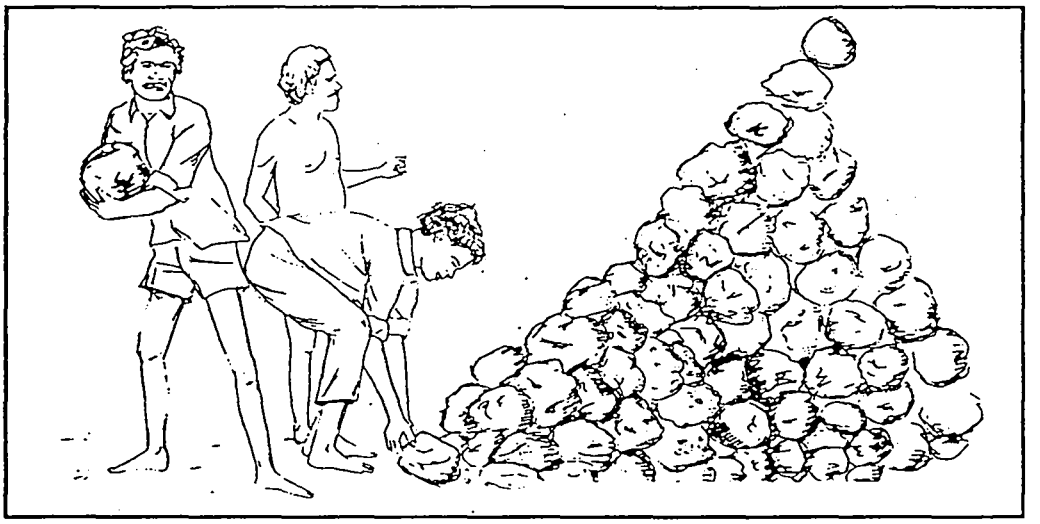
QUEENSLAND ABORIGINAL TRUST COMMUNITY INITIATIVES IN TAKING RESPONSIBILITY FOR SOCIAL CONTROL

DISCUSSION PAPER



Sometimes, when we look at the problems, they seem like a large mountain. But we can move that mountain, one rock at a time. All of us working together." *Weipa South QLD*

By

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For

ABORIGINAL CO-ORDINATING COUNCIL

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FOREWORD

"I don't believe that any of us is damaged. You know you come to a conference like this and you could walk away feeling damaged. We are not damaged. We have felt pain. We have been hurt but no one has touched our spirit. No one can take that spiritual part of you. You know when I talked to some Dakota Elders, they said, "We didn't loose anything because we kept the pipe. And it is so important when you go home you hear about ego damage or personality hurt or about cultural oppression or incest or rape remember this that those things happen but they happen to the earth suit and we need to heal from those things and we need to feel those feelings, but at our core are our creator. No one can take that away from you unless you give it up and there is one sure way to give up that core and that is to drink. One sure way to give up that core and that is to become an addict, but no one even made anybody an addict, cultural oppression does not create addiction, people may react to cultural oppression that way but we know people who have gone through great and incredible pain and stayed whole. You have to be careful to understand that oppression is real but not an excuse.....

I work for many years with children of alcoholics whose parent would come out of a detox or a rehab and tell their children how sick they were. Now what child wants a sick parent? Instead of telling their children how whole they were because now they rediscovered the source in them which is their creator so it's important you know I'm glad that I'm doing the closing to remind you when you go home and give your children hope, and vision and God, not just pain and confusion and hurt and a history of oppression."

Phil Diaz, Mexican Indian
Healing Our Spirit Worldwide Conference,
Edmonton, Canada. 7 - 11 July, 1992.

An Aboriginal woman describing her experience of incest and domestic assault said:

".....people get hurt physically - you can see the bruises and black eyes. A person gets hurt emotionally - you can see the tears and distressed face - but when you've been hurt spiritually like that - it's a real deep hurt and nobody, unless you are a victim yourself, could even understand."

Another Aboriginal woman said:

".....spiritually we've lost our vision of who we are - we have to find it again."

Judy Atkinson (undated, p.19)
Violence in Aboriginal Australia: Colonisation and Gender

"Any community, no matter how depressed, has visions of a different future, but we were not able to explore the visions articulated in the (Aboriginal) communities we visited. Instead, we would catch incomplete glimpses, usually based on past experience, of a hope for the future. The visions within a community are critical to creative activity in the community."

Blackman and Clarke (1991:11)

"There is a malaise of the spirit, whether the spirituality is expressed in a traditional Aboriginal world view, or in that of the Christian congregations in the communities. This is clearly linked to the lack of vision."

Blackman and Clarke (1991:13)

INTRODUCTION

The Project:

The Criminology Research Council responded to a request by the Aboriginal Co-ordinating Council for financial support for a project entitled Queensland Trust Community Initiatives in Taking Responsibility for Social Control. I began the project in the latter half of 1989 and visited Lockhart River, Aurukun and Yarrabah to ask the people what they wanted. I became Secretariat Director of ACC in December 1989 and was asked by the Chairman to carry the research project rather than appointing someone else for the Social Control Project (which did not include a wage). I managed to visit Kowanyama and Pormpuraaw in 1990 for this project and other communities in relation to other work.

The results of this research were basically written up in the ACC's submission to the Royal Commission Into Aboriginal Deaths In Custody (RCADIC) August 1990. I continued to write reports for the Criminology Research Council and left the ACC in November 1991. While working briefly as a consultant to the Queensland Police service to write a training manual for community police, I visited Weipa and Cherbourg in early 1992 and asked similar questions to those posed in relation to this project. The ACC asked me recently to make a final report on its Social Control Project. What I have basically done is updated the ACC RCADIC submission with recent developments.

The research method was qualitative. A key informant approach was used with meetings held with key individuals and groups eg. Aboriginal Councils, elders from different clan groups, Aboriginal JP's, Aboriginal Police, State Police, Women's groups, Teachers, Nurses, Aboriginal church members, Welfare Workers, Training Officers, Recreation Officers and community individuals. Also workshops and discussions were held at a number of full ACC meetings. The Queensland Police Service used me as a guest lecturer during their Community Police Training Courses and this enabled me to gather further feedback from community police.

An action research approach was taken so that many of the recommendations of the Social Control Project were put into place with community co-operation as the need for them became evident. The ACC Annual Reports for 1989 - 1991 pp.34 - 35 outlined some of the implementation that was associated with this project and it is important to note that the project will have a continuing effect:

"1. ACC secured funds to train Aboriginal mediators to work on their own communities. A number of communities have been visited and are keen to receive the training. Because of our limited funds, we are going to run a joint project in future with the Attorney General's Department who will do the training in liaison with ACC's project officer.

2. ACC trained Yarrabah Police in mediation skills.

3. Two ACC staff regularly run training sessions with Community police in community development and youth worker skills when State police bring them into Cairns for courses.

4. ACC addressed State police at a Remote Community Policing Conference in Cooktown on "Policing of Aboriginal Communities".

5. ACC has lobbied for better community police training, a career structure for

community police, better resourcing of community police etc., and this is bearing fruit. ACC contributed some written content to the Community Police Training Manual. It is good to see the bridging courses being set up at Johnston TAFE, Innisfail.

6. We have lobbied for Aborigines to be on interview panels to select State police for their communities and this has started to happen.

7. ACC has requested that state police be trained in Aboriginal culture and history and cross-cultural communication. We have had discussions by phone with the Police Academy in Brisbane towards implementing this.

8. In August 1990, ACC put in a lengthy Submission to the Royal Commission Into Aboriginal Deaths In Custody. This was well received and many of its recommendations are in the Royal Commission's final report.

9. At the request of the Cairns Base Hospital, ACC spoke on The Effects of Any Kind of Incarceration on Aboriginal People at an in-service for Doctors and Nurses in the Psychiatric Ward in October 1990.

10. Also in October 1990, a number of ACC staff spoke to social work students at James Cook University on issues such as social control, health, education, youth and domestic violence.

11. ACC spoke at a conference hosted by he Australian Institute of Criminology and the Criminal Justice Commission in Brisbane 1990, on Crime Prevention and Socio-Legal Reform on Aboriginal Communities in Queensland.

12. In December 1990, ACC presented a paper on crime prevention and socio-legal reform at the Two Laws Conference in Brisbane organised by FAIRA.

13. ACC also addressed a conference on Healing Our People Aboriginal Community Justice and Crime Prevention Forum in Alice Springs in April 1991.

14. ACC has initiated meetings with Cairns TAFE with a view to setting up a training program for Aboriginal JP's.

15. ACC has continually fought for funding for our customary law and by-laws project to no avail. However we have had a working party meeting to develop culturally appropriate by-laws.

16. Efforts at getting women's shelters, children's shelters or extended family homes, and alcohol rehabilitation centres will be discussed briefly elsewhere.

17. A number of recreation officer training courses have been held by the ACC with support from other groups and this has encouraged more communities to put recreation officers on CDEP. This is part of our crime prevention strategy but will be discussed further under training."

History and Purpose of the Aboriginal Co-ordinating Council:

The Aboriginal Co-ordinating Council replaced the Aboriginal Advisory Council when the Community Services (Aborigines) Act 1984 was put into effect. This Council, made up of the Chairman and a Councillor from each of the Aboriginal Trust Communities in Queensland was to "recommend to the Minister and the Under Secretary concerning matters affecting the progress, development and well-being of Aborigines and the administration of this Act." [Community Services (Aborigines) Act 1984:IV, 48 (b)]. Amended legislation in 1986 gave the Aboriginal Co-ordinating Council the responsibility to advise the Federal Minister for Aboriginal Affairs on matters of concern to our communities.

When the Queensland Department of Community Services which administers the Act was approached by the Aboriginal Co-ordinating Council (ACC) for a fuller statement of its responsibilities, we received the following undersigned, undated role description:

1. To comply with the discharge of its obligations under the relevant provisions of the Community Services (Aborigines) Act 1984 - 1986.

2. Advise on matters pertinent to the progress and well-being of Aborigines and to recommend to relevant authorities appropriate action to improve the well-being of Aborigines.

Note: This implies a research assessment, data gathering and collation mechanism which could be a combination of external consultancy sources and ACC research position (s).

3. Encourage Councils and residents to participate in and contribute to the development of the region within which the Community is located and to Queensland generally and to co-ordinate.

4. Encourage, assist and co-ordinate adequate research into all aspects relating to the socio-economic development of Communities generally, either through utilisation of ACC staff or external consultants.

5. Develop and maintain a thorough and accurate knowledge of the aims, aspirations and goals of Community Councils and residents.

6. With the consent of individual Councils, advise on programmes and strategies on communities to improve/advance their socio-economic standard and to assist Councils and residents to develop attainable goals.

7. Encourage, assist and co-ordinate cultural activities on and exchange between Communities.

9. If requested by an Aboriginal Council to do so, encourage, assist and co-ordinate establishment of developmental projects (such as tourism) following agreement of Council.

10. Undertake regular consultation with Aboriginal Councils and advise the Minister accordingly.

11. Advise on and coordinate adequate training programmes to cater for Community needs.

12. Investigate technological advances to enhance quality of life on Communities and report back to Communities.

13. Investigate possible avenues of funding for advice to Councils to enhance development of Communities and co-ordinate where necessary the utilisation of funds.

14. Develop and maintain a strategic planning process for the ACC and encourage Councils to do likewise.

15. Develop and maintain an understanding and appreciation of public attitudes on race relations.

16. Disseminate information to Councils to enhance their performance and assist in the social/economic advancement of Communities.

17. Furnish to the Minister a report on activities and assets as soon as practical after 30th of June each year.

At Hopevale in 1986, the ACC decided on the following long term objectives:

1. To achieve full participation and contribution by our communities in the social and economic life of the region within which a community is located and to Australia generally.

2. To develop social, emotional and spiritual strength through an enriched cultural environment, emphasising Aboriginal identity and building a positive relationship with the broader society.

3. To achieve physical health, physical well-being and general unity of purpose.

5. To ensure the educational needs for development on communities, is met.

In 1986, the ACC was given funds to establish a Secretariat and to call its own meetings. The ACC holds four (4) Full meetings a year and four(4) Executive meetings, the Executive being made up of a delegate representing each of the four regions: South - Cherbourg, Woorabinda; Palm Island; East - Yarrabah, Hopevale and Wujal Wujal; Gulf - Doomadgee, Pormpuraaw and Kowanyama; and Peninsula - Injinoo, New Mapoon, Umagico, Weipa South, Lockhart River and Old Mapoon.

Although the ACC is understaffed and under-resourced, we believe we have made substantial progress towards achieving our goals.

Mabo and Land Act Implications for Law and Order:

The Aboriginal Land Act 1991 (Qld) has the potential to change the face of Aboriginal Communities in Queensland as clan groups will be able to make claims for parts of deed of grant in trust land which is presently owned by the whole community and held in trust by Aboriginal Councils who manage the whole community along local government lines. Once a clan group owns a piece of land (and there is potential for community land to be divided into a large number of parts) they may then decide that they do not want the community council to have any say over their land. This will make local government very difficult and the carrying out of the councils

functions in relation to by-laws, community police and community courts very difficult.

It also has enormous implications for State and Federal government funding and service provision on communities. Who do governments talk to? If each clan group wants their own local government council, their own community justice system, their own housing allocation,their own community school and health services, their own economic enterprises and training programs, we need to consider how monies will be split up, economics of scale etc.

The Legislation Review Committee 1991 has responded innovatively though not sufficiently to those issues but there has been no response from the Queensland Government to their proposals. Nor has the Queensland Government developed a position paper on the effect of the Aboriginal Land Act 1991on local government or government service provision, community boundaries etc.

The Mabo decision on 3rd June 1992 is a welcome one with recognition finally that Australia was not "terra nullius" but belonged to Aboriginal people. However, it has created a vacuum with no position paper from the state government as to how Mabo would affect the Aboriginal Land Act 1991 which needs urgently amending so as not to extinguish native title etc. Also the paper should cover how Mabo would affect local government functions of Aboriginal Councils, and community justice functions (which are based on present boundaries) government resourcing to communities and government service delivery. For example, the Community Services Act 1984 needs urgent amendment. The Queensland and federal governments should provide legal opinions to the ACC on these issues as the peak body for community councils.

TRADITIONAL SOCIAL CONTROL

In traditional Aboriginal society as in other small scale societies, there was a greater emphasis on self-regulation than in Western societies and more emphasis on consensus than coercion. Socially accepted norms developed regulating inter-personal behaviour including violence, sex and sharing of resources etc. Through socialisation, these codes of behaviour were internalized. Dr. Coombs described this process of social control in traditional Aboriginal society:

> "In them an assessment by the person concerned of how other people will react was an important regulator of behaviour. Fear of disapproval expressed through ridicule, loss of prestige, physical retaliation, sorcery, the withdrawal of valued co-operation or even through total ostracism provided the basis of self-regulated conduct."
>
> (Coombs et al in Hazlehurst 1985:202)

Of course, there were disputes and processes for their resolution based on social pressure on the offender to conform. Gossip was an informal deterrent and an individual could feel 'shamed' by their own behaviour or that of others. Shared ceremonies usually gave the opportunity for senior men and women from groups or communities in conflict to sort it out.

