offences.[100] Protective custody figures for the year ending 30 June 1994 showed a 16.9 decrease for non-Aboriginal people.[101]

7.93 The Central Australian Aboriginal Legal Aid Service in Alice Springs told the Committee that despite the sobering-up shelter and night patrol the protective custody powers were still being used by police to keep Aboriginal people off the streets. The success of decriminalisation depended on how the police administer it.

7.94 Another essential element in reducing Aboriginal contact with the criminal justice system was the provision of night patrols. The Royal Commission referred to the effective night patrol operated by Julalikari Council in Tennant Creek.[102] The Committee heard also of the night patrol operated by Tangentyere Council in Alice Springs. This was initially established to patrol the town camps but it has been asked by the police to also patrol the town. It had extended its hours of operation and can respond within 10 minutes of the police calling to tell it that people are waiting to be picked up somewhere in the general town area. A co-operative relationship had been developed between the police and the night patrol, which was very useful because it is hard to resolve some situations without police assistance. The Police Aides have played a special role in this regard.

7.95 The Northern Territory Government does not support Recommendation 81 which recommended that there be a statutory duty on police to consider and utilise alternatives to police cells for those in protective custody because they are intoxicated. It said:

The Northern Territory does not support a statutory requirement. Subordinate legislation (General Orders) already adequately accommodates the principles espoused in this recommendation. Police management is required to ensure directions to place intoxicated persons in sobering-up shelters wherever possible are complied with.

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99 NT Government, evidence, p1026

100 NT Government, evidence, pp1021-2

101 NT Government, evidence, pp1032-3

102 RCIADIC, *National Report*, Vol 3, p17

The limited number of sobering-up shelters in non-urban areas limits their widespread use as an alternative to police custody.[103]

7.96 The failure to support Recommendation 81 is difficult to comprehend when the Northern Territory Government claims in effect to be implementing it in its response to Recommendation 85(a):

Persons detained for 'Protective custody' are only placed in police cells where no alternative exists. Detainees are automatically taken to sobering-up shelters if they are available and open for reception, unless detainees are too unruly for the shelters to handle. Operational Commanders and Superintendents closely monitor this aspect.[104]

7.97 The Committee concludes that the implementation of those recommendations which sought to divert intoxicated people from police custody, had been uneven around Australia and the true picture had not always been given through the individual implementation reports.

7.98 The Committee recommends that:

the Prime Minister through the Council of Australian Governments seek, as a matter of urgency, the implementation of state and territory commitments to the Royal Commission recommendations dealing with public intoxication. In particular state and territory governments should:

- **promote and fund more Aboriginal-run street patrols;**
- **increase the provision of sobering-up shelters;**
- **ensure that police services act in the spirit of the Royal Commission by:**
  - **minimising their contact with and detention of intoxicated people;**
  - **not utilising substitute charges, such as drinking in public, as some form of social control over Aboriginal people on the street.**

(Recommendation 37)

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[103] *Implementation of Northern Territory Government responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, 1992-93 Annual Report,* Office of Aboriginal Development, NT Government, p35

[104] *Implementation of Northern Territory responses, 1992-93*, p36

7.99 The Committee rejects as unsustainable the arguments of the Queensland Government for not adopting Recommendation 79 on the decriminalisation of public drunkenness.

7.100 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek the immediate implementation by the Queensland Government of Royal Commission Recommendation 79. (Recommendation 38)

7.101 The Committee is strongly critical of the delays by Victorian Governments to implement Recommendation 79.

7.102 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek the immediate implementation by the Victorian Government of Royal Commission Recommendation 79. (Recommendation 39)

CHAPTER 8

DIVERSION FROM POLICE CUSTODY

Arrest as a last resort

8.1 In examining the arrest rate of Aboriginal people the Royal Commission said:

> *A different type of challenge to reform of police practices is posed by the extensive use of the arrest power against Aboriginal people. A number of options are, of course, available to police in proceeding against a person suspected of, or detected, committing an offence. Among these are informal warnings, formal cautioning, reporting and summoning, although the availability and operation of each of these differs from one jurisdiction to another. Even after arrest, the possibility exists of police supervisors exercising, at least in some jurisdictions, a power to discharge detainees and return them to the place of arrest.*[1]

8.2 The Commission noted that police rules and training typically advise officers against too ready a use of the arrest power.

8.3 Commissioner Johnston emphasised the importance of the role of supervising officers in relation to arrests, in his report on the death of Craig Karpany:

> *At the group sitting with senior members of the Police Force I expressed my view that a change in 'police culture' is required in order to influence officers who are making arrests to use their power to do so with more caution. I also suggested that provision for the supervision of arrests by senior officers would lead to younger officers being more aware of the benefits of reporting over arresting, in that it entailed them in less administrative work.*
>
> *In thinking over matters since the hearing, I am more convinced of the point I then made. A young Constable is likely to be more influenced by the Station Sergeant congratulating him on not proceeding by way of arrest than by way he was taught at the Academy. Similarly, a young Constable is likely to be strongly influenced against not arresting if he is condemned by his Sergeant for so doing.*[2]

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1 RCIADIC, *National Report*, Vol 3, p34

2 RCIADIC, *National Report*, Vol 3, pp36-7

8.4 A Queensland Police Complaints Tribunal report from 1989, cited by the Commission, denounced the arbitrary exercise of the power of arrest without warrant, in the light of many instances reviewed by it, in which 'the power of arrest has been exercised mechanically, arbitrarily, without cause, or as a summary sanction'. Arrest rather than summons was often used 'merely because it is more convenient to arrest'. The Queensland Tribunal warned of the dangers posed by the possible incentives to the use of arrest posed by assessments of an officer's efficiency on the basis of arrests made.[3] The Royal Commission found, from the case histories of those whose deaths it investigated, that the arrest power was used very frequently. The Commission said:

> *In spite of judicial exhortation and police department rules and training, there is an urgent need to ensure that summons procedures and other means of addressing offending, short of arrest, become more extensively used by police. Where practical matters, such as the amount of paperwork involved in a policing intervention, may affect the use of non-custodial options by police, consideration should be given to changing the balance in favour of the non-custodial procedure.*[4]

8.5 In examining the allocation of police resources, the Royal Commission questioned the effect increased numbers of police had in particular locations on the rate of Aboriginal arrests and detentions. The Royal Commission found that as with other factors in policing this is only one of a number of determinants of arrest rates. However, it pointed out notable instances where increases in police staffing were associated with the size of the Aboriginal population, the number of charges being laid and substantial increases in arrests for street offences.[5]

8.6 The Royal Commission found that the expansion of the police capacity, oriented primarily to a proactive intervention through arrests and charges for offences, amplified considerably the numbers of Aboriginal people coming into contact with the criminal justice system. This is especially so where there is pressure from the police hierarchy and/or local government to vigorously enforce street offences legislation.[6]

8.7 Rather than intervening primarily through arrests and charges and an upward spiral in police numbers, the Royal Commission proposed:

> *An alternative perspective on the allocation of police resources is to look at those resources devoted to policing initiatives which are*

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3 RCIADIC, *National Report*, Vol 3, p38

4 RCIADIC, *National Report*, Vol 3, p38

5 RCIADIC, *National Report*, Vol 3, pp38-40

6 RCIADIC, *National Report*, Vol 3, pp39-40

preventive in object. Such measures include police liaison work, the resourcing of training programs and the development of police aide schemes.[7]

The Royal Commission's Report goes on to say:

The material before the Commission suggests that some Aboriginal people's needs are not being met in some areas. In particular, greater support for community policing initiatives, problems with over policing and inadequate policing have been raised by Aboriginal communities and individuals. It is important, therefore, that in reviewing resources police services should, in consultation with individual Aboriginal communities, closely examine these concerns and attempt to develop policing responses which are acceptable to both groups.[8]

Alternatives to arrest

8.8 The Royal Commission discussed some of the means by which police interventions might be avoided or where unavoidable, might be dealt with by resolution short of arrest or detention in custody. Such means included cautioning programs, the use of summons rather than arrest, and the potential for community based diversionary programs and facilities to reduce the rate of custody of Aboriginal people. It discussed innovative programs where Aboriginal communities have sought to establish diversionary processes themselves. These include the night patrols and general police liaison work undertaken by Julalikari Council at Tennant Creek and the Community Justice Panels in Victoria.[9]

8.9 The Commission noted that the strengths of these two programs are that they drew on Aboriginal community resources rather than depending on police initiative. However, their success also depended on police cooperation, which was highly regarded by the communities concerned.[10] The Commission saw considerable potential, through these initiatives, to reduce arrest and detention rates and urged greater support for such initiatives. It cited the achievements of one Community Justice Panel (CJP) in Victoria:

In Echuca, for example, the Commission has been told that before the CJP system was operating, there were between 400 and 500 instances of Aboriginal people being detained each year and that since its inception there have been no Aboriginal people detained for any reason

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7 RCIADIC, *National Report*, Vol 3, p40

8 RCIADIC, *National Report*, Vol 3, p42

9 RCIADIC, *National Report*, Vol 3, pp44-45

10 RCIADIC, *National Report*, Vol 3, p45

whatsoever. Importantly, there are large numbers of juveniles (reportedly 70% of Aboriginal appearances in the local court) who are avoiding being detained in police cells at all. The CJPs have also taken an active role in making suggestions as to sentencing.[11]

8.10 The Royal Commission saw the police caution as a common and important procedure for dealing with juvenile offenders. However, the power of police to caution adults is available only in a few jurisdictions. The Commission said that consideration should be given to widening of the powers of formal caution by individual officers.[12]