Interpersonal disputes were usually brought out in the open for community solution. An aggrieved man would parade up and down and proclaim loudly his complaint and those responsible. People would discuss this in their shelters. Senior men of the families of the alleged offender and of the family of the complainant would assist in reaching a consensus about what should be done. The action expected would be communicated to the parties who would usually conform in the force of this consensus.

Many writers see social control as external to the individual who by nature will be in conflict with

the social order. Hobbes, Rousseau and Freud for example held this position. However Durkheim saw social control as a moral order where society's social controls are internalized by its people. Socialisation studies show that social control requires the individual to exercise self control that is social in its form. The antagonism between man and society may be a false dichotomy. People co-operatively develop the social control mechanisms that govern them (Cook-Gumperz, 1973).

For the last two hundred years however, Aboriginal people have been subject to the social control mechanisms of the colonising culture, eroding but not destroying their own controls. This has had several destructive results outlined by Coombs et al in Hazlehurst 1985 (206-207):

". The power of Aboriginal families and groups to apply self-regulation has declined, sometimes because their social control mechanisms are viewed with repugnance or as illegal, and sometimes because their function has been usurped by Australian laws, but inadequately;

. our insistence, even in law, on the rights of the individual over the rights of the family or the clan has brought conflict at times, and distress between younger Aboriginals seeking to assert themselves and older Aboriginals seeking to assert Aboriginal law;

. Australian laws, applied against Aboriginals use power without accepting responsibility for the consequences of its use;

. The high rates of imprisonment among Aboriginals and their consequent absence from the socialising influences of kin. The life of their families - parents, spouse, children - are likewise disrupted. Additionally Aboriginals who value their rights to be with kinsfolk, regard with repugnance our punishment by imprisonment. The repugnance is arguably better founded than ours, where corporal punishment is concerned. Death excepted, a physical punishment involves a short term distress. Imprisonment, separation from one's social supports and isolation, physical and cultural, incur long-term distress;

. The anti-social consequences of imprisonment upon institutionalized Aboriginals where they are socialised into prison behaviour, not re-integrated or re-socialized as they would be under Aboriginal customary law;

. Inadequate legal representation until the advent in the last decade of Aboriginal legal aid services;

. the still inadequate linguistic representation in court for many people from remote Aboriginal communities; and

. the non-recognition of Aboriginal customary law has often resulted in Aboriginals being punished twice for the same offence and conversely, sometimes escaping punishment altogether."

These points will emerge more than once in the ensuing discussion. However we need to look first at rates of offending.

OFFENDING PROFILES

Adults:

A profile of Aboriginal and Islander prisoners in North Queensland was developed from prisoner files and records by the Queensland Corrective Services Commission on a nominated day for two consecutive months. The study showed that 50% of Aboriginal and Islander inmates are accounted for by remote communities in North Queensland. ATSI inmates from these communities have an imprisonment rate which is 14 times the general Queensland population (122/100,000).

The following extract is from Keats (1992:2) and outlines the results of the survey of prisoner's records:

"Type of Offence:

The bulk of the offending for this population group occurred within the two categories - offences against the person and property offences. With offences against persons accounting for 66% of the most serious offences (this figure is twice the Queensland average). An additional concern was the high number of secondary offences of a violent nature. Further, as the vast majority of these offences occurred in the prisoner's own community and often against relatives, this presented problems in developing strategies/programs which could safely return offenders to their communities.

Aggregate Sentence:

As the majority of offences committed by this population group were of a more serious nature they tended to incur longer sentences. For example, 44% were sentenced to periods of between 2-10 years imprisonment with another 11% in for more than 10 years and life. The length of sentence, coupled with the violent nature of the offence often precluded the use of most fast track options to release offenders.

Of the 45% of offenders serving sentences of two years or less, some were eligible for release under mainstream correctional programs such as Parole and Home Detention and more innovative programs such as outstation schemes. Largely, however, the violent nature of the offences and the limited services (treatment and supervision) available in most remote communities precluded many people from participating in these sentencing options.

* There were no outright fine defaulters in either sample group.

Previous Offending History:

The recidivism rate for this population group was very high with 90 % having prior convictions. Most had been exposed to at least one community Correctional order and 76% had prior Custodial experience. The latter figure is extra-ordinarily high when compared to the Queensland average of 55%.

Alcohol and Offending Behaviour:

Alcohol presented regularly as a significant contributing factor in the offending pattern of this population. Moreover, it was apparent that most, if not all, inmates had not been exposed to needs based nor culturally relevant counselling or treatment programs during their sentence."

This would point to the need for self-esteem, communication, and assertiveness training courses, and alcohol rehabilitation programs on Aboriginal communities. Marriage guidance and parenting skills courses would also be helpful plus availability of counselling. However, addressing self-determination and land rights is also important because of the violent colonising nature of European contact. (Miller 1990)

Juveniles:

Juvenile offending at Aurukun has been outlined by a Department of Family Services and Aboriginal and Islander Affairs Officer, Carter (1992:6-8):

"Prior to 1983 it is reported, Aurukun Support Group (1991:64), that the number of children appearing in court did not exceed one or two. In 1991, 25 males aged between 12 and 17 presented on 52 occasions in the Aurukun Children's Court on a total of 342 charges. In 1992 until the end of April, 16 males have presented on 23 occasions for a total of 204 charges.

A break down of the charges reveals in 1991:

Charges	N	Rank	%per
Break and/or Enter and/or Steal related charges	147	1	43.0
Unlawful Use of/Misuse of a Motor Vehicle related charges	136	2	39.8
Firearm related charges	23	3	6.7
Violence/Bodily Harm related charges	22	4	6.4
Armed related charges	9	5	2.6
Other	5	6	1.5
TOTAL:	342		100

IN 1992:

Charges	N	Rank	%per
Unlawful Use of a Motor Vehicle and related charges	92	1	45.1
Break and/or Enter and/or Steal and related charges	87	2	42.6
Violence/Bodily Harm related charges	13	3	6.4
Armed related charges	10	4	4.9
Other	2	5	1.0
TOTAL:	204		100

The majority of the offences were done conjointly which explains the high number of actual charges i.e. one unlawful use of a motor vehicle would result in 4 charges if 4 young people were involved.

Figures also reveal that offending in 1991 was concentrated in the months of July (124) and August (88) i.e approximately 62% of the charges were laid in those two months. In 1992, a similar fact is revealed with February (136) and March (55). Attempts to gain an understanding of this phenomena would suggest that a group of young people urged on by a few leaders - there is some hint of 'stand over' tactics - went out of control and police and families were powerless to stop it.

A further feature of the offending is that in 1991, seven young people were charged with 172 offences which means that 35% of all the young people charged in 1991 were responsible for 50.3% of all charges. In 1992, a similar figure emerges where five young people are credited with 108 charges or 31.25% of those charged are credited with 52.9% of all charges laid until April. Using 1991 census figures this means that 12.9% of males aged 10 to 19 years at Aurukun were responsible for over half of all the charges laid in 1991-92.

Results of Appearances in Children 's Court in 1991 were:-

Admonished and discharged	6	-	9.6%
Supervision	7	-	13.5%
Care and Control	39	-	75.0%
Remand	3	-	5.8%
Convictions recorded	29	-	55.8%
Restitution	0	-	0%
Charges withdrawn	1	-	1.9%
Orders Imposed	46	-	88.5%

Results of Appearance in 1992 until April are:

Admonished and discharged	3	-	13.0%
Care and Control	17	-	73.9%
Remand	2	-	8.7%
Convictions Recorded	15	-	65.2%
Restitution	4	-	17.4%"

Domestic Violence:

Aboriginal people to whom the Queensland Domestic Violence Task Force spoke consistently estimated that domestic or family violence affects 9% of Aboriginal families living in trust areas:

> "Task Force members spent perhaps thirty minutes at the Palm Island Police Station on a Thursday afternoon. Two female victims of domestic violence presented at the station during that time". (Qld Domestic Violence Task Force, 1988:257)

The ACC (Miller 1990:27) pointed out that 193 cases of domestic violence were treated at Lockhart River in the twelve months ending June 1990. The female population over 15 years of age was 133 and the female population over 20 was 107. This would suggest that few women escape domestic violence and that some women suffer from beatings again and again.

Further information on offending rates in relation to adults and juveniles may be found in Miller (1990) Finnane (1990) and Wilson (1982).

ABORIGINAL COMMUNITY COURTS

Aboriginal courts were initially established under the Aborigines and Torres Strait Islander Affairs Act of 1965, the 1965 Act becoming replaced by the Aborigines Act 1971 and the Torres Strait Islanders Act 1971. The Aborigines Act was then replaced by the Community Services (Aborigines) Act 1984 - 86 which is the current legislative base for Aboriginal courts, Aboriginal Police and By-laws for Aboriginal Communities.

The courts are constituted by two local Aboriginal Justices of the Peace usually elders or if they are not available, three Aboriginal Councillors. They hear matters relating to settling disputes, offences against regulations and By laws, for offences which apart from the usual local government by-laws, include social order offences such as drunk and disorderly, offensive language, minor assault, damage to property etc. see appendix 1 and 2 for details.

Councils can prescribe by by-law up to a $500 fine or $40 if they are still operating in by-laws made under repealed legislation.

No longer can only residents be brought before a community court. Since a 1990 amendment, to the Community Services Act, any person present on a community can be held responsible for a breach of a community by-laws, as is the case in other local authorities (S.42 (5A).

As the ACC told the Royal Commission Into Aboriginal Deaths In Custody (RCADIC), the following problems arise with Aboriginal Courts:

> "(1) Complete lack of training of JP's and Councillors.
> (2) Infrequent court hearings.
> (3) A white system of justice is administered by Aboriginal people.
> (4) They have difficulty in remaining aloof from community conflicts or dealing with relatives.
> (5) They have no support staff or facilities.
> (6) There is no clear definition of their role."
>
> (Miller, 1990:49)

This has led to a lack of faith by some Aboriginal people who call them "Kangaroo Courts".

The Doomadgee Community Court was virtually inoperative at the time of the RCADIC Inquiry:

> "Mr. Frederick O'Keefe who, at the time of the Commission's hearing, was the Aboriginal Police Sergeant at Doomadgee, gave evidence that in the twelve months that he had been an Aboriginal Policeman, the Aboriginal court had only sat on one occasion. An inspection of the 'Watchhouse Book Doomadgee' which in rather haphazard fashion provides some record of people who are arrested, reveals that on each Friday and Saturday night between 10 and 20 persons are usually arrested and locked up for being 'drunk'. Mr. O'Keefe gave evidence that a person was not arrested for being drunk unless he was fighting at the time. Thus a situation has been allowed to develop at Doomadgee where regularly up to 20 people were being arrested by the Aboriginal police and held in custody with no intention that they be brought before a court."
>
> (RCADIC Report of the Inquiry into the Death of Alistair Albert Riversleigh, 1989:37)

Some reasons for the infrequency of court hearings on communities are that the JP's are often too old or too sick to attend court or they are tied up with other jobs on the community which take precedence because JP's are unpaid.

Should Community Courts be Abolished?:

Before considering how the Aboriginal Community Court system can be improved, however, we really need to look at whether such courts should be constituted or abolished. An extensive survey of Aboriginal opinion on the Aborigines Act 1971 was done in 1979 by the Foundation for Aboriginal and Islander Research Action (FAIRA) and the Aborigines and Torres Strait Islander Legal Service in Brisbane to present a submission to the Queensland Aboriginal and Islander Commission appointed to review the Act.

The Aboriginal Court system was part of this review but it does not appear the interviewees were asked if they wanted Aboriginal courts to continue. They were asked whether the Aboriginal court should have more power to deal with small stealing and assault and assault charges. "The vast majority of people questioned (90.1%) should have more power to deal with small stealing and assault charges." Malezer, Fole & Richards, 1979:101). To an open ended question on improvements to the law, 912 people were interviewed with 57.5% responding with a suggestion. Ninety-one people thought tribal law would be better for their community than present laws. FAIRA recommended:

> "17. That the Aboriginal courts be maintained and trained and their powers enlarged with appeals as from a magistrates court."

The Aboriginal Co-ordinating Council (ACC) was set up by the Queensland Government with the Community Services Act 1984 although it did not have a Secretariat until 1986. The ACC consists of the Chairman and one other Councillor (usually the Deputy Chairman) of each of the Deed of Grant in Trust (DOGIT) communities in Queensland (reserves prior to 1982). These same communities received local government status in 1984 with the Community Services Act - - Cherbourg, Woorabinda, Palm Island, Yarrabah, Wujal Wujal, Hopevale, Lockhart River, Injinoo, Umagico, New Mapoon, Doomadgee, Weipa, Kowanyama and Pormpuraaw. Aurukun and Mornington Island were established as local government Shires in 1978 under the Local Government (Aboriginal Lands) Act 1978 and therefore are not legislatively part of the ACC although ACC services them and they send delegates to ACC meetings as does Old Mapoon and a number of other communities which do not have community courts. Aurukun and Mornington Island do not have Aboriginal courts but magistrates courts on which local Aboriginal JP's sit.

The body which the ACC replaced was the Aboriginal Advisory Council, similarly made up of reserve council Chairman. It was barely given the time of day by the State Government which had set it up as a token gesture but it was the only voice of reserve Aborigines under the infamous discriminatory Aborigines Act 1971, except for the North Queensland Land Council which was too radical for Premier Bjelke-Petersen to recognize. It was a coalition of reserve and urban Aborigines. The Aboriginal Advisory Council set up a working party on the Aborigines Act 1971 and the Catholic Bishops of Australia provided the services of Jesuit priest and lawyer Fr. Frank Brennan to advise them . Les Stewart of Cherbourg chaired the 1981 Working Party while Tom Geia chaired the 1982 Working Party. Brennan (1982:33) said of the 1982 Working Party:

> "There was a general feeling that we should keep both the Aboriginal court and the Magistrates Court, as the Magistrates Court cannot handle disputes - these happen all the time, and should not go before a big court".

However, Paul Wilson, Queensland criminologist, used the occasion of the Alwyn Peter case to do a critique of the justice system on Queensland Aboriginal Communities and argued that Aboriginal communities set up their own dispute settling and social control procedures:

> "A precedent for some of these procedures exists in other countries. In Israel, the individual must designate the religious/customary regime that will be applied to him or her in personal law matters. In New Guinea, there is a well-developed system of village and land mediation courts; in the United States, native American Tribal courts are well established. Legal pluralism is an accepted philosophy that appears to work well. However, my suggestions go beyond most of the procedures proposed or practised in this country or overseas. I would not limit the scope of Aboriginal control and criminal justice methods to minor offences, nor restrict them only to traditional communities. If we are really serious about rekindling an Aboriginal identity - perhaps a different identity from that of the past - it is important that they control the nature of individuals and groups within their communities".

Had Aboriginal communities been aware of these comments they probably would have agreed with Wilson. I wrote a paper for the Human Rights Commission in May 1984 that was not published until 1986. It discusses the Community Services (Aborigines) Act 1984 and the Queensland Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 ie. DOGIT generally and particularly from Yarrabah communities viewpoint. Yarrabah did not wish to retain their community court:

> 'Council wishes constituted at Yarrabah a Magistrates Court comprising 2 or more Aboriginal Justices of the Peace and further that all monies collected as a result of imposition of court fines be remitted to the Yarrabah Community Fund and that these monies not be paid into Consolidated Revenue."
>
> (Miller, 1986:24)

This would have brought them into line with Aurukun and Mornington Island but the Queensland Government did not heed their request.

The Australian Law Reform Commission did not receive many requests from Aboriginal people for the establishment of an Aboriginal court system because of the concern about its impact on existing Aboriginal authority structures and the consequent loss of identity that might ensue. There were also concerns that it would be difficult to appoint people to exercise judicial authority from within the community. The Commission stated:

> "It has been suggested that Aboriginal courts are most effective in those Aboriginal communities which have undergone the greatest changes in respect of their ways of life and customary laws. Existing Aboriginal courts, whatever form they might take, are overwhelmingly transplants of Australian values and authority structure... For these reasons, the Commission does not recommend a general system of Aboriginal courts for Australia. There is simply no indication that such a scheme would be workable in the diverse range of Aboriginal communities. Nor did the Commission find any general support from Aboriginal people for such a scheme. It is better that such questions be considered in the context of local self-government already referred to. This does not involve rejecting the establishment of local courts in response to genuine local demands where that occurs. Nor should existing courts be abandoned unless the local community so wishes. Notwithstanding the criticism directed to both the Queensland and the Western

> Australian courts, they appear to have a degree of local support."
> (ALRC,1986:71)

The Aboriginal Co-ordinating Council asked Kayleen Hazlehurst, a Criminologist from the Australian Institute of Criminology, to look at community justice mechanisms. She found that at Woorabinda the new European Police Sergeant judged the Watchhouse unsuitable for prisoners to be held more than three hours. So they were released on bail for whatever they had in their pockets somewhere between 10c and $20. They often then failed to turn up for court and forfeited bail. This meant the court had not been fully functional for 3 months. A courthouse was also needed. The JP's were not happy with their reduced role in social discipline and resources were lost in fines and community services. Despite this:

> "They felt, however, that the Aboriginal community policing and the community court scheme had introduced an element of dignity and self-regulation to community administration and was a system worth preserving. Being judged by one's peers was, in many ways, more effective than being judged by outsiders."
> (Hazlehurst, 1988:14)

Noel Pearson of Hopevale pointed to a trend for Hopevale Aborigines to look to the Magistrates Court for remedies eg. to press assault charges because of increasing litigiousness and the shortcomings of the community court system in which the procedure was haphazard because no one was clear about the relevant provisions. (Hopevale Community By-laws: preliminary report, Oct. 1987:4-6).

The Queensland Government decided to conduct a Review of Judicial and Emergency Services within Aboriginal communities in 1989 and seemed to indicate that Aboriginal courts might be outdated and could be replaced by a Community Justice Service using mediation as in New South Wales (The Queensland Government did not set up its Community Justice Program until 1991). The Review stated:

> "The establishment and use of Aboriginal courts occurred in the history of Aboriginal reserve administration as part of a separate and distinct law enforcement trilogy for exclusive application within reserves. It reflected strongly the special and separate laws applicable to reserve residents and was linked with special Aboriginal jails (which have now been dispensed with) and Aboriginal Police. The concept was one of common customary and traditional conduct within communities being best understood by a court of local people....
>
> The reserves are now open towns, certainly in comparison with 20 or even 10 years ago. Non-Aboriginal people as well as Aboriginal people now live in harmony on many communities and the sentencing practices adopted by local courts have become distanced more and more from customary and traditional criteria, until this is now a negligible or non-existent criteria."
> (Queensland Government, 1989:22)

The Review continues:

> "It is quite probable that mediation would serve a useful purpose in attempting to reconcile differences arising in communities and operate as an alternative to Aboriginal courts."
> (Queensland Government, 1989:25)

The Queensland Government does not appear to have consulted with Aboriginal people in the course of this Review. Trust communities would certainly not see themselves as "open towns" but as retaining a distinct identity from the rest of the community. Reserves have not been assimilated out of existence. Also Aboriginal people were still dying in watchhouses on communities at the time the Review was prepared.

The ACC Working Party prepared a very detailed submission on the Community Services Act 1984 which was handed to Anne Warner, Minister for Family Services and Aboriginal and Islander Affairs, one week after the ALP Goss Government took office in Queensland. This submission did not question the continuance of Aboriginal courts but did recommend that:

> "Communities would declare their customary law in the Council's By-laws, in which case the Council's right to make such a By-law would need to be extended under section 25 of the Community Services Act."
>
> (ACC, 1989:21)

The following year the ACC recommended to the Royal Commission Into Aboriginal Deaths In Custody a review into the appropriateness of the Aboriginal Community Court system as to whether it should be retained. It was stated that with reform, Community Courts were a possible vehicle where customary law could be recognised in communities. It was noted that:

> "Community Courts could have increased jurisdiction and the following factors should be taken into account:
>
> 1. Aboriginal people should deal with most juvenile offenders.
> 2. Where this has not already occurred, a community group should be established to advise the court on juvenile offenders (and child abuse and neglect).
> 3. Drunkenness should be decriminalised.
> 4. Mediation or dispute resolution mechanisms need to be incorporated.
> 5. The procedures and informality of the small debts and the small claims courts and tribunals in Queensland should have application within the community court system."
>
> (Miller, 1990:50)

The ALP Government set up a Legislation Review Committee Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland. It was an all Aboriginal and Islander Committee chaired by Eric Deeral from Hopevale and justice issues were covered. After extensive consultation, they recommended:

> "44. That the Aboriginal and Islander courts remain, unless individual communities agree to dismantling of the Community Court in their area. The Queensland Government should provide the following assistance to Aboriginal and Islander courts as a matter of urgency:
>
> (a) Undertake a comprehensive study of the jurisdiction, powers and procedures of the of the Aboriginal and Island Courts. Communities need to be advised through Community education programs of the conclusions of this study in order for communities to decide what charges, if any are required to improve the Aboriginal and Islander courts.

(b) Adequate legislative support.
(c) Adequate financial support and resourcing.
(d) Adequate on-going training for officers of the courts.
(e) Ensure that relevant services are available to the courts, especially the sentencing progress of the Corrective Services Commission on community areas."

(Legislation Review Committee 1991:34)

Nearly two years later there has been no government response to their own Inquiry, probably because it is far reaching in its recommendations on self-government for communities. It is particularly innovative in dealing with self-government issues for urban areas and in how the Community Services Act needs to change to deal with the Aboriginal Land Act 1991. The Government was requested in recommendation 47 to urgently assist Aurukun in the development of a community justice scheme or Aboriginal court.

Certainly in my visits to communities on this project, Aboriginal people have been more interested in reforming the Aboriginal court system than in replacing it. Recommendation 44 of the Legislation Review Committee is therefore supported.

Reform of Community Courts:

The reforms of the Aboriginal community court system suggested are:

1. That customary law be more recognised. (ALRC 1986; ACC 1989; Miller 1990)

2. That mediation and reconciliation be used. (ALRC 1986; ACC 1989; Miller 1990)

3. Community-based culturally appropriate by-laws need to be developed. (ALRC 1986; Hazlehurst 1988;Miller 1990)

4. Training for Aboriginal JP's is a high priority. (FAIRA 1979; Brennan 1982; Miller 1986; Human Rights Commission 1985; ALRC 1986; Miller 1990; Legislation Review Committee 1991)

5. Aboriginal Local Government Councillors should not sit on courts as it is a conflict of interest. (FAIRA 1979; Miller 1986; Miller 1990; Legislation Review Committee 1991) FAIRA recommended that JP's be selected so that all major clan or kin groups are represented.

6. Community courts should be able to deal with juveniles. (FAIRA 1979; Miller 1990; Legislation Review Committee 1991).

7. Community Courts should use community service order for sentencing. (FAIRA 1979; Brennan 1982; Hazlehurst 1988; Miller 1990; Legislation Review Committee 1991), including for fine default. (Miller 1990; Legislation Review Committee 1991)

8. Local autonomy is an important context for Aboriginal courts. (FAIRA 1979; Brennan 1982; Wilson 1982; Miller 1986; ALRC 1986; Hazlehurst 1988; ACC 1989; Miller 1990; Legislation Review Committee 1991)

9. More JP's should be appointed and they should be paid. (Miller 1990).

10. The local community should appoint JP's. (FAIRA 1979; Miller 1990). The Human Rights Commission (1985) was concerned that there is no appointment procedure or qualifications necessary to become a JP.

11. Aboriginal courts should be able to make compensation and other restitution orders against offenders and their parents to restore social harmony, providing the order is proportionate to the offence. (ACC 1989; Legislation Review Committee 1991:34).

Nettheim (1981) Brennan (1982) and Miller (1986) have all pointed out the need for due process such as legal representation and rights of appeal with regard to Aboriginal Courts. Miller (1986:73) says:

> "The Community Services (Aborigines) Act is silent about legal representation in the Aboriginal courts, although Article 14.3 (6) of the Covenant sets down the right in full equality for a person to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing.'"
>
> (The International Covenant on Civil and Political Rights).

The ACC recommended to the RCADIC that a defendant have the right to have a friend speak on their behalf before an Aboriginal court (Miller, 1990:82). The courts are subject to the provisions of the Aborigines and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 which provides among other things for the right to legal representation before Aboriginal courts and the right of appeal. Aboriginal courts have been reluctant to allow legal representation to occur because it is felt that using white lawyers might detract from local control. However white State Police are involved in prosecution and guiding procedural matters in Aboriginal courts. I have seen State Police teaching Aboriginal JP's what to do in a real court setting.

Tharpuntoo Aboriginal Legal Service represents Aboriginal people in magistrates courts not Aboriginal courts because of lack of funding and uncertainty over whether the Aboriginal court system should be disturbed.

However concerns about due process may be met by procedures consistent with local tradition. In commenting on this, the Australian Law Reform Commission (1986:70) said:

> "For example, legal aid and legal representation may not be required in minor cases. Moreover in the case of local courts or other mechanisms which are the result of genuinely local initiatives or wishes, these standards may be satisfied with procedures consistent with local traditions and values; for example, an impartial tribunal may be constituted by a number of representatives selected by different groups within the community (see para. 151 for discussion of the Yirrkala proposal which is structured along these lines). On the other hand if a particular court or other mechanism is in reality an extension of the general legal system, there is no justification for departing from the requirements of that system (including legal representation and legal aid). The danger with hybrid models is that neither the general legal system's standards of due process nor those of the local community, may be complied with."

We must admit that what we have on Aboriginal communities in Queensland is a hybrid model.

Miller (1990:49) says:

> "We have to face the fact that the introduced system of law and order on Aboriginal communities in Queensland is not working. The imposition of European law and systems of police, courts and jails is alien to traditional Aboriginal culture and has resulted in the breakdown of traditional methods of social control although they still operate to some extent alongside the introduced system."

In assessing overseas experience, the ALRC (1986:70-71) found a similar pattern:

> "There are examples of increased indigenous involvement in law and order matters in Canada, New Zealand and elsewhere (although this has tended to be more limited than in Papua New Guinea or the United States). But many of the justice mechanisms cannot be regarded as indigenous, nor do they deal with problems in ways that can be regarded as 'traditional'. They are usually modelled on lower courts within the general legal system, and tend to become more formal over time as a result of demands for due process, rights to appeal and to legal representation. In general, they deal with relatively minor matters."

The ALRC research found that the dispute resolution mechanisms operating within indigenous overseas communities played useful adjuncts to the general legal system but were not reflected on official justice mechanisms so that there was no real recognition of local customary law or local autonomy. It is possible to appeal a decision of the Aboriginal court but this rarely happens as Aboriginal people are generally not well informed of their rights to do so.

The Human Rights Commission (1985) and Miller (1986) expressed concern that Aboriginal courts cannot deal with white officials who must go before a magistrates court for a by-law offence. The Community Services Act 1984 was amended so that community courts can treat cases irrespective of race or resident status. The Act does not lay down any procedure as to how an Aboriginal courts orders and judgments are to be enforced. The Human Rights Commission noted the desirability of limiting the powers of "unqualified magistrates" sitting in Aboriginal courts until the establishment of a course for Aboriginal magistrates to gain appropriate legal qualifications.

The ACC recommended to the Queensland Government that the Community Court be able to impose conditions such as attendance at a court or a camp and that the offender refrain from eg.:

"i. entering any licensed premises.
ii. possessing, buying or consuming alcohol.
iii. entering designated areas.
iv. approaching specific persons.
v. holding or discharging a firearm."
(ACC, 1989:7)

Returning to the issue of untrained Aboriginal JP's sitting on Aboriginal courts, Recommendation 98 of the RCADIC recommended the phasing out of the use of JP's for the determination of charges or for the imposition of penalties for offences. However the Legislation Review Committee recommended the community courts be held by ATSI JP's. Special training programs are being developed as part of a general training package for Justices of the Peace (Magistrates court). In the meantime, two Aboriginal JP's (Magistrates court) have been appointed at

Woorabinda and three at Palm Island as a result of interim training courses. The ACC has been pushing for some years for JP training courses for Aboriginal communities and could have provided input into these training courses if consulted.

NON-JUDICIAL DISPUTE RESOLUTION

Alternative to Court:

A community justice program using mediation has been suggested as replacing the Aboriginal Court (Qld. Govt. 1989) or as an alternative to the Aboriginal Court (ALRC 1986; ACC 1989) or working in conjunction with Aboriginal and Magistrates courts (Miller, 1990):

> ""Mediation or dispute resolution as well as being a preventative measure could also be used as a sentencing option of the Community Court or Magistrates Court depending on the severity of the offence. Restitution might be agreed upon between parties with the help of a good mediator. Each disputant is more likely to carry out his/her side of the contract (Agreement) because they helped in devising it."
> (Miller 1990:61)

Aboriginal Councils could make by-laws giving community courts power to order mediation. A court could decide that a matter would be better solved by mediation than an adversarial approach. If the dispute was not settled by mediation, it could be taken back to court. The most preferrable situation would be for a dispute to be settled through mediation before it ever reached court.

Process of Mediation:

As well as reducing crime and incarceration levels, mediation should reduce recidivism as the underlying problem causing the crime would be sorted out. The concept of mediation is that it is a non-coercive, non-punitive and the mediator is not an arbitrator but facilitates the process of getting disputants to talk to and hear each other so they can reach a solution together. It may take a number of sessions in difficult cases and then a written agreement is made. This agreement is not legally binding but could be registered in a court.

Aboriginal Co-Ordinating Council:

Initial consultations (1989) were held with Aboriginal communities such as Aurukun, Yarrabah, Lockhart River, Kowanyama and Pormpuraaw by the author and later at Weipa and Cherbourg (1992). The ACC in 1990 employed Aboriginal Mediation trainers who consulted at Hopevale and ran a course at Yarrabah. Communities visited were keen to have mediation services with local Aboriginal people trained as mediators, paid initially by CDEP. Women's groups and Aboriginal JP's and police indicated an interest in mediation training to improve their work and personal skills. ACC officers mediated a number of complaints including Aboriginal organisation's management disputes.