8.11 The Royal Commission made the following recommendations:

Recommendation 86 *That:*

a *The use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge; and*

b *Police Services should examine and monitor the use of offensive language charges.*

Recommendation 87 *That:*

a *All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.*

b *Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice;*

c *Administrators of Police Services should take a more active role in ensuring police compliance with directives, guidelines and rules aimed at reducing unnecessary custodies and should review practices and procedures relevant to the use of arrest of process by summons and in particular should take account of the following matters:*

i *all possible steps should be taken to ensure that allowances paid to police officers do not operate as an incentive to increase the number of arrests;*

ii *a statistical data base should be established for monitoring the use of summons and arrest procedures on a Statewide basis*

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11 RCIADIC, *National Report*, Vol 3, p45

12 RCIADIC, *National Report*, Vol 3, pp46-7

noting the utilization of such procedures, in particular divisions and stations;

iii *the role of supervisors should be examined and, where necessary, strengthened to provide for the overseeing of the appropriateness of arrest practices by police officers;*

iv *efficiency and promotion criteria should be reviewed to ensure that advantage does not accrue to individuals or to police stations as a result of the frequency of making charges or arrests; and*

v *procedures should be reviewed to ensure that work processes (particularly relating to paper work) are not encouraging arrest rather than the adoption of other options such as proceeding by summons or caution; and*

d *Governments, in conjunction with Police Services, should consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution.*

Recommendation 88

The Police Services in their ongoing review of the allocation of resources should closely examine, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. In the course of that process of review, they should, in negotiation with appropriate Aboriginal organisations and people, consider whether:

a *There is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town;*

b *The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities; and*

c *There is sufficient emphasis on crime prevention and liaison work and training directed to such work.*

New South Wales

8.12 The New South Wales Government has given only qualified support to Recommendation 86. Its March 1992 response said:

> *Offensive language should not normally be the subject of arrest. Consideration will be given to any necessary administrative changes such as Commissioners Instructions and police training to emphasise*

the appropriate way for dealing with offensive language. The Judicial Commission will be approached to make awareness programmes available to judicial officers in relation to the problem of offensive language.

Consideration will also be given as to whether it would be more appropriate for the Bureau of Crime Statistics and Research to undertake a project on the use of offensive language charges, rather than the Police Service as suggested in the recommendation.[13]

8.13 Its June 1993 position was:

Part a of the recommendation is covered by the Police Service in training at the Police Academy and at in-service training sessions.

A review of Section 4 of the Summary Offences Act 1988 in relation to offensive conduct and offensive language, is currently being conducted by the Attorney-General's Department.

The Attorney-General's Department is considering approaching the Bureau of Crime Statistics and Research with a view of undertaking a project on the use of offensive language charges rather than the Police Service as suggested in the recommendations.[14]

8.14 The Committee heard that offensive language charges were regularly relied upon for the purpose of arrest in some areas. In Wilcannia it was said that this was very much the case. The Committee also heard that the use of summonses generally was very rare and that arrest was commonly used. The Committee was told of a chart that is affixed behind the station desk in the Wilcannia Police Station. The chart lists the name of each officer in the Wilcannia Patrol, the number of arrests that each officer has been made and the percentage of arrests that each officer has accumulated in relation to the Patrol total. The Committee agrees with the Western Aboriginal Legal Service that this incentive to arrest is unacceptable and appears to directly breach Recommendation 87.

8.15 Copies of complaints made by the Western Aboriginal Legal Service to the Ombudsman's office were provided to the Committee and detail numerous serious incidents involving offensive language, racist and sexist language and assaults by members of the police force in Wilcannia. Police management practices in Wilcannia are dealt with further at paragraphs 8.26-8.29.

8.16 The Committee heard that in Dubbo, police provoked incidents with arrest for offensive language leading to multiple charges such as resist arrest, assault

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13 *New South Wales Government Report 1992-93*, p26

14 *New South Wales Government Report 1992-93*, p76

police, or malicious damage. This arrest for a single original offence, usually for a quite minor matter, which then provokes an altercation with police leading to further serious charges, still occurs quite frequently in New South Wales and is commonly referred to as 'the trifecta'.

8.17 The Royal Commission specifically recommended that the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge. It is also questionable whether, in the vast majority of circumstances that the Committee heard of, that offence can legitimately be taken from the language used. The same language is more commonly used in society today, on television, in films, by police and by magistrates.[15]

8.18 The New South Wales Aboriginal Justice Advisory Committee told the Committee that Section 4 of the *Summary Offences Act 1988* should be repealed.

8.19 In its submission to the Inquiry, the New South Wales Police Service said:

> *There is a great deal of anecdotal evidence suggesting the wide use of discretion by police in relation to language offences. However, police often find themselves in situations where intoxicated persons, Aboriginal and non-Aboriginal, are behaving in such a violent or threatening manner that it is imperative that they be removed from the area before their conduct escalates to more serious offending.*
>
> *In carrying out their duty to prevent further offending, or injury to themselves, other persons or property, police are often resisted, usually due to the intoxicated state of the person being arrested.*[16]

8.20 The Committee believes that insufficient account is being taken of the diminished responsibility of intoxicated people and the frequently hostile reaction by many Aboriginal people to any police intervention largely due to historical reasons. The Committee believes that this underlines the need for Aboriginal operated night patrols in areas where intoxicated Aboriginal people are frequently detained.

8.21 It would appear that the Judicial Commission programs have not been implemented. The Aboriginal Legal Service representatives in Wagga and Dubbo advised that many magistrates were unaware of the Royal Commission recommendations as they rarely referred to them. Magistrates were reported as believing that Aboriginal people should not be treated any differently to non-Aboriginal people as this would be discriminatory. The Aboriginal Legal Service reported that while some magistrates were empathetic to Aboriginal people, they

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15 Victorian Aboriginal Legal Service, evidence, p1471

16 Evidence, pS2013

still do not want to hear lawyers say that something happened because of the presence of police nor are they willing to entertain criticism of police.

8.22 The Committee concludes that Part (a) of the Recommendation is not being fully implemented in New South Wales by either the police or magistrates courts. If courts were more critical in their acceptance of these charges, police may be more reluctant to use them inappropriately. If Part (b) of the Recommendation was being implemented, deficiencies in implementing Part (a) would have been identified earlier and remedial action taken.

8.23 The New South Wales Government's responses to Recommendation 86 were set out earlier at paragraphs 8.12-8.13. Both responses said that consideration was being given to approaching the Bureau of Crime Statistics and Research to undertake a project on the use of offensive language charges.[17] No progress would appear to have been made on this indefinite proposal. A Bureau of Crime Statistics and Research project, would be welcome to the extent that it can establish the degree of compliance with Part (a) of the Recommendation. However, Part (b) of the Recommendation was intended as a police service management tool to ensure ongoing compliance down through the ranks. The failure to implement this part of the Recommendation is evidence of serious weaknesses in senior police management in New South Wales.

8.24 The Police Service advised that the On-Line Charging computer system is available at 76 locations which account for approximately 80% of all police custodies.[18] The on-line charging system could be used to monitor compliance, although the Royal Commission pointed out that the arresting officer's direct supervisor probably has the greatest influence over arrest practices.

8.25 The New South Wales Government supported the implementation of Recommendation 87. Its initial response to the Royal Commission in March 1992 was:

> *Supported.*
>
> *a* *This is the case in NSW.*
> *b* *Police Training includes substantial components on alternatives to arrest.*
> *c* *Policies and instructions are under review.*
> *d* *This matter will be considered in the course of review of policies and instructions.*[19]

Its June 1993 position was:

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17 *New South Wales Government Report, 1992-93*, p76

18 NSW Police Service, evidence, pS2012

19 *New South Wales Government Report 1992-93*, p77

No further action has as yet been taken in respect to this recommendation in view of the uncertainty about diversionary procedures. A small working party has been established to consider juvenile cautioning and agreed on a proposal which has been provided to the Commander, Office of Strategic Services in draft form.

It has been requested that when the question of juvenile diversion from the criminal justice system has been resolved that this recommendation be considered from a policy and programmes perspective.[20]

8.26 While the NSW Government says that Part (a) is now the case in New South Wales evidence to the Committee in the western part of the State is strongly to the contrary. The Western Aboriginal Legal Service told the Committee that in Wilcannia, arrest was the norm rather than the exception.

8.27 The New South Wales Government response to Parts (b) and (c) totally miss the point of the recommendation. Parts (b) and (c) are also about monitoring the performance of police officers around the state. The failure to implement Part (a) effectively would have been identified and able to be rectified if Parts (b) and (c) had been implemented. Poor management practices have allowed these failures to continue.

8.28 The New South Wales Government supported Recommendation 88. Its March 1992 response said:

Community Based Policing is the principal operational strategy of the New South Wales Police Service. Patrol Commanders in areas with significant Aboriginal communities are required to consult with representatives of those communities, particularly through Community Consultative Committees.

a *A number of towns are identified in the National Report. Policing levels and styles in those towns are being reviewed.*

b&c *These issues are under review in line with the development of the State Crime Prevention Plan. This is also part of the consultative process for our Police Patrol Commanders and their communities. The issues raised are also matters addressed in the State Community Safety Plan.*[21]

Its June 1993 position was:

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20 *New South Wales Government Report 1992-93*, p77

21 *New South Wales Government Report 1992-93*, p28

The issues raised in parts b and c of this Recommendation will be addressed by the Police Service when the State Community Safety Plan is implemented and at this stage it would be inappropriate to take any specific action regarding the implementation.

It is expected that when the State Community Safety Plan is implemented action will be taken by way of policy and programmes to address the issues raised in this Recommendation.