Community Justice Program:

The Community Justice Program (CJP) in Queensland became operative in mid 1990 and desired to work in co-operation with ACC's established mediation program. The CJP requested Barbara Miller, ACC, to take them to Aboriginal communities to discuss mediation so visits to Aurukun and Yarrabah were made. As ACC's mediation funding from ATSIC was running out and the CJP

could offer accreditation to mediators it trained, a co-operative arrangement was worked out in late 1991. The CJP ran a training program for Cairns and Yarrabah Aborigines in 1992 and this team provides a fly-in mediation service to Aboriginal communities until local mediators are trained. Hopevale Aborigines have just completed a preliminary mediator training course. Aurukun Aborigines have indicated that they want neutral mediators from outside the community for the time being and for their own people to be trained later. The CJP had handled a range of disputes over land issues (Yarrabah) community, use of alcohol (Doomadgee), and disputes between rival families and their juveniles (Hopevale), which have been dealt with reasonably well - issues well beyond the capability of a court to deal with and usually involving large numbers of people in dispute. The CJP also helped Palm Island to formulate a response to community problems and establish community by-laws.

Traditional Dispute Resolution:

It has been suggested that mediation would interfere with traditional dispute resolution processes. However, if mediators were selected by elders from the different clan groups, the Kowanyama elders did not think this would be a problem. Jacob Wolmby, an Aurukun Councillor said "Mediation is what we do anyway." He said the Council would like to have a building next to the Council chambers to use as a Community Mediation Centre. Mediators would need to involve a number of kin in the mediation process for it to be effective, not just two disputants.

Ownership of Disputes:

The mediation process enables people to own their disputes and this is empowering. The present court system means that offences become offences against the state while lawyers speak on behalf of both victim and offender.

Neutrality:

Neutrality, confidentiality and voluntary attendance are important aspects of mediation, the legislative basis of which is the Dispute Resolution Centres Act 1990. Because of the need for impartial justice, the neutrality of the mediator is important. However this will be almost an impossibility within Aboriginal communities because of wide family and kinship affiliations. A respected person would be suitable however because they are the ones traditionally required to take a role in dispute resolution. Disputes involving whole communities or between the community and outside bodies eg government or companies could benefit from the use of an outside neutral mediator.

Confidentiality:

While the disadvantages of court-time, expense and public exposure - make mediation attractive to the community generally, particularly as what is said in mediations can't be used for future legal action, confidentiality is not usually possible or desirable within an Aboriginal community:

> "Aboriginal communities, it need hardly be said, do not resemble the same dispersed and private living arrangements as those found particularly in urbanized Australian society. Privatisation of disputes through mediation as experienced in cities would not only be absolutely impossible on communities but also, in many cases, completely unacceptable. It is expected that disputes on communities will be public and polycentric, that is involve issues of shifting focus and importance and affect the wider community beyond merely two

protagonists."

(O'Donnell, 1992:11)

Voluntary Attendance:

While voluntary attendance at mediation is the most desirable, it may be useful to use mediation as a compulsory pre-court diversionary option or a sentencing option of the Aboriginal court in criminal matters. An Aboriginal council or elder may order attendance in civil disputes. In the industrial arena, compulsory conferences are often required and the Race Discrimination Act 1975 and the Sex Discrimination Act 1984 have power to require attendance at conciliation conferences. Mediation could be flexible on this issue.

Domestic Violence:

There is a policy debate over whether mediation is appropriate between couples with a history of domestic violence and the general stance of the CJP is no. This is consistent with the policy of the National Committee on Violence against Women. However in reality, it is not always possible to screen out domestic violence cases at intake and victims have a right to choose a method of dispute settlement. Therefore procedural guidelines to protect victims safety and protect them from entering agreements based on fear and powerlessness have been developed. Aboriginal women have made it clear that domestic violence is often the very thing they want mediated. They are often not prepared to use the formal justice system against their man because of distrust of the system, not wanting their men jailed etc.

Crime Reparation:

The CJP has piloted a Crime Reparation Program at the Beenleigh Magistrates Court. This provides a voluntary opportunity, after conviction and before sentencing, for adult and juvenile offenders to talk to victims and work out reparation, personalising the process for victims and offenders. While the mediation is confidential, parties sign a waiver so the agreement can be given to a Community Corrections Officer who reports to the court. The Magistrate may then take the mediation into account in sentencing.

Police Complaints:

There is also a Police Complains Mediation Initiative of the CJP where minor complaints against police and public officials can be mediated. This is an arrangement between the Criminal Justice Commission who investigates serious matters, the Queensland Police Service and the CJP.

Corrections:

Mediation could conceivably be used post sentencing as part of a correctional strategy during probation or imprisonment or as a condition of a parole order.

COMMUNITY BY-LAWS

One of the most frustrating aspects of the Community Justice process for Aboriginal communities has been the by-laws which are enforced by Aboriginal police and which result in prosecutions in the Aboriginal or Community Court. These by-laws are ostensibly passed by Aboriginal Councils as part of their local government powers. But getting these approved by Crown Law takes years.

However let's look at the historical background first.

Human Rights Infringements:

Prior to 1984, the infamous Aborigines Act (1971-79) operated on Queensland reserves and it was an infringement of human rights as were its precursors. (FAIRA,1979; Nettheim,1981; and Miller,1986). It was the instrument for the total domination of Aboriginal people living on reserves so that Aborigines became institutionalized inmates and European administrators their jailers. (Craig,1979). The by-laws that pertained to the Aborigines Act were also discriminatory with numerous infringements of the International Covenant on Civil and Political Rights (ICCPR).

The power to make by-laws is vested in Aboriginal Councils not by the Aborigines Act but the Aborigines Regulations of 1972 as amended. In fact, however, these by-laws were drawn up by the Department of Aboriginal and Islander Advancement. Nettheim (1981:113-114) says:

> "From study of one set of by-laws, it appears that the by-laws made for Aboriginal reserves have not in any real sense been made by the Aboriginal Councils at all. Rather, it seems that a standard set of by-laws has been produced by the Department which the Aboriginal Councils simply adopt. If this could be established it might well follow that the by-laws would be invalid as not having been made by the authority to which the power was delegated or as having been by them acting under dictation."
>
> The Human Rights Commission (HRC) was supplied by the DAIA with a uniform set of by-laws which applied in each of the 14 Aboriginal reserves in Queensland at the time of their 1993 report."

The HRC criticized the wide discretionary powers given to the non-Aboriginal manager of the reserves as well as infringements of human rights. The HRC (1983:21) wrote:

> "While this question is not entirely free from doubt, on the whole, it would be unsafe to conclude that the by-laws extend to persons on reserves who are not of Aboriginal descent and there is even some doubt as to whether they extend to Aboriginal persons visiting reserves. Ultimately as the by-laws can only be enforced against Aboriginal persons, it is difficult, if not impossible, to argue that they apply to other Australians found on reserves."

The HRC noted that the fact that Australians living on Aboriginal reserves in Queensland live under a special legal regime derived from the by-laws and their administration makes one ask the question whether human rights are infringed by the very existence of those by-laws. Because they live on land of traditional significance they cannot opt out.

> "Put another way, their right to live in their preferred place of residence is subject to a condition which many must find intolerable - that is, coming under the provisions of the by-laws. The imposition of this condition for living in the reserves is itself a form of discrimination.....In their offensively intrusive nature, as well as their selective applicability to residents on reserves, by-laws are a clear form of discrimination."
> (HRC 1983:12).

The Commission had been informed that certain Aboriginal Councils had from time to time tried to alter by-laws but been prevented. This would infringe Article 24 of the ICCPR re. the right to take part in government and the conduct of public affairs.

By-law 1(g) of Chapter four prohibited the carrying of "tales about a person so as to cause domestic trouble or annoyance to such a person". The HRC (1983:26) wrote:

> "It can be argued that the prohibition on the carrying of tales which cause domestic trouble or annoyance is a by-law protecting the rights and reputations of people and therefore a justified restriction on the right to freedom of expression. The by-law is, however, expressed so widely as to raise questions of inconsistency with Article 19.2 dealing with freedom of expression."

Chapter four's by-law 1(h) prohibited games of chance or games prohibited by the manager but gives the manager an unfettered discretion to permit the playing of any game. This meant that the manager could prevent games of football or cricket etc. It could have been used to prevent playing games in houses and yards occupied by residents on a reserve. This by-law infringes Article 19 (freedom of expression), Article 21 (right of peaceful assembly) and Article 22 (freedom of association) of the ICCPR.

Although some laws can be found in Australia requiring notification of infectious diseases, none contain such a sweeping requirement to accept compulsory medical treatment as by-law one of Chapter five. It required a person to "attend for medical attention or examination in cases of sickness or when so directed by the Council, the manager or the medical officers." This is contrary to Article 17 of the ICCPR which protects people against arbitrary interference with their privacy and their family life. The HRC (1983:29) commented:

> ".....if, on certain reserves health and sanitation facilities are inadequate, it is hypocritical to have a compulsory requirement to attend for medical examination in the absence of proper facilities."

> By-law 6 of Chapter eight was worded in such a way as to allow the invasion of privacy of the homes of Aboriginal people living on reserves, as it allowed authorised persons to inspect premises. Another unfettered discretion given to managers of reserves which was an invasion of privacy is found in by-law of Chapter 10 which provided that: "A person swimming and bathing shall be dressed in a manner approved by the manager."
> (HRC 1983:82).

By-law 5 of Chapter 14 does not provide an objective standard by which it could be determined whether a person's behaviour constituted an annoyance, to reasonable people nearby. It reads:

> "A person shall so conduct himself in the Community area and in any building so as not to annoy other residents."
> (HRC 1983:85).

Such a general by-law could lead to limitations on freedom of expression of Aboriginal residents.

Managers were given unfettered power to use their personal discretion to control an Aboriginal person's ability to earn a livelihood by by-law 3 of Chapter seventeen:

> "A person shall not without permission of the Manager, engage in any trade or business in a park or anywhere in the Community/Reserve area."
> (HRC 1983:86)

The prohibition of sorcery in by-law 1 of Chapter twenty-four is also seen as problematic by the HRC (1983:38) which says:

> "While the Commission is of the opinion that sorcery 'which interferes with the harmony or well-being of the residents' is wholly reprehensible, it is nevertheless aware that other practices relating to traditional methods of medicine may, by outsiders, be termed 'sorcery' and conceivably be punished under this by-law which has the potential to be used to inhibit the practice of traditional rights and customs of Aboriginal communities. In such circumstances, questions of inconsistency with Article 18 of the ICCPR could arise. This Article provides for freedom of each persons'...to manifest his religion or belief in worship, observance, practice and teaching'. This by-law also raises issues under Article 27 of the ICCPR which provides that ethnic and religious minorities have the right'...to enjoy their own culture, to profess and practice their own religion, (and) to use their own language.'"

The HRC goes on to explain that in Papua New Guinea, the Sorcery Ordinance 1971 makes a distinction between 'innocent sorcery' which is protective or curative and therefore lawful and 'forbidden sorcery' which is not protective or curative and therefore unlawful. If the by-law had been reworded so as to prohibit only forbidden on evil sorcery, then it would not be inconsistent with the ICCPR.

As we can see there were a number of provisions of the by-laws that were racially discriminatory, infringed the rights to privacy, freedom of expression, the right to peaceful assembly, freedom of association, freedom of movement, religious freedom and economic freedom. There are other infringements such as restriction of freedom of movement but the above discussion gives the reader a brief overview of the situation that the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cwth.) sought to rectify. However the Queensland Government ignored it until 1984 when the Community Services (Aborigines) Act came into being.

Culturally Appropriate By-laws:

However, the Queensland Government made no attempt to ask Community Council what they wanted to see in the new council by-laws that would operate under the head of power of this legislation. Nor was there any effort by government to assist the councils to develop culturally appropriate by-laws or to put into place the recommendations of the Law Reform Commission on the Recognition of Aboriginal Customary Laws.

By-laws Under Repealed Legislation:

Some communities have no by-laws at all. Others are operating under outdated by-laws that pertained to legislation that no longer exists - the discriminatory Aborigines Act 1971-1979 (Qld). This is disgraceful! The Queensland Government advised Aboriginal Councils to adopt the Mt. Perry by-laws which were devised for a non-Aboriginal Council. Yarrabah was the first to do so, on 12 August, 1987 and a number of other councils have followed suit because no alternatives were given. These by-laws are framed in inappropriate legalize, have irrelevant provisions and important matters such as ranger by-laws aren't covered.

The Crown Law Department has often rejected sections of Council's by-laws because they would not allow for cultural differences on communities. For instance, Aboriginal councils and police on a number of communities want curfews to keep their children off the street and want it to be an offence to "cart tales" because it causes fights, and to say the name of a dead person because it

offends the relatives and will cause fights.

The situation as at July 6, 1993 can be found in Table 1, prepared by the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA). The Department noted that:

> "In 1966 by-laws were purportedly made in respect of all communities under the Aborigines and Torres Strait Islander Affairs Act 1965. It is arguable that these are still in existence by virtue of the saving provisions in the Community Services Acts. However the better view is that the 1966 by-laws were either not validly made, not saved under the new Acts or have since been repealed by the Regulatory Reform Act 1986. Thus, communities without by-laws passed under the Community Services have been assumed not to have by-laws."
>
> (DFSAIA 1993)

No By-laws:

Communities which still do not have gazetted by-laws are Kowanyama, New Mapoon, Pormpuraaw, Umagico, Wujal Wujal and Hopevale which only has arrest by-laws. Kowanyama and Pormpuraaw have submitted a set of by-laws without a Solicitor's certification so no progress has been made. Department of Family Services and Aboriginal and Islander Affairs drafted a set of law and order by-laws for Wujal Wujal which were submitted in December 1992 and are awaiting a Crown Law opinion. Cherbourg Council submitted law and order by-laws without a solicitor's certification and these are also awaiting a Crown Law opinion. Only those communities with gazetted law and order by-laws have powers of arrest plus Hopevale. Aurukun and Mornington Island communities received their by-laws in February, 1986.

Model Set of By-laws:

The DFSAIA are seeking funding for a by-law project to develop a model set of culturally appropriate by-laws in keeping with the Legislative Standards Act 1992 and the recommendations of the RCADIC. This is something the ACC has also been seeking funding for for some years with the intention that the project would involve large scale community consultation and ownership and that each community could adopt this model set or add on to it to meet local needs. Hazlehurst (1988) also suggested this in her report for the ACC and the Legislation Review Committee made similar recommendations:

> "50. That a comprehensive study of current powers to make and enforce by-laws be conducted, to ascertain the current law and legal status of by-laws. The conclusions of this study need to be provided to communities in the form of community awareness programs, in order for the community to decide what changes, if any, are required to improve the by-laws.
>
> 51. That the Queensland Government, its departments and agencies should provide the necessary assistance to draft model by-laws appropriate to Aboriginal and Torres Strait Islander Communities. Model by-laws should be optional and incorporated as a schedule to the new legislation. The individual communities must then be assisted in the tailoring of the model by-laws to suit their particular needs.
>
> 52. That, in the event that by-laws are subject to government, ministerial or departmental veto or amendment, Recommendation 15 (c) and (d) apply to the

approval of by-laws."

(Legislation Review Committee, 1991:35-36)

Recommendation 15 (c) is to the effect that any veto or amendment to by-laws should only be on the grounds of being beyond the power of the community to enact and 15 (d) gives the overseeing person or body a 3 month time limit on their amending or veto power with a further one month time limit for gazettal purposes.

Importance of By-laws:

In Miller (1990:59) the ACC said it put a high priority on the by-laws project because:

"1. By-laws are perceived to be the main avenue for law reform.....(Reference was made to feeding into the Legislation Review Committee).

2. By-laws are the basis of law and order on communities with community police arresting for by-law infringements (Yarrabah once called them by-law officers when there was a dispute between Council and State Police over their supervision) and community courts having the ability to hear only by-law infringements.

3. By-laws provide the best vehicle for the communities to recognize and/or reintroduce customary law recommendations of the Law Reform Commission on the Recognition of Aboriginal Customary Laws.

4. By-laws are an avenue for communities to be more self-determining. A much wider range of powers can be created under Aboriginal Council by-laws than under non-Aboriginal Council by-laws. For example, Aboriginal Councils can make determinations as to who is a resident, who is eligible to vote and stand for elections, what classes of persons can enter their communities and make determinations about the use of alcohol, land and resource management, social control issues etc. In this sense Aboriginal communities are 'domestic nations' like North American Indian Tribes.

5. Traditional dispute resolution mechanisms could be incorporated into community by-laws to reduce the amount of homicide, domestic violence, child abuse and juvenile offending on communities. We need reform of community policing and community courts so they are more in tune with traditional dispute resolution methods.

6. The present by-laws are either outdated and discriminatory or are designed for white councils, culturally inappropriate framed in legalize, have left out important matters and contain many irrelevant provisions."

No Powers of Arrest:

One of the biggest concerns of the Police Service has been trying to supervise Aboriginal community police who have over the years illegally arrested Aboriginal people either because their by-laws were invalid or because they did not have powers of arrest. In an urgent letter from Sergeant 2/c Robert Frazer to the District Officer Townsville District on 23 August, 1987, he said:

"To date these by-laws have not been approved and accordingly there would appear to be

> no legal basis for the arrest or detention in custody of persons by Aboriginal community police in Trust areas. It is pointed out that such arrests are being made on Palm Island by Community Police working under the direction and control of State Police Officers.....There are no provisions, formal or otherwise for the release of prisoners on bail....Similar circumstances in relation to the non-existence of requisite by-laws apply to this trust area (Doomadgee).....It is also understood that this is the practice to release prisoners from custody on termination of the evening shift when Police cease duty for the night."

When the Hopevale Council and Community policemen were taken to court in 1987 by a Hopevale resident who realized they did not have power to arrest him, panic broke out in State and Community Police and Department of Family Services and Aboriginal and Islander Affairs circles. The Hopevale situation has been partly rectified as they now have powers of arrest but they have no gazetted by-laws for a person to infringe. Other communities which do not have law and order by-laws today are Wujal Wujal, Kowanyama, New Mapoon, Umagico and Pormpuraaw and these same communities do not have powers of arrest in their by-laws. There has been confusion in the recent past as to whether community police had powers of arrest or not and this has led to a feeling of powerlessness on the part of Community police/Yarrabah did not have the offence of drunkenness in their by-laws when three young men were arrested for being drunk (on different occasions) and died in custody. This was tragic. On 19 March, 1988, amendments to their by-laws were gazetted (no. 73, 1646) adding drunk, disorderly, assault, bodily harm, obscene language etc.

Liquor Offences:

Aboriginal communities have sought powers to control the availability and consumption of alcohol. In 1990, the Community Services Act was amended to authorize community councils to make by-laws regarding alcohol (S.25 2(A)). Section 191 of the Liquor Act 1992 provides that these by-laws would prevail over any inconsistent provisions in liquor licences.

Review:

Obviously, the whole situation with regard to by-laws needs review. Also workshops need to be held on communities between Council, JP's, State and Community Police, Elders and interested residents to see that there is a common interpretation of present by-laws and so that new by-laws can be developed. Communities need to look at the advantages and disadvantages of having street offence and law and order by-laws which give them a law and order function mainstream Councils don't have. With the extra responsibility however, comes the opportunity to be more self-determining.

The Department of Family Services and Aboriginal and Islander Affairs has produced the following list of community status re by-laws as at July 1993:

"By-laws on Aboriginal and Torres Strait Islander Communities:

Note: In 1966 by-laws were purportedly made in respect of all communities under the Aborigines and Torres Strait Islanders Affairs Act 1965. It is arguable that these are still in existence by virtue of the saving provisions in the Community Services Acts. However, the better view is that the 1966 by-laws were either not validly made, not saved under the new Acts or have since been repealed by the Regulatory Reform Act 1986. Thus, communities without by-laws passed under the Community Services have been assumed not to have by-laws.

Community Council	Current By-laws/Date Gazetted	Outstanding By-laws
Cherbourg	26.5.90	Law and order by-laws submitted by Council without solicitor's certification. Awaiting Crown Law opinion.
Doomadgee	26.5.90	By-law submitted to curb supply of "monkey blood". Re drafting and clarification required. Awaiting Council's response to queries.
Hopevale	Arrest by-laws only. 16.7.88	
Injinoo	28.8.92	
Kowanyama	-	Set of by-laws submitted without solicitor's certification and Council's certificate. Awaiting Council's response to approaches.
Lockhart River	21.7.90	
Napranum	16.6.90	
New Mapoon	-	
Palm Island	21.12.91	
Pormpuraaw	-	Set of by-laws submitted 25.8.92 without solicitor's certification.Awaiting Council's response to a number of approaches.
Umagico	-	
Woorabinda	23.3.91	
Wujal Wujal	-	Law and order by-laws drafted in this Division submitted 24.12.92. Awaiting Crown Law opinion.
Yarrabah	15.8.87	Seeking by-law to create an interest in land (not formally submitted). Probably invalid.

		Awaiting Crown Law opinion.
Torres Strait Islander Communities	-	There have been no direct requests for assistance with by-laws from Islander Councils. A draft model set is required."

CUSTOMARY LAW

There are a number of questions that need to be addressed when considering the possible recognition of Aboriginal customary law on communities:

1. There is variation in the degree to which customary law is already practised, the remoteness and size of communities and the homogeneity of communities so flexibility of application of customary law would be important.

2. Who has authority? Traditional authority, while strong in many places, has been eroded and younger western educated leaders have emerged. Juvenile offending has become a major problem as they listen less to their elders.

3. Customary law does not have a code of conduct to cover alcohol and drug use. The acquisition of material possessions also poses new problems for customary law.

4. Policemen or JP's may be hindered by kinship roles preventing them exercising authority over particular persons or it may lead to favouritism and bias. Avoidance relationships make police work difficult.

Arguments for Recognition:

The main arguments in favour of recognition of customary laws outlined by the Australian Law Reform Commission are summarised as follows (Crawford in Cuneen, 1992:55):

". Non-recognition contributes to the continued undermining of traditional laws and authority structures. Aboriginal customary laws are a continuing reality in the lives of traditionally oriented people.

. Non-recognition can lead to injustice. It is unfair, for example, for an Aboriginal person to be punished by the general law for taking action required by his or her customary laws.

. Aboriginal people generally support recognition of their laws and, more specifically have sought ways to enable the two laws, the general law and Aboriginal customary law, to work together. One concern, however, is their desire to maintain secret aspects of their law and to retain control over their law.

. Aboriginal customary laws assist in maintaining law and order within Aboriginal communities. Non-Aboriginal law and order mechanisms are often seen as ineffective and based on alien value systems.

. Recognition may also provide a way to compensate Aborigines for past wrongs,

including the injustice of initial non-recognition.

. Australia's international standing would benefit from appropriate forms of recognition."

Arguments Against Recognition:

A number of arguments against recognition were also made:

". Recognition would involve endorsement of unacceptable punishments which cannot be tolerated by the general legal system.

. Recognition would involve endorsing a system which discriminates against Aboriginal women and leads to other violations of basic rights.

. Recognition would entail the loss of Aboriginal control over their laws and their traditions.

. Recognition requires reliable information about Aboriginal traditions, including secret matters, and this information is usually lacking.

. Aboriginal customary laws have ceased to exist in any meaningful form.

. Aboriginal communities are undergoing such change and the variety of Aboriginal experience is such as to preclude recognition altogether.

. Recognition would create a form of legal pluralism which is discriminatory and divisive."

(Crawford in Cuneen, 1992:56)

While the ALRC did not find these opposing arguments persuasive enough to warrant non-recognition of Aboriginal customary law in any form, it was concerned about the variety of Aboriginal lifestyles and the right of Aboriginal people to make their own choices about their lives. Another concern was equality before the law, pluralism and Australia's international human rights obligations.

Pluralism and Equal Rights:

In the Gerhady v Brown case, the validity of S19 of the Pitjantjatjana Land Rights Act 1981 (SA) which provides that a person other than a Pitjantjatjana may not enter upon their land without the permission of the body established to administer the land was tested. The Court held that while this section involved a distinction on the basis of race, colour, descent or national ethnic origin as defined by the Racial Discrimination Act (Cwth.), it was a special measure within S8(1) of the Act and Act 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination 1966 and was therefore justified.

The ALRC therefore decided that special measures for the recognition of Aboriginal customary laws would not be racially discriminatory or remove equality before the law if they were responses to the special needs of Aborigines, were generally accepted by them and did not deny individual Aborigines access to the general legal system or basic human rights. (See ALRC, 1986 vol. 1 par. 165)

Codification and Incorporation Into Australian Law:

Codification and the general incorporation of Aboriginal customary law within the general legal system was rejected by the ALRC on the basis that Aboriginal people might lose control over their laws and secret matters might be intruded upon. (See ALRC 1986, vol. 1 par. 200 - 2). Aboriginal people generally only sought specific recognition of customary laws as a protection against outside interference. One example is the Aboriginal child placement principle which requires that in decisions affecting care of custody of children, unless there is a good reason not to, preference should be given to placements with a parent of the child, a member of the child's extended family, other members of the child's community, particularly those with customary responsibility towards the child. This is one of the few recommendations of the ALRC that have been put into place by State governments. Federal responses have been particularly lacking. The States have always objected to federal legislation affecting matters they see as their preserve (legislative base) despite the federal government's constitutional power to do so. The Commonwealth has the financial and political power but perhaps not the will to intervene. Legislation could require the general legal system to take Aboriginal customary laws into account eg the exercise of sentencing discretions.

Would Recognition Decrease Offence and Imprisonment Rates?:

Even when traditionally oriented Aborigines are involved in criminal charges, offences are often non-traditional or involve non-traditional elements such as alcohol. It is much more common, even for traditionally oriented Aborigines that the offence was both a violation of both Aboriginal customary law and general law. The high offence and imprisonment rates are not simply a result of non-recognition of Aboriginal customary laws and such recognition or its own is not likely to deal with this high imprisonment rate although it should help. The ALRC found that the characteristics of traditionally oriented Aboriginal offenders are not much different from other Aborigines. (See ALRC 1986, vol. 1 pars. 399-400).

Customary Law Defence for Tribal Killings?:

A customary law defence would involve endorsing tribal killings and deprive persons of legal protection. This was not seen as desirable. Crawford in Cuneen (1992:65) said:

> "The Commission did however recommend the creation of a partial defence, similar to a defence of diminished responsibility, which would operate to reduce the level of liability in particular cases from murder to manslaughter. This defence was thought to have several advantages, it would not involve payback killings or woundings, nor would it deprive victims of legal protection or the right of redress."

Sentencing Discretion:

Courts cannot require traditional punishments as a condition to the release of offenders or in mitigation of punishment and this must be balanced against the need to take into account Aboriginal dispute settlement procedures. Guidelines on how to exercise sentencing discretion are covered extensively in ALRC 1986, vol.1 pars. 504-22).

Breach of Australian Law:

The Law Reform Commission posed the question that if the resolution by customary law involves a breach of Australian law, should Australian law intervene. The Commission commented:

"If killing and spearing are prohibited as forms of punishment, it is unlikely that the use of customary law punishments will lead to a breach of Australian law."
(ALRC,80:65)

Community Justice:

Aboriginal communities could consider codifying customary law in local by-laws passed by an Aboriginal Council (which has local government status) and which has been advised by a council of elders (where appropriate) made up of the various clan groups in the community. The council of elders would be the real law making body and pass their decisions on to the Aboriginal council which presently has the legislative power to make by-laws. Communities such as Cherbourg may decide that a council of elders is not appropriate for them but that the Aboriginal council may codify any customary law which it considers appropriate today after community consultation. Alternatively, this could occur but not be passed in by-law form. The Yirrakala proposal to the ALRC suggested codification of their customary law for their own purposes and some Native Canadian (Indian) courts have done so (Frazer,1988).

If customary law were to be more fully incorporated into the community court system or a non-judicial community justice mechanism, decisions would have to be made as to what offences there would be jurisdiction over both in criminal and civil matters, territorial jurisdiction and jurisdiction over persons. The present situation for Aboriginal courts is that this jurisdiction is over any persons within the boundary of their local government trust area and only minor criminal and civil offences are dealt with.

An appeal system from the Aboriginal courts is in place. The issue of how matters relating to customary law on appeal should be considered lead on ALRC paper (1980:66) to comment:

"The problems of reconciling traditional views as to the manner in which disputes should be resolved with the standards required by Australian law may present difficulty on an appeal. Questions such as the right to representation, due process, absence of bias, and the proper conduct of a trial may be grounds for appeal. By what standard are they to be judged? At a time when racial and sexual equality is desired, it may be considered regressive to apply traditional rules. These factors may produce an ultimate integration of Aboriginal law and Australian law."

It was suggested that Aboriginal field officers of the Aboriginal Legal Service could act as lay representatives in Aboriginal Courts.

I must differ with this conclusion which at the time did not necessarily reflect the views of the ALRC as it was a discussion paper. Racial equality does not mean that things have to be the same. It simply means equivalence across cultures so that a way of meeting a certain standard can be different in two different cultures. A system of indigenous law should be able to operate alongside "mainstream" law and whether we like it or not it already does operate and will continue to whether anyone takes any notice of this report or not.

Magistrates Court:

Magistrates need to seriously consider having Aboriginal elders sit with them when having court so that they can advise the Magistrate on matters of local custom and advise on sentencing.

Spiritual Versus Political Law:

Merv Gibson, a past Chairman of the Aboriginal Co-ordinating Council who lives at Hopevale spoke at the Two Laws Conference in Brisbane in 1990 saying that customary law was a matter of blood and spirituality, not a politico - legal matter:

> "As we briefly look at the present day communities, the structure of genealogical control has been affected by the dominance of the Australian legal system. Kinship mediation relating to internal domestic violence, no longer possess a traditional customary force to maintain social order. Aboriginal council bodies elected through the democratic process seek justice through the legal system of Australia. Customary law cannot be utilised even though council bodies are seen to be a traditional group of elders rather than a body of people who represents local government responsibilities. Because of this, Council members are politically and emotionally squeezed between a customary obligation and a local government responsibility. It is rather a ridiculous expectation for Council bodies to operate between a political and customary process.
>
> Aboriginal customary law and the legal system cannot be seen to find common ground. There is no room for both to compromise. Principles or forces of both laws are totally different because the legal system is a written form of law that requires political attention or debate which takes place between two political parties and debated for a long period of time before conclusions can be reached, whereas customary laws have a cultural set of powers or focus which derive from the blood of our traditional people and their spiritual beliefs."
>
> (Gibson, 1990:5)

This view is thought provoking and shows that more community consultation is needed on this issue. The ACC Customary Laws/By-laws Project which would have done this did not receive DFSAIA funding.