The issues raised by part a of this Recommendation are currently under review.[22]

8.29 The claim that Community Based Policing is the principal operational strategy is hard to sustain in the field. Of the places visited by the Committee, Nowra, Wagga, Wilcannia and Dubbo, only Nowra had a police-Aboriginal liaison committee. Wilcannia was one of the towns identified in the Royal Commission's *National Report*. Since the *National Report*, the number of police in Wilcannia has increased from 11 to 13 for a town with a population of around 1000. The Committee heard that the policing of Wilcannia has become increasingly inappropriate and inefficient with virtually no attempt to liaise with the majority of the community. Community policing is dealt with further in Chapter 10.

Australian Capital Territory

8.30 Both the ACT Government and the Commonwealth supported Recommendation 86.[23] The ACT Government's implementation report states:

a *Australian Federal Police (AFP) members would not normally arrest or charge a person unless other members of the public are present and find the language offensive. AFP officers are also required to consider proceeding by way of summons where possible.*

b *The regulation and monitoring of the use of language charges is conducted within the AFP by on line supervision and through the adjudication of briefs of evidence by the AFP's Legal Services Branch. The views of the Director of Public Prosecutions and the Courts in respect of these charges are disseminated to members via the Legal Services Branch. The ACT Director of Public Prosecutions has the ultimate decision as to what charges proceed at court.*[24]

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22 *New South Wales Government Report 1992-93*, p78

23 *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, AGPS, Canberra, 1992, Vol 1, p302

24 *1992-93 ACT Government Implementation Report*, pp57-8

8.31 The ACT Government and the Australian Federal Police gave evidence to the Committee at a public hearing on 22 August 1994. On Monday, 29 August Mr Justice Higgins permanently stayed a trial in the Supreme Court of the ACT of two Aboriginal people. They appeared on a number of charges but the initial arrest was for offensive language. The judge held that this arrest was questionable, if not unlawful, as it was a trivial offence and the arrest was contrary to the Royal Commission recommendations. However, he ruled the arrest unlawful as it followed unlawful questioning by Police. As the other charges had arisen out of the unlawful arrest he held that there was no offence.[25]

8.32 It would appear that the AFP management procedures outlined are not being fully implemented.

8.33 Both the ACT Government and the Commonwealth supported Recommendation 87. The ACT Government's implementation report states in relation to Part (a):

> *Training and established practices in place encourage members to proceed by way of formal caution, if that is the desired course, or by way of summons. Section 8A of the Commonwealth* ***Crimes Act 1914*** *and s352 of the* ***Crimes Act 1900*** *require a police member to consider whether proceeding by way of summons would be effective.*[26]

8.34 The court case referred to above indicates that these provisions are not being effectively followed and that the close checking, called for in Part (b), is not occurring. The implementation of the On-line Charging System[27] will provide an important monitoring tool to management but, as the Royal Commissioner emphasised, the supervisors of those making arrests can have perhaps the most significant influence on whether an arrest or summons is used.

8.35 The ACT Government's response also includes the following in response to Part c(v):

> *The Voluntary Agreement to Attend Court (VATAC) scheme, a court and police initiative, was introduced into the ACT on 1 August 1992 following consultation with the Director of Public Prosecutions, the courts, the Legal Aid Commission, the Criminal Law Consultative Committee, the Attorney-General's Department and other ACT Government agencies. VATAC provides a third way by which a police officer can bring a person before the court, the other two being by way of arrest, and the laying of an information followed by the issuing of a summons. Whilst the main aim of VATAC is to overcome delays and*

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25 *Canberra Times*, Tuesday, 30 August 1994, p6

26 *1992-93 ACT Government Implementation Report*, p59

27 Australian Federal Police, evidence, p1315

ensure that people attend the Court within an expeditious time frame, the paperwork involved is considerably less than that required for a summons. Under VATAC, a person who would normally be issued with a summons is asked if he or she wishes to voluntarily agree to attend Court at a given time and date.

VATAC has been readily accepted by all users of the scheme, including police and clients, and has received favourable comment from the courts and the ACT Law Society.

Police are also looking at the feasibility of introducing a police diversionary scheme in the ACT, similar to that which is operating in Wagga Wagga. The aim is to divert persons from the criminal justice system. The scheme involves a conference of the offender and victim, their respective families and friends, and police, including a police facilitator, and operates on the principle of shaming the offenders into not offending again by making them confront the victim and the consequences of their actions.[28]

8.36 The Committee believes that the VATAC is a welcome introduction as it requires less paperwork than a summons. As the Royal Commission pointed out, the paperwork required for a summons is a disincentive to it being used in place of arrest. In relation to the possible diversionary scheme, based on the Wagga model, the Committee suggests that the ACT Government and the Australian Federal Police should examine the changes to the NSW scheme before finalising their own scheme. The Committee deals with the scheme further in Chapter 11 (paragraphs 11.93-11.109).

8.37 Both the ACT Government and the Commonwealth supported Recommendation 88. The ACT Government's implementation annual report stated:

> *The ACT Aboriginal and Torres Strait Islander Advisory Council and the Australian Federal Police are working together to review and restructure the Aboriginal/Police Liaison Committee. This matter will be placed on the agenda when the Committee is reconvened.*[29]

The Committee deals with community policing in Chapter 10.

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[28] *1992-93 ACT Government Implementation Report*, pp60-1

[29] *1992-93 ACT Government Implementation Report*, p62

Queensland

8.38 Despite its stated support[30] the Queensland Government's response to Recommendation 86 does not provide any evidence that it is to be implemented.[31] No indication whatsoever was given that the Queensland Government intended to reduce the number of people ending up in custody through offensive language charges.

8.39 The Queensland Government supported Recommendation 87.[32] The Queensland Government response said of Part (a):

> *QPS Police Custody manual outlines that officers should proceed by way of complaint and summons in preference to arrest where effective, practical and appropriate.*[33]

8.40 This wording was far less direct than that used by the Royal Commission. The Committee does not believe that this Recommendation is being implemented effectively and deals with this matter in further detail below.

8.41 The Government's response to Part (b) was:

> *The QPS Custody Manual was introduced together with appropriate training.*[34]

8.42 Evidence to the Committee showed that the QPS Custody Manual was both poorly understood by the police at all levels and poorly implemented. The remainder of the Recommendation was responded to in a perfunctory manner and did not indicate any high level of commitment to the implementation of the Recommendation. In response to Part (d) the Queensland Government said that formal cautions are currently used for aged and juvenile offenders but gave no indication of its intention on the remainder of offenders.[35] The Committee notes, however, that special provisions exist under the *Juvenile Justice Act 1992* for Aboriginal and Torres Strait Islander children to be cautioned by community elders instead of police.[36]

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30 *Queensland Government Progress Report to December 1993*, p94

31 *Queensland Government Progress Report to December 1993*, pp94-5

32 *Queensland Government Progress Report to December 1993*, p95

33 *Queensland Government Progress Report to December 1993*, p96

34 *Queensland Government Progress Report to December 1993*, Vol 3, p96

35 *Queensland Government Progress Report to December 1993*, Vol 3, p96

36 *Queensland Government Progress Report to December 1993*, Vol 3, p97

8.43 Section 21 of the *Juvenile Justice Act* places restrictions on the use of arrest for juveniles. Section 22 imposes obligations to inform parents and the Department of Family Services and Aboriginal and Islander Affairs of the arrest and whereabouts of the child.[37] The Committee heard of breaches of this provision by police.[38]

8.44 Evidence from a number of witnesses indicated that arrest was still being used as the sanction of first resort[39]:

> *What happens in Brisbane is that members of the Queensland police service use their discretion to arrest in order to solve what they consider to be an unseemly social problem, the sight of black people on the streets, the sight of black people within the view of middle-class diners at open-air eating establishments in the Valley. I could give you more examples.*
>
> *The point is, what the police do typically is arrest those people for disorderly conduct or drunkenness under the* ***Vagrants, Gaming or Other Offences Act.*** *We are not so much concerned with the recommendation that says that drunkenness should be expunged from the statute books. To us that is not a priority. What is a priority is to teach police that they do not always have to exercise their discretion to arrest in order to prosecute people.*[40]

8.45 The Brisbane Aboriginal Legal Service gave further details of policing practices:

> ..... *what the police do on the street, in order to control what they consider to be a social problem, is to effect the arrest of one or more of a group. I have seen it many times at the back of the Melbourne Hotel, after closing time in the car park. The evidence of police is that if they arrive there, and there is a group there whom they consider to be disorderly, they arrest a couple. They are not arresting those two for any particular act. They are really trying to break up the group. They are really trying to exercise their authority over the presence of black people on the streets.*[41]

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37 *Queensland Government Progress Report to December 1993*, Vol 3, p97

38 National Indigenous Media Association of Australia, evidence, pp643-5, and Aboriginal and Torres Strait Islanders Legal Service (Brisbane), evidence, p744

39 Peninsula Health Authority, evidence, p512-3

40 Aboriginal and Torres Strait Islander Legal Service (Brisbane), evidence, p716

41 Aboriginal and Torres Strait Islander Legal Service (Brisbane), evidence, pp739-40

8.46 It was also a frequent feature of the evidence in Queensland that police have no knowledge of the Royal Commission recommendations and 'have no apparent desire to act in accordance with the recommendations'.[42] There were also many references to failures in both awareness and observance of the Police Custody Manual. Funding for the Manual resulted from the 1988 *Interim Report* of the Royal Commission but the Manual had only been completed in the last eighteen months.[43] The Far North Queensland Families and Prisoners Support group said that Royal Commission recommendations were being slowly implemented in the Cairns Watch-house. In spite of the fact that large numbers of people were lodged in watch-houses due to intoxication, screening processes are seriously lacking.[44] This group is quite vulnerable to self-harmful behaviour.[45] The Cairns Watch-house failed to identify a woman who had suffered from schizophrenia for 10-11 years. She needed ongoing medication and was likely to be in the watch-house for approximately 4 weeks. Dr Ernest Hunter, a psychiatrist, who visited this woman in the cells told the Committee:

> *If the services within the lock-up cannot identify people who have serious psychiatric illness, then their capacity to be able to identify the far more subtle conditions which predispose to, say, self-harm is in question. The other issue is, here is a person who may not have been wildly agitated but clearly was in need of ongoing treatment which she was not getting until the prison visitors were able to identify that and say, 'Look, here's a lady who has got a psychiatric illness and she needs her injection'.*[46]

8.47 Further evidence was given that despite having a duty of care to prisoners in their custody, police were not fulfilling their responsibility by providing necessary medication to prisoners. Both the Wu Chopperen Medical Service and the Far North Queensland Families and Prisoners Support group said that they were having to buy medicines from their own funds.

8.48 This is another example of government agencies relying on the resources of community organisations that have very limited funds. The QPS Custody Manual in Section 3.4 provides:

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42 Aboriginal and Torres Strait Islander Legal Service (Brisbane), evidence, p747

43 Informal discussions, Wu Chopperen Medical Service, Cairns

44 Far North Queensland Families and Prisoners Support Inc., evidence, p494

45 Peninsula Health Authority, evidence, p513, see also Tharpuntoo Legal Service, evidence, p5315-6

46 Peninsula Health Authority, evidence, p523

POLICY
Medication should be obtained and provided to the prisoner where it is established a prisoner is prescribed medication by a medical practitioner.[47]

Included amongst the procedures are:

If a prisoner indicates medication is required and not in the possession of the prisoner:

i *firstly, arrange to have the prisoner's medication delivered to the watchhouse where practicable; or*

ii *if the medication is unavailable elsewhere, obtain advice from a medical practitioner to obtain the medication for the prisoner;*

and
utilise the expertise of the Aboriginal Health Service for Aboriginal prisoners, where this service is available.[48]

8.49 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek undertakings from state and territory governments that their agencies will not seek to divert resources from Commonwealth funded community organisations to provide state services. (Recommendation 40)

8.50 Tharpuntoo Legal Service drew attention to further serious deficiencies in implementing the Custody Manual which were identified during an inquest into a non-Aboriginal man who died in the Cairns Watch-house:

Already it seems clear that the case reveals serious shortcomings in the way police are discharging their general duty of care to detainees. In addition, according to the report, evidence by Inspector Neville Cooper of the Criminal Justice Commission suggests that the police custody manual, trumpeted again and again in the Queensland government's progress report as an emblem of its commitment to implementation of Royal Commission recommendations, is simply not being read by police

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47 *Queensland Police Service Custody Manual*, p29

48 *Queensland Police Service Custody Manual*, p30

officers nor, according to the report of Acting Inspector Brian McDonald's evidence, is it being brought to their attention by more senior officers.

The circumstances of Mr Kelly's death, in which intoxication or perceived intoxication masked serious head injuries requiring urgent medical treatment, are unfortunately reminiscent of several deaths investigated by the Royal Commission. Mr Kelly was not taken to hospital by police but removed directly to the watch-house. The Coroner is reported as finding that the Cairns Watch-house keeper was too slow to react to Mr Kelly's continued inability to be roused and that his determination that he would not adopt a different approach if placed in the same situation again suggested a person with an unacceptable mind-set. Tharpuntoo will scrutinise the full transcript of evidence in the Kelly inquest when it is received. Preliminary indications strongly suggest that Queensland police, even in major provincial centres like Cairns, continue to breach both the spirit and the letter of Royal Commission recommendations on duty of care and custodial health and safety, whatever the government would have us think.[49]

8.51 Recommendation 24 concerns coroner's inquiries and the making available to families of the deceased, information about the inquiry. The Queensland Government said that the principles of Recommendation 24 would be incorporated in the Custody Manual.[50] The Manual at Section 11.3 contains most of the Recommendation[51] but omits the words 'all efforts should be made to provide frank and helpful advice and do so in a polite and considerate manner'.[52] Tharpuntoo Legal Service, acting for the next-of-kin of a prisoner who died in Lotus Glen Correctional Centre, wrote to both the Coroner and the District Inspector of Police at Mareeba for details of progress on the coronial inquiry. Despite the provisions of the Custody Manual, the Inspector answered:

Your interest in the matter has been noted and the family of Mr ..... J will be advised in due course when a date has been finalised.

All matters raised in your correspondence will, no doubt be addressed at the relevant Inquest and therefore it would be improper to provide any particulars from this office prior to this date.[53]

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49 Tharpuntoo Legal Service, evidence, p554

50 *Queensland Government Progress Report 1993*, Vol 3, p25

51 Queensland Police Service Custody Manual, p79

52 Recommendation 24

53 The full letter is at page S368 of the evidence

8.52 Despite Recommendation 24 and the Queensland Government's response, the Coroner's response to the request provided little more information than that of the Police.[54] Tharpuntoo commented:

> *Despite that we get a letter from an Inspector of police who must be ignorant of the Royal Commission recommendations. He must be ignorant of the police Custody Manual. And he must also be ignorant of the Commissioner of Police's circular which put the Custody Manual into operation.*[55]

8.53 Tharpuntoo contrasted the very inadequate response from the Coroner at Mareeba with the senior magistrate from Townsville sitting as Coroner. Tharpuntoo said that Mr John Beck SM provided 'a very good model of sensitive coronial behaviour'.

8.54 The Brisbane Aboriginal Legal Service told the Committee:

> ..... *all of the police witnesses that were called to Mr Wyvill's inquiry to give evidence regarding their involvement in the death of Daniel Yock displayed almost complete ignorance of the procedures which were set down by the police service in the custody manual which was published less than four months prior to Daniel's death in November.*[56]

8.55 The Aboriginal Legal Service went on to observe:

> *These must be seven random police as of 7 November 1993 who were not to know that they would be embroiled in this controversy. Even with the preparation of their lawyers and the brouhaha that was the Criminal Justice Commission and the publicity and the time and the effort that was taken in preparation of their evidence, by the time they gave evidence they still could not demonstrate a knowledge.*[57]

8.56 It is clear to the Committee that until serious management deficiencies within the Queensland Police Service are overcome, reliance on the Police Custody Manual is insufficient to implement the many recommendations of the Royal Commission that it is meant to address.

8.57 If the Queensland Police had made a more genuine effort to introduce community policing practices many of these deficiencies would have been identified

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54 Evidence, p556

55 Evidence, p556

56 Evidence, p707

57 Evidence, p715, see also p742

and addressed before now. The Committee deals further with community policing in Chapter 10.

8.58 In its March 1992 response to Part (c) of Recommendation 87, the Government said:

> *The Police Service Administration Act 1990 and the Code of Conduct developed in 1990 have created a new disciplinary regime to ensure compliance with orders and procedures. The policing of the provisions of the Code of Conduct and the Police Service Administration Act are the responsibility of all police, the Professional Standards Unit and where official misconduct is concerned, the Criminal Justice Commission.*[58]

8.59 In its 1993 response to Part c(v) the Government indicated that the review of police powers is considering ways of streamlining the summons process.

8.60 The Queensland Overview Committee in its report, which is included in the Queensland Government's Implementation Report, welcomed the 18% reduction in watch-house custodies in Queensland. However, it believed that the level of over-representation remained disturbingly high.[59]

8.61 The Queensland Government supported Recommendation 88.[60] Its March 1992 response said:

> *The Queensland Police Service has recently established an Aboriginal Police Advisory Group which has a charter to consider relevant matters and make recommendations to the QPS. It has power to communicate with any person and to make findings and recommendations to the QPS and other appropriate bodies.*
>
> *At a formal level, Police Community Consultative Committees and Aboriginal and Torres Strait Islander Liaison Officers and Committees provide a forum for community consultation in line with community policing philosophies. At a more informal level, negotiations and consultation on these issues is conducted by Aboriginal Liaison Officers with local police and with Aboriginal and Torres Strait Islander community police.*[61]

8.62 In its report to December 1993 it said:

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58 *Queensland Government Progress Report to December 1993*, Vol 3, p96

59 *Queensland Government Progress Report to December 1993*, Vol 1, p27

60 *Queensland Government Progress Report to December 1993*, Vol 3, p9

61 *Queensland Government Progress Report to December 1993*, Vol 3, p98

Police Community Consultative Committees, and Police Aboriginal Liaison Committees are being progressively established to provide a forum for community consultation on local law and order problems, community policing issues and crime prevention programs.