Royal Commission Into Aboriginal Deaths In Custody:

The RCADIC Recommendation 219 requested government to report as to the progress in dealing with the report on the Recognition of Aboriginal customary law. The Commonwealth Government responded that it would do so by the end of 1992. The Queensland Government considered it inappropriate to enact specific legislation dealing solely with Aboriginal customary law but said it was looking at specific relevant law reform initiatives.

The Criminal Code Review Committee has considered recommendations dealing with criminal liability of availability of defences such as provocation. The Qld Law Reform Commission has been reviewing the law relating to shared property and DFSAIA is considering other recommendations to implement where relevant. (Aust Govt. 1992:837-9). Not much for 17 years down the track is it?

AUSTRALIAN COURTS

Should Aboriginal Communities Be Subject to Australian Courts?:

Options for more serious offences include magistrates courts or Australian law not intervening in any way in traditionally oriented Aboriginal communities or intervening only when requested. Of the latter two alternatives, the ALRC (1980:72) commented:

> "Both appear to be impractical, particularly in view of the continuing contact with other Australians in even the remotest communities and the extent to which Australian law already impinges upon Aboriginal life. The first alternative would---deny benefits under Australian law. Difficulties with the second alternative include deciding who in the community is entitled to seek the intervention of Australian law, and if say the police are called, what law they should enforce."

The Aboriginal and Islander Commission in 1978 recommended:

> "That within the next five years all reserve communities should be designated as areas where magistrates courts should be held."
> (Nettheim, 1981:174)

The Aboriginal Advisory Council Working Party 1982 agreed that:

> "There was a general feeling that we should keep both the Aboriginal Court and the Magistrates Court, as the Magistrates Court cannot handle disputes - these happen all the time and should not go before a big court."
> (Brennan, 1982:33)

Communities I visited for this project were also accepting of the idea of the Magistrates Court but wanted better legal representation and for courts to sit more often.

Offences that result in charges under State laws are dealt with by visiting magistrates. These magistrates visit communities on a regular basis every 1 or 2 months and deal with cases over a 2 - 3 day period. Mostly matters are dealt with summarily, with police evidence, pleas of guilty, evidence from the accused by means of a signed statement, followed by a conviction and judgement. Visiting Magistrates sit at Yarrabah, Weipa, Cooktown and Mornington Island and Aurukun monthly and Lockhart River, Pormpuraaw, Bamaga and Kowanyama every two months. District Court has recently started being held at Weipa although Tharpuntoo Legal Service has not received extra funding from the Aboriginal and Torres Strait Islander Commission to cover this so have had to cut back elsewhere.

Magistrates should be selected on the basis that they have a knowledge of and respect for Aboriginal culture. Elders from the community should sit with magistrates and advise them on Aboriginal customary law and sentencing.

<u>Community Input Into Sentencing:</u>

The Royal Commission Into Aboriginal Deaths In Custody Recommendation 104 requests community input in sentencing:

> "That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases."

The Response by Governments to the Royal Commission Vol. 1; 1992:384 outlines that the Queensland Government's response is to set up Aboriginal Community Justice Panels which will

oversee Queensland Corrective Services Commission (QCSC) projects on communities. They are designed to represent all clan groups and have a community development brief not just law and order issues. While this sounds good, it is mid 1993 and so far none of these groups are off the ground though negotiations for the Palm Island panel are underway. It is planned that these groups be available to advise sentencers and supervise community service.

Cross-Cultural Training for Judiciary:

The ACC has been concerned about cross-cultural training for members of the judiciary and court and probation and parole officers. Recommendation 96 of the RCADIC recommends this also. The Queensland Government seems to have some reluctance in "imposing training on judicial officers in that this could be perceived as an unwarranted intrusion on the independence of the judiciary." (Aust. Govt. 1992:352). However, magistrates in the Northern Territory have participated in many training programs during the last few years. Also Northern Territory magistrates have monthly one-day conferences which regularly focus on Aboriginal issues. In Victoria, the magistrary has requested a program tailored to their needs.

The Queensland Corrective Services Commission is proposing to introduce Community Justice Elders into the Court Advisory Service as a pilot program in liaison with the Aboriginal and Torres Strait Islander (ATSI) community. Cross-cultural training programs are being developed by the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) for its staff. This is being co-ordinated by Aboriginal workers employed by DFSAIA in consultation with ATSI communities in line with Recommendation 97 of the RCADIC that, in devising and implementing courses, consultation take place with appropriate Aboriginal organisations, including Aboriginal Legal Services. ATSI community representatives have participated in the training of Child Care Officers of DFSAIA since 1985.

A cross-cultural program needs to be developed for the Attorney-General's Department, Justice Department, Community Legal Services and QCSC staff both in prison and non-custodial work. A research and training body - Yalga-Binbi is developing a training program for QCSC officers based on Aboriginal communities.

Interpreter Services:

Where necessary interpreter services should be provided to Aboriginal people who do not understand English and are before the courts (ALRC 1980, RCADIC 1991). The Queensland Department of Justice is involved in a review of interpreter services. It will be necessary to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts (Rec. 100 RCADIC). The Queensland Department of Justice is commencing implementation of this recommendation using the Aboriginal Employment Strategy of the Department of Employment, Vocational Education, Training and Industrial Relations.

Panel of Elders to Advise Magistrate:

The Australian Law Reform Commission (1980) also recommended a panel of elders to advise magistrates in remote areas of high Aboriginal population because comprehension of white legal concepts was often poor, taboos against speaking the name of a sister, mother-in-law or dead person can interfere with court hearings, and certain defences under European law such as provocation, mistake and duress take on different meanings in the light of Aboriginal culture.

Non-indictable Matters:

Magistrates Courts basically hear and determine non-indictable matters in a summary manner. Complaints before Magistrates Courts can also be heard by two Justices of the Peace when a Magistrate or Acting Stipendiary is unavailable. In such a case, the court is not competent to deal with any matter where an offender does not plead guilty. (S3.14 (3) of the Justices of the Peace and Commissioners for Declarations Act 1991).

The Queensland Government Review (1989:24) suggested two options:

"(1) Arrange for Magistrates Courts to sit more frequently on Communities under a Magistrate.

(2) Implement changes in consultation with the Justice Department whereby more cases on Aboriginal Communities can be heard by a Magistrates Court comprising two JP's who are local people."

There has been no formal Queensland Government response to this paper. The Legislation Review Committee made no recommendations re Magistrates Courts.

Aurukun and Mornington Island Courts:

The former reserves of Aurukun and Mornington Island were abolished as reserves by order in Council on 6 April, 1978, and were thus no longer subject to the Aborigines Act 1971 or its regulations or by-laws. This was a deft stroke by the Queensland Premier Joh Bjelke-Petersen to outwit the Commonwealth Government's attempts to respond to Aurukun's demands for self-management. The Communities had previously been managed by the Uniting Church who were prepared to relinquish control. The Commonwealth Government passed the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 to allow the communities self-management and there was discussion as to whether the Commonwealth would resume the reserve land and compensate the Queensland Government as it was crown land. Joh saw the writing on the wall knowing that other communities would probably follow suit to get out from under control of the Department of Aboriginal and Islander Affairs (DAIA). By abolishing Aurukun and Mornington Island as reserves , the Commonwealth legislation did not apply unless it was amended. The Commonwealth Government backed down and the Queensland Government made Aurukun and Mornington Island Local Government areas under Queensland's Local Government Act 1936-1977 by virtue of the Local Government (Aboriginal Lands) Act 1978 as amended later that year.

The 1978 legislation continued the system of Aboriginal Councils and Aboriginal police but made no provision for Aboriginal courts. Instead the Shires became subject to the general provisions of the Magistrates Court Act 1921 -1924 and the Justice Act 1886-1964. Two Aboriginal Justices of the Peace exercise the normal jurisdiction of a magistrates court. The Aboriginal Advisory Council Working Party 1982 considered that the arrangement at Aurukun and Mornington Island makes the Magistrates court more community based by having local JP's sit on it. (Brennan, 1982:33). This did not result in their wanting to abolish community courts in favour of a magistrates court with JP's however. Interestingly, the Legislation Review Committee recommended that Aurukun be urgently assisted in the development of a community justice scheme or Aboriginal court.

Indictable Offences:

Indictable offences eg crimes involving death or bodily harm or offences connected with attempted murder, rape, arson etc are usually investigated by the Criminal Investigation Branch flown into the community. Following an arrest, accused persons would be removed quickly, usually by air to the nearest town pending court.

Aboriginal Assistant to the Court:

Fraser (1992) has suggested that a position of Aboriginal Assistant to the court - Magistrates Court, District Court, Supreme Court and Court of Criminal Appeal - be created. This person would explain the nature of proceedings and his/her legal rights to an Aboriginal person, and in the case of illiterate, uncomprehending or reticent litigants help them express themselves. With the leave of the Judge, the Aboriginal Assistant could question witnesses and the accused on matters relevant to customary law. The Aboriginal Assistant to the Court would retire with the Magistrate or Judge to advise him or her on sentencing where an aspect of customary law is relevant.

COMMUNITY POLICE

Review of Community Policing:

The RCADIC recommended that the question of Community Police in Queensland and the powers and responsibilities of Community Councils in relation to them be urgently reviewed. The Queensland Government's response was that the Legislation Review Committee (1991) had done this and that:

> "It was recommended that Community Police Officers remain, that they continue to be employed by Aboriginal and Torres Strait Islander Councils, but they be trained by the Queensland Police Service (QPS). It was further recommended that protocols be negotiated as a matter of urgency between police and communities in order to clarify community policing functions, including chains of command. Commonwealth funding has been sought to enable the QPS, in consultation with the communities and other agencies, to develop a suitable training program. It is anticipated that protocols will be developed in conjunction with delivery of the program.
>
> (Aust Govt. 1992:890)

However the Queensland Police Service is currently co-ordinating a review into policing needs in ATSI trust communities as part of their response to the RCADIC. The police are assisted by the Aboriginal Co-ordinating Council and expect to report to the Police and Emergency Services Minister, Paul Braddy, by December 1993.

The main issues that need to be discussed re: Community Police are - their retention, their employers, selection, training, career structure, resourcing, powers of arrest, protection against being sued, compensation and role.

Retention:

It has been suggested that community development officers or peacemakers could be a replacement for community police. However, an ACC meeting in 1990 agreed that although policing needed to be more proactive, it was felt that both community development officers and Aboriginal community

police had a role in Aboriginal community life. Despite all the problems surrounding the community police system, it was felt it was worth trying to improve community policing rather than abandoning it because then there was at least some buffer between the community and State Police who at this stage are all European. This was the general attitude of Aboriginal people on the communities I visited.

Aboriginal people have expressed this point of view a number of times over the years eg. Aboriginal and Islander Commission (1978), FAIRA survey (1979), Aboriginal Advisory Council Working Party (Brennan.1982), Aboriginal Co-Ordinating Council (ACC) Working Party (1989), ACC (Hazlehurst 1988, (Miller 1990) and Legislation Review Committee (1991). A Queensland Government Review (1989) also supported their continuance.

However the Law Reform Commission (1986:74) recommended that Police Aide schemes be temporary and that if they are introduced it should be with clear local support, clear articulation of needs and aims, promotion of aides after necessary training to the regular force, periodic review and adequate police powers and support so they are not seen as second class:

> "Police aide schemes should be seen as essentially temporary measures, with the longer term emphasis on self-policing, on increasing the number of Aborigines, in regular forces and on other measures."

There is sufficient local support for the Queensland Aboriginal Community police scheme to continue. However, this does not mean the job of Community police is an easy one. They can be disliked for locking up their own people and there are general anti-police feelings. Because of their lack of training and because their power is limited to by-laws and regulations offences, they are sometimes called "mickey mouse" police. This makes it hard for them to respect themselves and carry out their jobs. It is also difficult for Community police to arrest Councillors or their families because they are their employers and to arrest relatives or kin because of family obligations (Craig,1979; Brennan,1982; Hazlehurst,1988; and Miller,1990). This results in a high turnover of Aboriginal police (Craig,1979; Miller,1990).

Who Should Employ Aboriginal Police?:

Prior to 1984, the Aboriginal police were employed by the Department of Aboriginal and Islander Affairs (DAIA) and directly responsible to white managers of the Aboriginal reserves. They policed by-laws developed by the State Government that were highly discriminatory (Human Rights Commission 1983 and Miller,1986) and were arms of an oppressive system of control (Craig,1982 and Miller,1986) under the Queensland Aborigines Act 1971. With the Community Services (Aborigines) Act 1984, the Aboriginal Councils became local government authorities with the Queensland Government (now Department of Community Services) phasing in local control over a number of years. Aboriginal police became community police under Aboriginal Council control on what were now communities not reserves. Aboriginal and international pressure and the passing of the ATSI (Queensland Discriminatory Laws) Act 1975 led to these changes.

This context must be born in mind when the Aboriginal Advisory Council Working Parties of 1981 and 1982 said that the Community police should be selected by both the Council and the State Police but employed by the State Police once they are trained. This would have been in preference to Community police being employed by the DAIA and probably without full awareness that Council control was an option.

What did Aboriginal people have to say after Councils were given governing powers on

Communities? Community police have expressed the difficulty of having two bosses - Aboriginal Councils who employ them and State Police who have authority to supervise them, particularly when liaison between Councils and State Police has not always been good. In a review of the Community Services Act, the ACC stated:

> "Community Police are presently in a difficult position in which they receive instructions both from the Community Council and from the State Police. It is submitted that the laws should be altered so that State Police may only divert local police where that authority is given to them by the Community Council."

There was no response from the government to this but their own reviews suggested taking control completely out of the hands of Community Councils. Two options were proposed:

> "Jurisdictional changes be given effect through legislation by -
>
> (a) Amending the Police Act so that Community Police are appointed to come under State Police jurisdiction.
>
> or;
>
> (b) Amending the Community Services legislation to enable the Under Secretary for Community Services to engage persons as Community Police.
>
> (Qld Govt 1984:4)

When I discussed this with Aboriginal Communities, they were quite angry at option (b) and support for option (a) came from a few Community Police but not from Council or Community Members. Self-determination was an important issue in retaining Council control. ACC told the RCADIC:

> "A range of viewpoints were received from Councils, Community Police and State Police on various communities but the overall attitude was in favour of Community Councils retaining their present responsibility for Community police with State police supervising the duties of Community police. This was, despite uneasy and at times, conflictual relationships between Council and State police. Options (a) and (b) were for the most part rejected although some Community police supported integration into the State Police Force, an option favoured but not considered possible by State Police on Communities."

Regular meetings need to be held between Councils, State and Community Police to facilitate smooth functioning of police services and protocols should be negotiated.