In addition, the Queensland Police Service, with the assistance of a Department of Employment and Education Training grant, has established a review of policing on Aboriginal and Torres Strait Islander communities.[62]

8.63 The evidence the Committee received on police-Aboriginal liaison mechanisms indicated they were very poor in many areas. Witnesses in Brisbane indicated that Aboriginal-Police relations were at an all time low.[63] While the Committee heard of good relations in Innisfail[64] relations in Mareeba and Cairns were described as bad, due to racist attitudes.[65]

8.64 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek the agreement of the Queensland Government to address the poor liaison between police and Aboriginal and Torres Strait Islander communities. (Recommendation 41)

Western Australia

8.65 The Western Australian Government only partially supported Recommendation 86 in its 1992 response and in its 1993 report described it as 'partially implemented'.[66] It said:

Police routinely exercise discretion with respect to charges for use of offensive language. Offensive language by itself is not normally an

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62 *Queensland Government Progress Report to December 1993*, Vol 3, p98-9

63 Ms Cherie Imlah, evidence, 764,
Watch Committee, evidence, p679, 682, 684, 685
Aboriginal and Torres Strait Islander Legal Service (Brisbane), evidence, p724, 732-36, 744, 747
Informal discussions, ATSIC Brisbane Regional Council

64 (Brisbane) Njiku Jowan Legal Service, evidence, p619

65 Njiku Jowan Legal Service, evidence, p622

66 *Government of Western Australian Implementation Report 1993*, p71

occasion for arrest. The incidence of these charges is not monitored in any formal way, as charges for use of offensive language are recorded as 'disorderly conduct'.[67]

8.66 Evidence to the Committee in Broome and Roebourne was that arrests for disorderly conduct were very common and that charges for disorderly conduct and drinking in public had replaced drunkenness as a 'standard charge' in trying to clear Aboriginal people from the streets. Mr Dan Dwyer of the Aboriginal Legal Service of Western Australia (ALS of WA) told the Committee in Roebourne that as soon as an Aboriginal person swore they were charged with disorderly conduct. He went on to say:

The irony is, of course, that the police themselves use the same kind of everyday language that the locals do, but as soon as one of the locals uses it he is picked up on a charge.[68]

8.67 The Committee does not believe the recommendation is being even partially implemented, as the intent of the Royal Commission recommendation is not being met at all. The Royal Commission sought to reduce the number of arrests and charges which it saw as being the direct result of the police presence itself. This was of particular concern to the Commission because of the general hostility to police of many Aboriginal people. In those places visited in the north of the state, no attempt appears to have been made to address this recommendation.

8.68 On Recommendation 87 which was supported in 1992 by the Western Australian Government, it said it was now partially implemented.[69] In its 1993 response to the Recommendation it said:

The Police Department has adopted the principle of arrest as the sanction of last resort, and the use of arrest and summons options continue to be routinely monitored as part of supervisory duties. The establishment of a data base to monitor the use of cautions, summons and arrest procedures on a Statewide basis is still under consideration. Additional resources are required to further the matter. In addition, an officer's ability to carry out this supervisory function is now assessed as part of promotional requirements.

The juvenile cautioning system and Court Attendance Notices are procedures to discourage arrest. The Court Attendance Notice system is currently being reviewed, particularly in relation to the paperwork involved for police officers.

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67 *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, Vol 1, p304

68 Informal discussions, Roebourne

69 *Government of Western Australia Implementation Report 1993*, p71

There has been no change to the meal allowance system since the 1992 Report.[70]

8.69 As reported earlier evidence to the Committee was that arrest is still used as a first resort for most street offences in the northern centres the Committee visited. In addition the ALS of WA report on Wiluna pointed out:

> *Ten charges only, (0.9%) were commenced by way of Summons over the period studied. (1/1/94 to 31/8/94). The remaining 1061 (99.1%) charges proceeded by way of charge and admission to bail. Frequently, police would defer their decision to admit a person to bail for extended periods despite there being no power to do so under the Bail Act. The only power to defer bail is for the purpose of obtaining required information. The Bail Act makes it quite unlawful for Police to defer decisions in relation to bail except in circumstances where the officer either does not know, or cannot obtain information necessary to make a bail determination. Deferring bail simply because the defendant is intoxicated, is unlawful and if the relevant information is known or available, the authorised police officer must make a determination. The current practice of deferring bail determinations appears to be a defacto form of detaining intoxicated persons and may encourage inappropriate charging of otherwise intoxicated persons, rather than dealing with them as intoxicated persons.*
>
> *Eighty per cent of the charges arising between 1/1/94 and 31/8/94 were for street offences. Hence proceeding by way of summons ought to be utilized as a matter of course.*[71]

8.70 Many of the charges for street offences were for quite trivial matters. The Committee heard of an elderly woman in court for urinating in public in a park at 2.00am. The magistrate pointed to the triviality, in that the only people who could see her committing this act in the dark were policemen with torches.[72] She was nonetheless convicted and fined $5.00. The ALS of WA also pointed out that many of these trivial street offences were rarely contested in the magistrates court and never appealed, because defendants wanted to get out of the alien court environment as quickly as possible - regardless of the cost.[73]

8.71 In another example of arrests on trivial charges the solicitor for the ALS of WA in Broome told the Committee:

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70 *Government of Western Australia Implementation Report 1993*, pp71-2

71 *Counting the Cost*, p20

72 Aboriginal Legal Services of WA, Broome, evidence, pp122-3

73 Aboriginal Legal Service of WA, Broome, evidence, p123

I had a case last week where a young man was walking towards the pub and was handed a can of beer by a friend. He took a sip and gave the can back. They went inside the pub, and two minutes later they were dragged outside by the police and charged with street drinking. I cannot possibly imagine what the motivation for that was. Obviously this fellow was not going to commit any crime out in the street after having had a sip of beer. The police did not allege that he was acting improperly or in an intoxicated or abusive way. They simply said that technically he drank from the can of beer outside the licensed area.[74]

8.72 The Committee was told that while the magistrate regarded the case as ridiculous, a conviction was nonetheless recorded, together with a $10 fine.[75]

8.73 The evidence in Broome and Roebourne contrasts with that heard in Kalgoorlie. An Aboriginal-police relations meeting had resulted in a very large drop in the crime rate.[76] The Aboriginal-run street patrol had been very successful. The police had become involved in the street patrol on their own initiative and been very supportive. There had also been a lot of support from local government with a donation of $1300 as well as support from local businesses such as caterers. One vehicle had been provided by each of the Aboriginal Affairs Planning Authority and ATSIC.[77] The Western Australian Government said that the Aboriginal run street patrols had been very effective and cited the outcomes:

Kalgoorlie, for instance, has been running a twofold approach, one in relation to glue sniffing and the other on street offences. They have 32 patrollers. They utilise the services of one police sergeant and two police aides to help .... That patrol has dropped the crime rate in Kalgoorlie 50 per cent. If that police sergeant and the two police aides were at the police station, they would not have dropped it one per cent. So it is a matter of us focusing our staff to pick up the good vibes and work in this sort of area.[78]

8.74 The chief Police witness for the Western Australian Government also said that Aboriginal run street patrols in Halls Creek had typically dropped weekend street offences from 40 to 4. Patrols in Mullawa had dropped the crime rate 70%.[79]

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74 Aboriginal Legal Service of WA, Broome, evidence, p116

75 Aboriginal Legal Service of WA, Broome, evidence, p116

76 Informal discussions, ATSIC Regional Council, Kalgoorlie

77 Informal discussions, Yamatji Ngura, Kalgoorlie

78 Evidence, p381

79 Evidence, p380-1

8.75 The style of policing in Marble Bar was also praised by Mr Dan Dwyer of the ALS of WA in Karratha:

> *It seems to me that one of the things that you can look at, if you look at the statistics for the Marble Bar court and for Roebourne court, is the type of charge that comes up. If you get a disorderly conduct charge in Marble Bar court you can be sure it has been referred from Nullagine; it does not come from Marble Bar. They are very loath to use those kinds of charges. In Marble Bar court you will find the more serious charges of stealing things and so forth when that does occur. It does occur there at different times. Juveniles in particular will get into a bit of trouble but it is not that often. They are usually dealt with in a way in which you do not see a continuation. We have one or two who continue. You would expect that in a community. What you do not expect are the 10 to 15 which you get in other places.*
>
> *By contrasting the types of charges, you then ask the question, 'What is the difference? Are the people at Marble Bar more law abiding? Have they got different socioeconomic problems? Is that the difference? ' And you say no, the difference is the community policing.*[80]

8.76 Mr Dwyer further commented on styles of policing:

> *I have watched new constables come up to South Hedland from Perth. They come new into the area; they see something happening and they go straight in. They are like storm-troopers in many ways. 'We are going to fix this problem up.' They go in and next thing you know there is bad language flying, from the police as well in many cases. The Aboriginal person is drunk; next thing you know there is a scuffle and everybody has got their backs up and there is a major confrontation that leads to the charges.*
>
> *The more experienced police in South Hedland will stand on the outside and let things develop to a certain stage, go up, have a few words, talk to them and give them every opportunity. Sometimes they will still arrest them but at that stage they have given them all that benefit. They have just got a different approach. They understand the problem better. I am not saying that the young people that come up from Perth are wrong in their attitude; it is just they do not know. Once again, it gets back to the recommendations that there should be more training for people in remote areas.*[81]

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80 Evidence, p158

81 Evidence, pp159-60

8.77 The Committee concludes from the different styles of policing and vastly differing degrees of police effectiveness in reducing crime, that Recommendation 87, Part (a) is being partially implemented because it is only being implemented in some areas. Similarly, Parts (b) and (c) are clearly not being implemented in a number of areas. Without a computerised database on cautions, summons, arrests and cell detentions, monitoring will continue to be ineffective.

8.78 On the question of incentives to police to detain people in police cells the Government said in its 1992 response:

> *It is considered that this comment is directed, in the main, toward the Prisoners Meal Allowance.*
>
> *Inquiries reveal that in most other States, police provide meals for their prisoners, either directly or through the process of tender. While several alternatives to the current system in Western Australia were examined, research failed to identify an option feasible for implementation on a State-wide basis.*
>
> *Having subjected returns of allowances paid to a review-in-depth which was intended to identify faults in the present system, it was considered that given appropriate safeguards against abuse and a close audit by responsible officers, the payment of an allowance for meals provided was the most suitable operating procedures for Western Australia as a whole.*
>
> *It is expected that audit procedures now in place and overseen by the Commander of the Inspectorate will eliminate further problems.*[82]

8.79 This system of meal allowances continues.[83] The Committee heard evidence that the high level of arrests and detention in the cells at Roebourne may be due in part to the meal allowance.[84] The Committee notes elsewhere that monitoring of charges and arrest rates by senior police management is poor. It is not clear why the monitoring of the meal allowance system would be any better. The Task Force on Aboriginal Social Justice has recommended:

> *That the police develop a strategy to bring to an end even the possibility that any police officers might benefit financially from the*

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82 *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, Vol 1, pp310-1

83 WA Government, evidence, p384

84 Aboriginal Legal Service of WA, Karratha, pp155-7, see also Aboriginal Legal Service of WA, Perth, evidence, p293

incarceration of Aboriginal people. (Task Force Recommendation 266)[85]

8.80 In a 1980 report on the Sentencing of Federal Offenders, the Australian Law Reform Commission considered the meal allowance scheme in Western Australia and concluded:

> *It is a system which is wrong in principle and open to abuse. It should therefore be terminated and alternative procedures adopted which contain no inducement, or appearance of inducement, to increase the numbers in lockup custody.*[86]

8.81 In the Western Australian Regional Report of the Royal Commission, Commissioner O'Dea said:

> *I consider that the present meal allowance scheme remains open to abuse in a number of ways:*
>
> - *Police being overzealous in making arrests;*
> - *police proceeding by arrest where a summons would be appropriate;*
> - *prisoners being held in custody longer than is necessary eg. by delaying bail until after a meal period has expired;*
> - *supply of poor or inadequate quantities of food to prisoners;*
> - *claims for meals that have not been provided.*[87]

8.82 The officer in charge of the lockup claims reimbursement for meals from different government departments depending on whether the prisoner is a sentenced or unsentenced adult or a juvenile.[88] The present rate is $4.51 per meal or $13.53 per day.[89] The officer in charge provides the food and either prepares the meals for prisoners or the prisoners themselves prepare the meals. Commissioner O'Dea noted:

> *Although the officer in charge is required to complete and return a standard form to claim reimbursement for meals supplied, he is not required to forward any receipts for foodstuffs purchased.....*

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85 Government of Western Australia, *Task Force on Aboriginal Social Justice, Report of the Task Force*, April 1994, Vol 2, p571

86 The Law Reform Commission, *Sentencing of Federal Offenders*, 1980, para 176

87 RCIADIC, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, Vol 1, pp341-2

88 RCIADIC, *Regional Report - Individual Deaths - Western Australia*, Vol 1, p341

89 *Counting the Cost*, p17

It should be noted that if a prisoner who has been held in a lockup is subsequently convicted, he may be liable for payment of the cost of any meals supplied to him - in addition to any other penalty imposed by the court.[90]

Commissioner O'Dea went on to say of practices in Wiluna:

The Commission has heard evidence that at the Wiluna Lockup it has been the practice of officers in charge to supply prisoners with kangaroo meat shot by police staff. Reimbursement would then be claimed by the officer in charge for the 'cost' of meals provided. Prisoners at Wiluna also participate in the cooking of their own food.[91]

In a separate report, Commissioner O'Dea said of the Wiluna Lock-up:

The officer in charge is presumably being paid a flat rate per meal to acquire food for, and prepare, each prisoner's meal. It is clear that prisoners are largely responsible for the preparation of their own meals. In many cases little or no preparation is required..... If this is the case, then the Officer in Charge is being paid for work he is not undertaking.[92]

8.83 The ALS of WA estimated more than $88,000 would be paid to the officer in charge in meal allowances over the year in Wiluna.[93] It is not clear to the Committee that appropriate levels of taxation are being paid on this income supplement by police in Western Australia.

8.84 The ALS of WA said that the situation whereby prisoners prepare their own meals remains the case in 1994. A stove in the cell complex is used by prisoners to cook whatever food is supplied.[94]

8.85 Summing up the position in Wiluna of gross over-policing and of very high arrest and detention rates, the ALS of WA said:

Much of the foregoing analysis of current policy and procedure, is consistent with profit-maximising behaviour in respect of the lock-up. The doubling in the detention of intoxicated persons, the substantial

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90 RCIADIC, *Regional Report - Individual Deaths - Western Australia*, p341

91 RCIADIC, *Regional Report - Individual Deaths - Western Australia*, p343

92 RCIADIC, *Report on the death of Robert Anderson*, cited in *Counting the Cost*, p17

93 *Counting the Cost*, p18, see also Western Australian Government, evidence, pp383-4

94 *Counting the Cost*, p26

increase in charges, and irregularities in the provision of work and development orders, each contribute to meal allowance revenue.

In this regard the disparity between adult and juvenile charge rates is noted. Compared to the 1071 adult charges over the period, there have been only 81 juvenile charges to 31/8/94. Statewide charges for juveniles in 1991/92 made up 36% of total charges, whereas in Wiluna such charges constitute only 7% of total charges. The incentives for abuse of the meal allowance scheme referred to by the Royal Commission do not apply to juvenile detentions to the same extent that they do for adult detentions. Police have extremely limited powers for the detention of juveniles in the police lock-up. At a recent meeting of the WA Juvenile Justice Committee, Wiluna's Officer in Charge made representations to the Committee that the Wiluna lock-up be permitted to hold juveniles for longer periods. Based on the foregoing analysis, it is of concern that implementation of such a proposal would result in a substantial increase in juvenile charge rates.[95]

8.86 The Committee believes that the meal allowance scheme remains wide open to gross abuse. The meal allowance scheme clearly still operates as an incentive to increase detentions. The audit procedures and the oversight by the Commander of the Inspectorate are clearly quite inadequate. The present meal allowance scheme should be scrapped and a scheme similar to those operating in remote areas of other states and the Northern Territory should be introduced. The Committee is amazed that in areas of high Aboriginal unemployment and high Aboriginal numbers in police custody that local Aboriginal organisations have not been approached to tender for catering.

8.87 The Committee recommends that:

- the Prime Minister through the Council of Australian Governments gain the agreement of the Western Australian Government to end the present prisoner meal allowance scheme and introduce a scheme which does not encourage arrest and incarceration; (Recommendation 42) and

- the Commissioner for Taxation examine the operations of the Western Australian meal allowance scheme for police prisoners to ensure that tax evasion has not been occurring. (Recommendation 43)

95 *Counting the Cost*, p17

8.88 The Western Australian Government in its 1992 response supported Recommendation 88 and said:

> *Community policing as an organisational strategy, is part of the total policing philosophy in this State. However, it must co-exist with a need for enforcement when the occasion demands such a response. Each region and town is expected to allocate resources to both enforcement and to service the needs of the community according to particular requirements.*
>
> *There are community consultation groups in existence in most areas and the needs of Aboriginal and Torres Strait Islander communities can be relayed to police by these groups or through the Aboriginal Affairs Planning Authority. The needs of women are provided for in general policing practices to the extent that this is both possible and practical.*[96]

8.89 The 1993 report indicated this response still stands and was subject to ongoing implementation.[97] From the evidence in the previous section the implementation of community policing is very uneven. Advances have been made in places such as Kalgoorlie, Marble Bar and Halls Creek but in areas such as Wiluna, Roebourne and Broome there is no effective liaison between police and the Aboriginal community. Inappropriate and inefficient policing continues in Wiluna, Roebourne and Broome. There is gross over-policing in Roebourne with 13 police for a population of 1500 yet no improvement in crime rates. Even worse is Wiluna with 6 police and 2 police aides for a population of 250-300 and no improvement in crime rates. The Royal Commission pointed to the adverse effects on crime rates of over-policing. This is a huge waste of taxpayers' money and is continuing to have serious adverse effects on the individual communities. Police senior management is seriously deficient in not identifying and rectifying these ineffective and wasteful practices.[98]

8.90 The response makes no mention of over-policing. Wiluna is the worst case of over-policing that the Committee has heard of during this inquiry. Wiluna has one police officer for every 41 people in the town. This police/community ratio of 1:41 compares badly with Roebourne with 1:120 which itself compares badly with the Western Australian average of 1:450.[99]

8.91 The ALS of WA set out some other measures of over-policing:

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96 *Government of Western Australia Implementation Report 1993*, p72

97 *Government of Western Australia Implementation Report 1993*, p92

98 Aboriginal Legal Service of WA, Perth, evidence, p293

99 *Counting the Cost*, p3

The measurable indicia of over-policing include charge rates, particularly in relation to so called 'street offences'. Such offences are typically initiated by Police, rather than as the result of a complaint, and hence embody a high degree of discretion and unfettered power in arresting police. The levels of detention of intoxicated persons is for similar reasons, a potentially strong tool for policing by containment and a suitable measure of over-policing. The level of charging people for minor offences where a court summons would be appropriate is a similar indication that police are imposing excessive controls over Aboriginal people.[100]

8.92 The ALS of WA goes on to outline recent police policy and practice in Wiluna:

Early 1994 saw a marked increase in the indicators that support the community's concerns that police had introduced a number of measures effecting a policy of containment. The resulting increase in charge and incarceration rates particularly in relation to minor matters supports their concerns. In addition, there has been a substantive shift away from community initiated reform particularly with respect to the provision of alcohol within the township. For example, the initiatives of the Mardu community in securing the closure of the Hotel's 'front bar' by 7pm nightly, was removed by the officer in charge of Wiluna Police station. It now remains open until 10pm nightly, contrary to the community's previously negotiated arrangements with the Hotel.