Training:

There is a high degree of agreement that training of Community police is important - (Aboriginal and Islander Commission,1978); FAIRA,1979; ALRC,1980; Brennan,1982; Hazlehurst,1988; Qld. Government,1989; Miller,1990 and Legislation Review Committee,1991). All Communities I have visited for this project have requested Community police training.

Kayleen Hazlehurst of the Australian Institute of Criminology was approached by the ACC to prepare a Community Police Training Manual and video in conjunction with the Queensland State Police. The Cherbourg Aboriginal Community was involved in making the video. This was a good program but only one Policeman was appointed to do the training over a large area and

because of the high drop-out rate by the time he got back to a community to teach the next module, he'd have to repeat the first module. So the full course was not completed.

In 1992, the Queensland Police Service asked the author to work with them on a new Community Police Training Manual that would satisfy the requirements of the RCADIC. Its emphasis was on crime prevention, mediation and community based policing. This included Community Police developing projects with the Council and community to deal with domestic violence, juvenile offending, child abuse and neglect and alcohol abuse. Community organisations are to provide talks for and lead discussions with community police. The course also provides opportunity for community elders to teach a course on Aboriginal customary law. To be successful this course must be taught on communities not in Cairns because it is community based in design. Experienced Aboriginal police should be used as course lecturers where possible.

Career Structure:

Johnstone TAFE in Innisfail has a Certificate of Tertiary preparation (ATSI - Justice Studies) Course which is a bridging course enabling Aboriginal and Islander people to improve their chances of selection to the Police Academy to train as State Police or their selection into other positions eg. QCSC, Aboriginal Police Liaison Officers, etc. The first Aboriginal and Islander people who had come through the Johnstone TAFE course graduated from the Police Academy in 1993. Most of those were from urban areas however.

While this initiative is very important, the Queensland Police Service needs to look at providing community-based training that will provide entry into the Police Academy. This could be done with the assistance of Johnstone TAFE. Instead of spending time at a University in Brisbane, discussions need to occur with James Cook University, Cairns to provide this segment of the Police Academy Course. This is to reduce the drop out rate which would be high if all the training were to be done in Brisbane. Home sickness is a real issue.

The value of this would be to provide a career structure for community police who want to move into the Queensland Police Service. Their training needs to articulate with Queensland Police Service training. For those community police who stay community police, there still needs to be a career structure with incremental wages. These wage increases would be appropriate to the training received and duties performed.

Community police presently have jurisdiction in their own community only but it may be desirable to amend the Community Services (Aborigines) Act 1984 (CSA) so that Community police could apply for a position in another Aboriginal community (perhaps as Sergeant of Community Police). It would be up to the Aboriginal Council to decide if their community would accept him/her or see them as an outsider. This could be done without amending the CSA as employment by the council would automatically give the new community police officer jurisdiction there. It would not require employment of community police by State police for community police to be able to move to another community to work.

Resourcing:

Aboriginal councils are not sufficiently funded to properly resource community police and this often leads to ill feeling with community police feeling unsupported by councils. Aboriginal councils often feel State police should be responsible for equipping community police with uniforms, boots, two-way radios, police vehicles, (boats where necessary) etc because they are getting policing on the cheap. This has often lead to community police lacking adequate uniforms

and boots or wearing secondhand uniforms.

The State Police Service has in the past refused to take over responsibility for community police because it would cost them a great deal more than what it costs Aboriginal councils because of better working conditions and benefits that would be available etc. However the State Police Service is now considering doing this on a trial basis if it can find a community interested. It would mean the transference of the Department of Family Services and Aboriginal and Islander Affairs budget for community policing of that community to the Queensland Police Service. ACC has argued that if the Queensland Police Service has access to other state or federal grants to fund community policing, why don't Aboriginal councils have access to this money so that they can better resource their own community Police? The Queensland Police Service has received a great deal of money eg from RCADIC but Aboriginal councils or the ACC have not.

Powers of Arrest:

It is important that Community police have powers of arrest for by-law offences (FAIRA,1979; Brennan,1982; ALRC,1986; ACC,1989; Qld. Govt,1989 and Miller,1990). There have been difficulties in this area for a number of years leading to a situation where a community policeman was sued for wrongful arrest. It is also important that arrest be a last resort. A review of by-laws could limit the number of arrestable offences and limit arrest to when a person is a danger to themselves or community members. The new Juvenile Justice Act 1992 will prevent community police from arresting juveniles as community courts will lose the power to process juveniles for by-law breaches. This is liable to anger some Aboriginal councils who say the State has eroded their power to deal with their young. There has been no consultation by DFSAIA with ACC on the Juvenile Justice Act 1992.

Liability and Compensation:

It is important that Community police and councils as their employers are protected against being sued for wrongful arrest etc. (FAIRA,1979; Hazlehurst,1988; ACC,1989 and Miller,1990). The Qld Government Review said (1989:10):

> "They and their employers, the Councils, are however quite vulnerable against torts. A tort is a civil wrong as distinct from a crime. It is an act which gives rise to a right of action at Common Law for unliquidated damages which are not exclusively a breach of contract eg. assault, trespass, slander, negligence, nuisance. The Crown is liable for torts committed by members of the Queensland Police in the performance of their duties but is not similarly liable in relation to Aboriginal police on councils."

The Legislation Review Committee Interim Report 1990 commented on this and legislative changes were made to the Community Services Act to indemnify Community police and Councils.

Aboriginal Councils have expressed concern as to whether the Workers Compensation Board would recognise a claim from an unarmed Community police officer shot in a drug raid or murder case as Community police are only supposed to police council by-laws.

Community Police Not Really Police:

The term 'Police officer' is defined in the Acts Interpretation Act 1954 to mean a police officer within the meaning of the Police Service Administration Act 1990 so does not include a community police officer. Section 39 (1) of the Community Services (Aborigines) Act 1984 provides that:

> "The function of maintaining peace and good order in all parts of an area is that of persons who hold appointments for the time being as Aboriginal Police for the area."

However their duties and powers are conferred on them by Aboriginal council by-laws and limitations on by-law making powers restrict the functions of community police. While community police are subject to the direction and control of state police, their powers are separate from them. The State police have taken the view that community police are there to assist them but DFSAIA say this is not the case. (Malezer, 1992).

While Aboriginal communities have been frustrated that they cannot detain their people in their new watchhouses, liability for events occurring in watchhouses rests with the Commissioner for Police not with the community police or council, so community police cannot take responsibility for management and supervision of people in watchhouses.

Community police are not able to take persons into custody in order to take them to the houses of friends or relatives eg if they are drunk, without the persons consent, unless that person has been arrested (Malezer, 1992). Community police also do not have the power to sieze liquor unless they are appointed as 'investigators' for the purpose of the Liquor Act under S.174 of the Liquor Act.

The DFSAIA has told the State Police Service that Community police have no powers under the Bail Act:

> "With respect to bail, community police have no powers under the Bail Act. However, a system of bail could be developed through community by-laws. The draft law and order by-laws supplied to you address the issue of bail. We note also that an argument exists that the Bail Act does not apply to by-law offences at all. This may be another matter requiring referral to the Crown solicitor."
>
> (Malezer, 1992:9)

Community Police may be expected to fill out summonses with respect to by-law offences. Community police cannot execute warrants maybe Yarrabah Council had a good point when, for a time, they renamed their community police by-law officers. The role of community police needs further discussion at a community level and inter-departmental committee level.

STATE POLICE

Queensland police were first stationed on Aboriginal communities in 1968 - at Cherbourg, Yarrabah, Palm Island and Woorabinda. They were to provide the same standard of service as at any country town. In 1972, they were placed at Kowanyama and Bamaga. The Department (DAIA) paid all costs involved with having Queensland Police on Aboriginal reserves, including salaries, overtime, accommodation, police station and vehicle expenses.

In 1983, Cabinet agreed that DAIA was not and had never been a law enforcement agency. The Queensland Police Department accepted financial responsibility for all centres where Queensland Police were stationed. This now included Aurukun and Mornington Island. During 1984 - 85, Queensland Police were stationed at Edward River and Lockhart River. To this day, State police are not stationed at Hopevale and Wujal Wujal but come from Cooktown if necessary, or at Napranum or Doomadgee, coming from Weipa or Mt. Isa respectively when necessary.

Relations between State police and Aboriginal communities have at times been volatile particularly at Yarrabah. Craig (1979:117) says:

> "Until 1977, the State police kept the Yarrabah watchhouse book, arrested Aborigines and charged them under the Aborigines Acts, oversaw the operations of the local jail and acted as part of the reserve police force. In a decision handed down regarding the assault of Yarrabah's two state policemen in 1976, a judge in Cairns determined that under the Aborigines Act of 1971 - 1975, State police could only arrest Aborigines on Yarrabah in two instances: (1) if specifically called upon for assistance by native police or (2) if they were prepared to charge the offender under a state statute and book him at their headquarters in Cairns. After their decision, a clearer separation of the two police forces emerged: the State police moved into its own room at the back of Yarrabah's police station and no longer made entries in the watchhouse book. They could not hold their prisoners in the local jail, nor did they prosecute cases before the Aboriginal court."

After this, there was a clearer definition of roles between state and community police. Miller (1990:44) writes of continuing problems between the Yarrabah community and state police however:

> "On 17 November, 1989, Baker called in police reinforcements from nearby towns to confiscate liquor from Aboriginal people at a peaceful unlicensed disco at Yarrabah. Two police officers were injured and police vehicles were damaged by stones after the 12 police, in what the people considered, a provocative manner entered the hall. A barricade was set up to prevent police vehicles leaving and many arrests were made."

Retention of State Police:

The Hopevale community has strongly resisted the stationing of state police there, preferring to use community police and call state police from Cooktown if necessary. Nearby Wujal Wujal community however has been asking in vain for State police presence. Most communities I spoke to in the course of this project would like to retain state police but they would like a better working relationship with state police.

After consultation with communities on this issue among others, Brennan (1982:43) said:

> "It is a regrettable fact that assaults to the person are very prevalent on a number of communities particularly where alcohol is readily available. These communities are entitled to adequate policing by the Queensland Police Force. The responsibility for policing of communities should rest with the Queensland Police Force."

The ALRC also noted concern to retain state police (ALRC, 1986:73):

> "The Commission did not receive any requests from Aboriginal communities for the removal of permanent police stations: on the contrary there is considerable demand for additional police stations,in the belief that this would assist in resolving internal problems (especially those relating to petrol sniffing, alcohol abuse and related offences). Many communities indicated they would strongly resist any attempts to restrict access to the police. What many Aborigines, especially those living in remote areas or in town camps, have sought is a greater degree of control over what happens in their community."

Development of Protocols:

It is important that guidelines or protocols are developed between Aboriginal communities and State police as to how State police are to operate on their community (ALRC, 1986). The Legislation Review Committee (1991:36) was also concerned about the urgency of developing such a protocol:

> "That communities have formal involvement in selection of state police officers for community areas and a veto over unacceptable officers; that there be better training of state police in Aboriginal and Torres Strait Islander culture, history and inter-cultural communications; and that there be comprehensive protocols developed as a matter of urgency about relations between Aboriginal and Torres Strait Islander communities and state police officers. Special attention should be given to protocols about state police enforcing liquor control by-laws and the Liquor Act. Comprehensive protocols should be negotiated and in place by July, 1992."

Community Policing:

Recommendation 214 of the RCADIC recommends the concept of community policing in relation to Aboriginal communities while Recommendation 215 goes into detail as to how this might occur. (RCADIC 1991):

> "That Police Services introduce procedures, in consultation with appropriate Aboriginal organizations, whereby negotiation will take place at the local level between Aboriginal communities and police concerning police activities affecting such communities, including: (a) the methods of policing used, with particular reference to police conduct perceived by the Aboriginal community as harrassment or discrimination; (b) any problems perceived by Aboriginal people; and (c) any problems perceived by police. Such negotiations must be with representative community organizations, not Aboriginal people selected by police, and must be frank and open, and with a willingness to discuss issues notwithstanding the absence of formal complaints."

The Queensland government is responding to this with Aboriginal/police liaison committees which have been established on Yarrabah, Hopevale, Weipa and Kowanyama. Such liaison committees were recommended by the ALRC (1980) and Miller (1990). These committees do not seem to have worked well however.

It is also important for State police to liaise with Aboriginal Legal Services.

Proactive Policing:

Proactive Policing is part of community policing and it is important that police take a proactive approach rather than responding to crime when it occurs. This has happened to only a limited extent on Aboriginal communities with the occasional blue light disco. Police need to have activities in schools and meet with young people, women, people with alcohol problems etc and plan together activities that will meet the needs of these groups in a way that promotes social harmony.

Selection:

Aboriginal elders and Councils are now involved in selecting state police, men and women, who

are going to work on their community and should be able to veto unacceptable officers. (Miller, 1990 and Legislation Review Committee, 1991). Also screening for racist attitudes of present state police personnel should occur and these officers should be moved to areas of low Aboriginal population. (Hazlehurst, 1988 and Miller 1990).

Cross-Cultural Training:

The Australian Law Reform Commission (1980) and (1986) Hazlehurst (1988), the ACC (Miller 1990), Legislation Review Committee (1991) and RCADIC (1991) have argued for cross-cultural training of police officers. Police training should not be confined to induction courses in contact history Aboriginal/police relations, Aboriginal culture and cross-cultural communication but there should be continuing education and these courses should be designed and taught by Aboriginal peole as much as possible.

The RCADIC recommended (Rec. 228) that such courses include:

> "(a) the social and historical factors which have contributed to the disadvantaged position in society of many Aboriginal people;
>
> (b) the social and historical factors which explain the nature of contemporary Aboriginal and non-Aboriginal relations in society today;
>
> (c) the history of Aboriginal police relations and the role of police as enforcement agents of previous policies of expropriation, protection and assimilation."

Such content is crucial to the success of these courses so that police have an appreciation of Aboriginal perceptions of them. Police need to know about cultural factors affecting police work eg. eye contact with and saying the names of certain kin is culturally forbidden.

An Aboriginal and Torres Strait Islander cultural awareness course for police was developed in Queensland in 1992 and university-based training courses were developed for police recruits in 1991. As part of their University studies, all police recruits now undertake Aboriginal and Torres Stait Islander Socio-Cultural Awareness training with guest Aboriginal lecturers. ATSI issues are integrated with other courses for recruits at the Academy with the assistance of an Aboriginal lecturer. This includes regular visits to Ngtanaluy Aboriginal Cultural Centre at Inala.

The cultural awareness training program was developed using Aboriginal and Torres Strait Islander project officers to consult with the ATSI community although I'm not aware of their contacting ACC. The program is to provide a module for the Competency Acquisition Program in 1993 and successful completion of the subject will be a prerequisite for wage increases for all non-commissioned offficers.

As part of the cultural awareness training, an induction package for police who are to serve in communities with significant numbers of Aboriginal and Torres Strait Islander people has been developed. QPS policy now includes community representatives on selection panels for ATSI communities. Another training package developed trains selection panel members including community representatives in selection skills. An Aboriginal consultant, Mary Graham is designing both these packages.

A program has been operating at Cherbourg since 1991 where first year constables spend one month full time living in the community gaining an insight into the lives of Aboriginal people.