A fenced compound was erected [by police] some distance from the Hotel where people are now permitted to drink, under the observation of patrolling police. People caught drinking elsewhere are routinely arrested and charged. Often people have been arrested for drinking on privately owned community land. Equally frequently, people are charged with 'Disorderly Conduct' for urinating against the drinking compound fence. There are no toilet facilities at the compound.

The legacy of this policy has been an explosion of charges for minor offences, a dramatic increase in the incarceration of the Mardu people and the erosion of their efforts towards self-determination at both the individual and community level. So widespread is the policing 'net', that Wiluna must be regarded as unique in Australia in that the number of separate individuals so far charged in 1994, exceeds any estimate of the town's population itself![101]

The ALS of WA commenting on these practices said:

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[100] *Counting the Cost, p3*

[101] *Counting the Cost*, p5

Police at local and regional level have sought to justify this policy as a means of containing Mardu people to prevent the incidence of more serious offences such as assaults. Paradoxically, despite a 2 year decline in serious offences as a whole, charge rates for assault have increased substantially since the institution of this policy. Such a result belies the apparent assumption of this policy 'that law and order would be achieved if Aborigines were made 'invisible' through more policing of the streets and the imposition of curfews, etc. There has been an underlying belief that if Aborigines were removed from 'public' places then law and order would be reinstituted'.[102] *Maintaining charge numbers to justify the high police presence may be one justification. The maximisation of profits from meal allowance is another factor which is certainly consistent with existing police behaviour.*[103]

8.93 The Royal Commission pointed to the failure of increased police numbers to reduce crime and that it frequently resulted in substantially increased arrest levels, particularly in the absence of any crime prevention work.[104] The warning of the Royal Commission has not been heeded by the Police Service in its management of Wiluna policing.

8.94 Recommendation 88 deals not only with over-policing but also with inappropriate policing. The Committee believes that it is highly inappropriate policing for an unelected official to overrule or subvert a community negotiated restriction on the availability of alcohol in the community. This is particularly inappropriate where his actions are highly likely to increase the crime rate in the community. This interference with the community is outlined by the ALS of WA:

Addressing issues which are important to Mardu people is not something foreign to them. It was the Mardu community that successfully petitioned the Licensee of the Wiluna Club Hotel, to stop the sale of liquor in glass bottles, some 5 years ago. It was also the community that secured the non-availability of spirits and wine to its members. A further agreement that the front bar of the 'club Hotel' close by 7pm nightly was overturned by the Officer in Charge early in 1994, against the wishes of the community. It now remains open until 10pm and must be seen as contributing to arrest rates for minor offences given the consensus that almost all offences are alcohol related. Somewhat perversely, the community's own initiatives

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102 Quote from C Cunneen & T Robb, *Criminal Justice in North West NSW*, NSW Bureau of Crime Statistics and Research, pp192-3

103 *Counting the Cost*, p6

104 RCIADIC, *National Report*, Vol 3, pp38-40

towards self determination are thwarted by policing decisions which apparently increase offending rates.[105]

8.95 The Committee is greatly concerned by the construction by police of a chain wire drinking compound where they 'allow' drinking by Aboriginal people.[106] This colonial style of policing is highly repugnant and should not occur.

8.96 The ALS of WA drew the following conclusions on policing in Wiluna:

> *The concept of 'overpolicing' provides a meaningful critique for the evolution of a regime of policing policies in Wiluna which are costly, excessive and oppressive for Mardu people. The rhetoric of its proponents, the Western Australian Police force, involves a perceived need to respond to a dysfunctional community by an increased level of intervention and incarceration. The reality, that such policies are in fact significantly destructive for individuals and community alike, is either beyond the perception of police and the Police Department, or is lower in priority than internal goals such as the maximisation of Police numbers or revenues from meal allowances.*
>
> *.....The excessive policing of Wiluna's Aboriginal population is reflected in the outcome that more individuals have been charged in the first eight months of 1994, than there are people living in the town. In most instances charging results in incarceration, if not at the first instance, then as a result of fine default. The annual aggregate level of fines of around $300,000 imposes significant impoverishment of an already impoverished population whilst increasing meal allowance revenues which accrue to the Officer in Charge as lock-up keeper.*[107]

8.97 Despite there being a desperate need for community policing and a police-Aboriginal liaison committee in Wiluna the Committee heard that this is being actively thwarted by police:

> *In spite of the existing state of affairs, or perhaps as a result of them, the Aboriginal community has consistently sought a forum in which to air their concerns and improve Aboriginal/Police relations. It was a Mardu initiative to discuss Policing issues at a workshop into Alcohol abuse held in June 1994 which led to a submission being forwarded to the Health Minister, the Hon Mr Peter Foss. The response by the Police force, was the recommendation that a 'detention shelter' be set-up in Wiluna and that an Aboriginal/Police Relations Committee be set-up.*

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[105] *Counting the Cost*, p25

[106] *Counting the Cost*, p5

[107] *Counting the Cost*, p31

In relation to the latter recommendation, 35 community members met with Wiluna's Officer in Charge on 8 September 1994. On that occasion, the Officer in Charge refused to be involved in a committee without a substantial number of non-Aboriginal persons on the committee. The Officer in Charge has failed to attend subsequent meetings and there appears to be limited opportunity for matters to be resolved at the local level. The Committee continues to meet.[108]

8.98 The Committee is appalled that policing at Wiluna is so oppressive and destructive of the community it is supposed to serve. Taxpayers are entitled to a more efficient and effective service than is provided in Wiluna.

8.99 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments gain an undertaking from Western Australia that the oppressive, inefficient and ineffective policing in Wiluna be discontinued immediately. (Recommendation 44)

8.100 A matter of considerable concern to the Committee arising out of evidence from Western Australia is the lack of interpreters and their use by police in interrogations of Aboriginal people for whom English is a second or third language and who are not proficient in English. Recommendation 99 of the Royal Commission deals with the use of interpreters in court and will be discussed by the Committee in Chapter 9.

8.101 However the International Covenant on Civil and Political Rights, Article 14, Clause 3(a) provides:

> *3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *a To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

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[108] *Counting the Cost*, p25

8.102 The Committee heard that this basic human right was being breached daily in those areas where traditional languages are still strong.[109] The Committee heard that people are being charged, interrogated and have their case heard before a magistrate without an acceptable understanding of the language used. This is a complete travesty of justice and must be addressed without further delay. There is a serious lack of trained interpreters and little appears to have been done to address the issue.

8.103 When this lack of human rights was drawn to the attention of the Western Australian Government the response was:

> *The Ministry of Justice does not see itself as legally representing in that sense the interest of the person appearing before the court and it would be improper to do so. Obviously their own lawyers or the Aboriginal Legal Service might play that role.*[110]

8.104 The Committee is appalled that the Western Australian Ministry of Justice is abrogating its responsibility for ensuring the protection of basic rights of people appearing in its courts. Merely saying that it is up to the individual's lawyer to do this begs the question of whether the person understands their need for, or rights to, legal representation. Western Australia should, along with other states, legislate to protect these basic human rights. Such protection would be in line with Australia's ratification of the International Convention on Civil and Political Rights.

Northern Territory

8.105 The Northern Territory Government supported Recommendation 86 and said it had implemented both parts. Of Part (a) it said:

> *Of the 1818 public order arrests in 1992/93, 276 were for 'indecent or objectionable words or behaviour' (no split up available). This is a minor component of total protective custody detainments/public order arrests (27634).*

Of Part (b) it said:

> *Implemented by amendment to Police General Orders - Arrests-code A12.*[111]

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109 Aboriginal Legal Service of WA, Broome, evidence, p122, pp129-30
Aboriginal Legal Service of WA, Kalgoorlie, evidence, pp178-9
Aboriginal Legal Service of WA, Perth, evidence, pp287-8

110 WA Government, evidence, p387

111 *Implementation of Northern Territory Government Response*, p37

8.106 The Northern Territory Government supported Recommendation 87 except for Part (d) which it only partially supported. It said that it had implemented all parts except for Part c(ii) which is in the process of implementation. It said that Parts (a) and (b) have been implemented by Police General Order-Arrests-Code A12 and in training policy. It gave the following responses to the other parts:

c(i) *There are only incidental financial considerations, such as provision of prisoners meals, in remote localities, where contracts for these services cannot be let.*

c(ii) *The NT's integrated Justice Information System will fulfil the requirements of this recommendation. At the present time a query facility to access the required information is not in place. As the use of the system becomes more widespread and enhancements are developed this information will become available.*

c(iii) *The pivotal role that supervisors play in the laying of appropriate charges is detailed quite clearly in General Order-Arrests-Code A12. In major centres, where staffing permits, all proposed charges are rigorously examined by experienced non-commissioned officers for appropriateness and relevance. Any charges found to be deficient are refused.*

c(iv) *Implemented by Police General Order-Arrests-code A12. There are no promotional advantages accrued as a result only of making arrests. Officers are expected to be diligent in carrying out their duties, and if they are, a certain number of arrests is inevitable. All arrests must be justifiable and sustainable under law. If they are not the officer will be subject to censure.*

c(v) *Administrative procedures for proceeding by way of summons are far less onerous than those for proceeding by way of arrest. This acts as a powerful disincentive for proceeding by way of arrest.*

d *Formal cautioning for juveniles has been practised extensively by Northern Territory Police for many years (General Order Children - Code C3 refers). Although no such procedures have been promulgated for adults, police have a common law discretionary power to decide whether to prosecute or not, and with the latter the member may issue an informal warning or caution. (The Northern Territory has not considered the question of instituting a formal system of statutory cautions for*

offenders because it is considered unnecessary in the light of the above procedures, which are considered effective.)[112]

8.107 The Northern Australian Aboriginal Legal Aid Service (NAALAS) told the Committee that people were still being arrested for offensive behaviour and other minor street offences when essentially the problem has been drunkenness.[113] The Central Australian Aboriginal Legal Aid Service (CAALAS) said that police have made a number of positive changes in the way they do their job, however, arrest rates were still high and had not decreased. CAALAS said people were still being charged with offensive language and other minor charges to keep them off the street.[114] The Committee was told of Aboriginal people being picked up for loitering.[115] The penalty for loitering has recently been increased from $200 to $2000 or six months imprisonment or both. This appears to be an extraordinary penalty for a street offence. The Northern Territory Government pointed out that decriminalisation of drunkenness together with programs such as street patrols has reduced the number of people apprehended for street offences.[116]

8.108 In Alice Springs, Tangentyere Council told the Committee that the street patrol was working well and had extended its hours of operation. It can respond within 10 minutes to the police calling to tell it that people are waiting to be picked up somewhere in the general town area. As well as patrolling the Town Camps the group also patrols the town at the request of the police. The street patrol was set up for the Aboriginal people in the Town Camps and assisting the police in town is an additional cost burden, but the night patrol has taken it on. However, the street patrol receives no money from the Northern Territory Government for this. Tangentyere said that a co-operative relationship has been developed between the police and the night patrol, which is very useful because it is hard to resolve some situations without police assistance.[117]

8.109 The Northern Territory Government supported Recommendation 88 and said in its 1992 response:

Implemented (on-going process).

This recommendation specifically relates to the allocation of police resources.

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[112] *Implementation of Northern Territory Government Response*, p38-9

[113] Informal discussions

[114] Informal discussions

[115] Informal discussions, Danila Dilba Medical Service

[116] Evidence, p1021

[117] Informal discussions

The principles espoused in this recommendation should form the basis of a review of the community policing program. Such review should place particular emphasis on remote communities.[118]

8.110 However in its 1992-93 Implementation Annual Report the Government said again that the Recommendation has been implemented and that it is an ongoing process.[119] No review of the community policing program was mentioned.

8.111 The Committee was told by CAALAS of over-policing in Tennant Creek accompanied by a very high arrest rate. The Committee was told that Alice Springs has a population of about 25,000 people and Tennant Creek has a population of only around 3000 people yet it has approximately three quarters the number of arrests as does Alice Springs. Tennant Creek has about 40 police officers to service a population of 3000, despite having a street patrol that is highly regarded.[120]

8.112 This level of over-policing and high arrest rates indicates that Parts (a) and (c) of Recommendation 88 are not being implemented across all of the Northern Territory.

8.113 Several witnesses pointed to police interrogations occurring without interpreters. One witness reported that:

the majority of young people who are convicted and who come from remote communities are actually convicted on the basis of the record of interview. This lawyer had concerns about whether those young people really understood the whole process that they were involved in. She was saying that she feels there is a major language problem and that the absence of interpreters is contributing to the high percentage of these young people being convicted.[121]

8.114 The CAALAS said that police needed to be more realistic about the language problems that exist. CAALAS uses its own interpreters in court on bail days as the court, the police and the Department of Law do not have their own interpreters.

8.115 As mentioned in the previous section this appears to directly breach Article 14, Clause 3(a) of the International Covenant on Civil and Political Rights.

8.116 In a 1983 judgement, Justice Muirhead of the Northern Territory Supreme Court stated:

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[118] *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, p319

[119] *Implementation of Northern Territory Government responses 1992-93*, p40

[120] CAALAS, informal discussions

[121] National Aboriginal Youth Law Centre, evidence, p967

Daily experience in this Territory illustrates the difficulties Aboriginal people experience in giving evidence in courts, difficulties compounded by the lack of comprehension of issues, language barriers and at times, embarrassment and fear.[122]

In another case in 1980 where evidence had been mutilated by language difficulties Justice Muirhead observed:

I was moved to request that the depositions of the girl principally involved be referred to the Solicitor-General. They illustrate graphically what has been known for so long, namely that without aid of trained and skilled court interpreters in Aboriginal languages, the administration of justice in the Northern Territory remains sadly impeded.[123]

8.117 From the evidence given to the Committee, Recommendation 99 is not being implemented in the Northern Territory and the administration of justice, 14 years after Justice Muirhead's comments, still remains sadly impeded and people's basic human rights continue to be violated by the justice system. The Committee deals with the question of interpreters in Chapter 9.

South Australia

8.118 The South Australian Government supported Recommendation 86 and said in its 1992 response:

While this is covered by current policies and procedures, ongoing training and education is required. This is a sensitive issue which could be further examined by the Aboriginal Justice Advisory Committee.[124]

8.119 Its 1993 Implementation Annual Report said that there is ongoing implementation of the Recommendation and that:

Strict arrest criteria are given in existing General Orders and circumstances will dictate their use. Recommendation incorporated into training and education programs.[125]

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[122] Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, AGPS, April 1991, p127. See also the Committee's 1992 Report, *Language and Culture - A Matter of Survival*, p60

[123] *Access to Interpreters in the Australian Legal System*, 1991, p133

[124] *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, Vol 1, p304

[125] *1993 Implementation Report, South Australian Government*, p98

8.120 The South Australian Government supported Recommendation 87 and said in its 1992 response:

Parts a to c	*Have been attended to by changes to General Orders, some of which came from the Interim Report; and*
Part d	*It is to be considered as a priority issue by Police and Attorney General's Departments.*[126]

8.121 The 1993 Implementation Annual Report simply repeats the 1992 response,[127] which calls into question how great a priority Part d is being given.

8.122 The Government said that there had been a 10% decline in Aboriginal people taken into police custody between 1988 and August 1992.[128] This could have been largely due to the introduction of the *Public Intoxication Act.*[129]

8.123 The South Australian Government supported Recommendation 88. In its 1993 Implementation Annual Report it said that there was ongoing implementation and that:

> *Community Policing is the core business of the Department. Police Aboriginal Aides (32 in number) form an integral part of local community action. Local crime prevention and community safety plans also have an impact.*[130]

8.124 While at Yalata the Committee heard that the one police officer and two police aides did an excellent job with a good relationship existing between them and the community. Four or five years ago there were no police in the community and there was a lot of violence because of alcohol. The Committee was told that alcohol legislation laws and the presence of police had helped the situation.

8.125 At Ceduna, a good working relationship with police was reported by the medical service who are regularly called to check on Aboriginal people in the cells. Unless violent, intoxicated people are taken to the sobering-up shelter.

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[126] *Aboriginal Deaths in Custody, Response by Governments to the Royal Commission*, Vol 1, p311

[127] *1993 Implementation Report, South Australian Government*, p98

[128] Evidence, p943

[129] Evidence, p943

[130] *1993 Implementation Report, South Australian Government*, p99

8.126 On a matter which comes under of Recommendation 91(c), the Committee was told of the problem of people being arrested and taken to a distant police station, even though it is the nearest police station, and then released on bail or following a court appearance. These people are frequently left without money or accommodation and a long way from home. Apart from being homeless this puts them in a position where they are highly likely to commit some offence merely to survive.

8.127 The South Australian Government witness from Corrective Services said that where a person is released from prison they are given a bus fare or voucher to enable them to return to their place of arrest. In some cases where there is a particular concern an Aboriginal liaison officer from the Department will accompany them.[131]

8.128 The Committee heard of Yalata people, picked up outside the community (Yalata is a dry community) and taken to Ceduna, being unable to return to Yalata, 200km away, on release. While the example used is Yalata and Ceduna, the Committee heard similar evidence around Australia. Yarrabah and Cairns presented a similar problem. The South Australian Police did not see they had an obligation in this matter.[132] Mr Rathman, head of the Department of State Aboriginal Affairs acknowledged that there was a problem which needed to be addressed.[133] Clearly, greater use of on-the-spot bail or voluntary agreements to attend court would go a long way in addressing this problem. As the Royal Commission noted, the purpose of arrest for minor offences, may well have been achieved by the temporary removal of the detainee from the location of offending. In remote areas, the lengthy trip to the nearest police station in many rural areas 'could have quite oppressive consequences for both police and offenders'.[134] Despite the Royal Commission believing on-the-spot bail to be a valuable initiative and one which should be pursued, the South Australian Government does not support it, saying:

> *This recommendation is not supported as the Government is concerned that the implementation of this recommendation could operate to the detriment of an arrested person. The Bail Act and Summary Offences Act provisions are designed to ensure that when a person is arrested that person is not kept in the custody of the arresting officers but is taken to a police station to be dealt with according to the law.*
>
> *The implementation of the recommendation could open the way to abuse eg. persons could be detained in cage cars for undue lengths of*

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131 Evidence, p920-1

132 Evidence, p929

133 Evidence, p930

134 RCIADIC, *National Report*, Vol 3, p50

time before being released, persons could be released at inappropriate places.[135]

8.129 The Committee agrees that while safeguards against abuses are certainly necessary the response does not address the problem. This is a very cavalier attitude on the part of police where their current actions can be quite oppressive and encourage the committal of further offences.

8.130 The Committee recommends that:

the Prime Minister, through the Council of Australian Governments, seek the agreement of state and territory governments to fully implement those Royal Commission recommendations concerning the diversion of Aboriginal and Torres Strait Islander people from police custody. (Recommendation 45)

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[135] *1993 Implementation Report, South Australian Government*, pp100-1