They visit the Emu Farm, receive talks from elders, visit the school and supervise youth camping trips etc. Evaluations have indicated an improvement in the perceptions of views of ATSI people. The program has the support of the community and has been designed with the community elders. An independent evaluation of the program and the development of a training program that can be extended to other regions is being undertaken with the assistance of federal funding. (See Tyler and Jeans, 1992).

Custodial Training:

A Custody Manual which meets the recommendations of the RCADIC has been developed by the QPS and the Queensland Health Department. Statewide training of watchhouse staff began in mid 1992 in the identification of at risk persons and duty of care obligations.

Recruit Aboriginal Police:

The Queensland Police Service needs to actively recruit more Aboriginal men and women into the service. A career path from community policing into the State Police Service needs to be charted to provide opportunity to interested community police. Problems in the past have been the literacy levels of community police and their not wanting to be stationed anywhere in the State. Community police have not wanted to leave home to go to the Police Academy in Brisbane. Training could be based on a community or in Cairns, perhaps partly at James Cook University, Cairns.

Recruitment of Aboriginal people into the Police Service could help in understanding the values and circumstances of Aborigines. Johnstone TAFE at Innisfail provides an access course in ATSI Justice Studies which makes meeting entry standards for the Police Academy easier though not guaranteed. So far a number of Aborigines and Torres Strait Islanders have sucessfully completed both the Johnstone TAFE and Police Academy courses. This bridging course satisfies the requirements of Recommendation 230 of the RCADIC.

Conduct and Complaints:

Violent treatment, verbal abuse or racist comments (verbal or written) directed towards Aboriginal persons by police should be considered a serious breach of discipline. In adjudication of complaints made by Aboriginal people one member of the independent review or adjudication panel should be an Aboriginal nominated by an appropriate Aboriginal organization. Aboriginal people have often complained about the "bullying" and condescending attitude of State police eg "talking down" to Aboriginals. Better public relations are needed as State police are often perceived by the Aboriginal community as "out fishing" or "sitting on their hands" while black police do all the work.

Anunga Guidelines:

Because of difficulties experienced in the Northern Territory in Reg. v Anunga (1976), the Supreme Court of the Northern Territory prescribed certain guidelines to be adopted by the police when questioning Aboriginal suspects. Consultations should be held between the Queensland Police, and the ACC to see whether these guidelines should be adopted in Queensland. They are:

> "(1) Unless the Aborigine is fluent in English, an interpreter should be present to ensure complete and mutual understanding.

(2) Where practicable a 'prisoner's friend' (who may also be the interpreter) should be present during the interrogation. The 'prisoner's friend' should be someone in whom the Aborigine has apparent confidence.

(3) Great care should be taken in administering the caution. Interrogating Police officers, having explained the caution in simple terms, should ask the Aborigine to tell them what is meant by the caution; phrase by phrase and should not proceed with the interrogation until it is clear that the Aborigine has apparent understanding of his right to remain silent.

(4) Great care should be taken in formulating questions so that as far as possible the answer which is wanted or expected is not suggested in any way.

(5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.

(6) The prisoner, if being interrogated at meal time, should be offerred a meal, and, where facilities so permit, should always be offered tea or coffee. If there are no facilities, he should always be offerred a drink of water. Further, the prisoner should always be asked if he wishes to use the lavatory.

(7) Aborigines are not to be interrogated when they are disabled by illness or drunkenness or tiredness. Interrogation should not continue for an unreasonably long time.

(8) Should an Aborigine seek legal assistance, reasonable steps should be taken to obtain such assistance. If an Aborigine states he does not wish to answer further questions or any questions the interrogation should not continue.

(9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing."

(ALRC, 1980:88)

South Australia has similar rules and a departure from guidelines without good reason may result in statements from Aboriginals being disallowed.

Aboriginal Policy and Development Unit:

The ACC (Miller,1990) requested that the Police Service set up an Aboriginal Unit with a strong proactive preventative approach employing as many Aboriginal people as possible. The RCADIC (R225) recommended similarly:

> "That Police Services should consider setting up policy and development units within their structures to deal with developing policies and programs that relate to Aboriginal people. Each such unit should be headed by a competant Aboriginal person, not necessarily a police officer and should seek to encourage Aboriginal employment within the unit. Each unit should have full access to senior management of the service and report directly to the Commissioner or his or her delegate."

This matter is under consideration by the Queensland Police Service but has not been discussed with the ACC to date.

CUSTODY AND NON-CUSTODIAL ALTERNATIVES

Royal Commission Into Aboriginal Deaths In Custody:

The Royal Commission into Aboriginal Deaths in Custody has exhaustively dealt with custodial issues in general and particularly in terms of prevention of deaths in custody and what should happen if they occur. The Queensland Government response has been dealt with in Aboriginal Deaths in Custody, Response by Governments to the Royal Commission Vol. 2, Recommendations 122 - 187; and Vol. 1, Recommendations 6 - 40. I refer the reader to this rather than covering the same ground. Many of these concerns had been raised by the ACC in Miller (1990). Let's firstly look at the history of watchhouses on Aboriginal communities.

Control of Watchhouses on Reserves:

In FAIRA's account of the Regulations to the Aborigines Act 1971 - 79, it spells out how watchhouses were under the control of white managers for the Department of Aboriginal and Islander Advancement:

> "The Council and/or the Director may establish a jail or lock-up on the reserve. There has to be separate accommodation for males and females. The Manager appoints the person who looks after the jail and that person has to keep a record book and the Manager has to make sure it is kept. The person in charge of the lock-up can put anyone in there who is delivered to them by the Aboriginal police or the Queensland police. The Manager can order a person to work in the community provided he has a medical certificate to say he is fit." (FAIRA, 1979:281)

With the Community Services Act 1984, managers became executive officers and began to be phased out. However, Sergeant R. Frazer's report on a trip to Palm Island in August 1987 shows that watchhouses were still owned by the DAIA (now Department of Community Services or DCS) who did not seem to be particularly worried about suicide-proofing the Palm Island watchhouse:

> "The complex is not a police department watchhouse, and has not been handed over to the community council. Inquiries some time ago from Mr. Jack Isaacs, DCS officer in that community indicated that this was the responsibility of that department, and was maintained by the State Works Department from Townsville. These inquiries were made at a time when watchhouses on other communities were being screened to prevent suicide attempts and I became aware that this facility had not been similarly modified. I was advised by Mr. Isaacs that it was not practical to mesh this complex, nor was it necessary." (Frazer, 1987:3)

Condition of Watchhouses:

In contrast to Palm Island Frazer found the Doomadgee watchhouse to be a poorly-ventilated, dilapidated hut without lighting. Prisoners were released on completion of the evening shift.

When I visited Aurukun, the watchhouse badly needed pulling down and rebuilding. There were

two female cells with a shower and two male cells with a toilet. Because there was no watchhouse keeper, the women had to use the shower as a toilet and the men missed out on their shower. Sometimes there was standing room only in the watchhouse. Fortunately a new one was recently built. At Pormpuraaw, ventilation was a problem with a window being bricked up to prevent further escapes. The Health Surveyors Report identified it as a health hazard. Wujal Wujal had no watchhouse.

New Watchhouses:

New police watchhouses have been built at Yarrabah, Cooktown, Lockhart, Weipa, Aurukun and Doomadgee. Old police watchhouses in poor condition still exist at Pormpuraaw, Kowanyama and Bamaga. Wujal Wujal has a new community watchhouse but it is not used because there are no community by-laws or community police. There is an old community watchhouse at Hopevale which they use because the community police have powers of arrest. However they are on tenuous ground because they are using by-laws developed for legislation that does not exist - the Aborigines Act (Qld) 1971 - 79. Napranum's community watchhouse has been closed because it is too old and dangerous. Prisoners are taken to Weipa. New watchhouses were built as a result of deaths in custody and the Royal Commission.

Imprisonment as Last Resort:

Queensland is the only state not to have decriminalized public drunkenness and appropriate diversionary facilities should be set up. The government is awaiting the results of a review of the Liquor Act 1912. Also when police intervene in a situation, the use of offensive language shouldn't normally be occasion for arrest or charges. A review of the Vagrants, Gaming and Other Offences Act 1931 and a review of police powers is in progress and this issue should be addressed.

The Juvenile Justice Act 1992 to be proclaimed in September 1993 includes the principle of detention as a last resort. The Queensland Corrective Services Commission (QCSC) has expanded its post-release programs to remove prisoners from the institutional environment. The Queensland Government claimed:

> "The policies of the QCSC in reducing the prison population have resulted in a reduction of 18 percent in the number of Aboriginal and Torres Strait Islander persons held in custodial institutions and a reduction of 25 per cent in the number of young Aboriginal and Torres Strait Islander offenders held in custody in the last 12 months."
>
> (Australian Government, 1992:333)

A Penalties and Sentences Review Committee is reassessing criminal law sentencing and penalties with a view to introducing new legislation into Queensland Parliament.

Bail:

Queensland must follow the lead of the rest of the states and decriminalize public drunkenness. However, if it does this without establishing declared places for the care of those found drunk in public, the arrest and detention of drunk people in watchhouses may continue. The Queensland Law Reform Commission (1991) pointed out that those who are drunk when arrested and who would not normally be released on bail because they are unemployed or homeless (Aboriginal people disproportionately falling into this category) could be released into a bail hostel. On remote Aboriginal communities it would be possible to have a multi-purpose half-way house where they could stay until their family was prepared to have them home again.

The RCADIC has recommended that the operation of bail legislation should be closely monitored to ensure that entitlement is recognized in practice. Bail legislation in Queensland has been under review by the Queensland Law Reform Commission and there has been no monitoring except in respect of bail forfeiture.

Further recommendations of the RCADIC were that where police bail is denied to an Aboriginal person, that the Aboriginal and Torres Strait Islander Legal Service (ATSILS) be notified. The ATSILS should be granted access to the person held in custody without bail. A statutory requirement should be on the police officer to notify the person in custody in writing of his/her right to apply for bail and a review of the decision if bail is refused. Currently bail, prior to appearance in court is at the discretion of the watchhouse keeper. Amendments to the Bail Act 1980 need to be made.

Queensland Police have been instructd to co-operate with ATSILS. Tharpuntoo ATSILS based in Cairns and responsible for remote northern communities do not have the resources to be on hand to talk to those in custody without bail. Tharpuntoo only visits when Magistrates Court is being held. Local field officers could perhaps be trained by Tharpuntoo and be paid by the Community Development Employment Program (CDEP) until Tharpuntoo is better resourced, but funds for training have been difficult to get.

It is hoped that the new Bail Act will revise criteria which inappropriately restrict giving bail to Aboriginal people, enable police officers to review another police officers refusal of bail and enable police officers to release a person on bail near the place of arrest without necessarily taking the person to a police station. These changes instituted would bring the new Bail Act into line with RCADIC Recommendations (89-91).

Non-Custodial Issues:

To rehabilitate offenders, part of their community service order could be satisfied by attending personal development courses to provide the offender with knowledge, skills and counselling. However this is difficult in remote communities where few rehabilitative programs are available. They need to be set up, with on the ground courses through TAFE for example. However to respond to a RCADIC recommendation for the above (94) the Queensland government is considering legislative change similar to other states so that a proportion of the hours of a Community Service Order can be used on work and the rest on rehabilitative programs.

In response to a RCADIC recommendation that sentencing authorities consult Aboriginal communities and organizations, the Queensland Government (1992:384) wrote:

> "Aboriginal Community Justice panels are also starting to be established in some communities and legislative recognition of these is being considered. The panels are designed to oversee the operation of QCSC projects on communities. However, their brief is broader, encompassing all community development issues, not simply law and justice. They are designed to represent all clan groups and to report to relevant governing councils. Conceivably, these could eventually play a role in the provision of advice to sentencers."

At this stage negotiations are occurring at Palm Island and Kowanyama for local Aboriginal justice committees to be established. However I shall return to this.

Queensland's Juvenile Justice Act 1992 includes Community Service Orders and Immediate Release Orders and it is intended to involve local ATSI people in program development and

implementation. This will be difficult in practice on northern Aboriginal communities because DFSAIA officers visit irregularly and infrequently.

ATSI representation on parole boards is provided for in the Corrective Services Act 1988 and ATSILS was given the opportunity though probably not the resources to comment on the penalties and sentences legislation being developed.

There is simply not the personnel or infrastructure to adequately surpervise Community Service Orders on communities (CSO's) and probation and parole, despite claims by the Queensland government (Aust. Govt.,1992:409 and 437). This should be provided. What usually happens is that the CDEP supervisor becomes the CSO supervisor and offenders work on CDEP for free. Sometimes this falls down however. The ACC told the RCADIC in 1990 that because a CSO supervisor could not be found at Lockhart River a combination imprisonment/probation order was often given by the magistrates court ie. they go to jail for a short time before being put on probation (Miller 1990). This meant more Lockhart people in jail compared to other communities.

Almost 5% of QCSC employeees are now ATSI people after a recruitment policy of 10% ATSI staff was established in 1989. These staff are particularly placed in areas of high ATSI population: Aurukun outstation is an Aboriginal owned and managed program that caters for local Aboriginal offenders on Release to Work programs. Juvenile detention centres have 20% Aboriginal employment and DFSAIA is aiming for a similar percentage in community corrections.

More creative use of CDEP and CSO schemes could be made however with work of more personal and community value. Unfortunately, raking up leaves is a common task in these programs.

In line with RCADIC recommendations, proceedings for a breach of a non-custodial order should be commenced by summons or attendance notice, not by arrest of the offender. The Corrective Services Act 1988 provides for this with QCSC maintaining that proceedings by way of warrant are only put into effect when the offender cannot be found to serve a summons or fails to answer a summons. Where the consequence of the breach may be a term of imprisonment, legislation should be amended so that a magistrate or judge can determine whether to make other orders besides imprisonment.

The Queensland Government's response (Aust. Govt.,1992:429) is:

> "The Corrective Services Act 1988 provides for two options where breaches of CSO's occur. An offender can be either fined up to $600 or re-sentenced on the original offence. The position is different where CSO's imposed for fine default (Fine Option Order) are breached. In that case, imprisonment follows automatically. Alternatives to automatic imprisonment are being explored and, in the meantime the Government through the QCSC endeavours to have prisoners so detained in circumstances of minimal restraint and minimal exposure to hardened prisoners. Sentencing authorities can make any order in re-sentencing, taking into account the offender's behaviour and circumstances. On 1 January 1992, the Community Services Act 1988 was expanded to allow inmates on the point of reception to a prison to elect to perform community service instead of undergoing a period of custody for non-payment of fines."

Breach provisions for the Juvenile Justice Act 1992 will commence by attendance notice. The DFSAIA can apply for a Justice to issue a warrant for the arrest of the child. The Justice must be convinced that there is sufficient evidence for a court to find that the young person failed to comply with the order and would not comply with an attendance notice.

The Juvenile Justice Act 1992 is introducing CSO's and breach proceedings will be held in court. The court has the option of extending the CSO or discharging the child from the order and dealing with the child for the original offence as if the child had just been found guilty of the offence.

Lotus Glen:

There have been hunger strikes by Aboriginal inmates from Lotus Glen prison at Mareeba and criticisms of the management's attitude to Aboriginals despite their winning of a Human Rights Award. Prisoners I spoke to were very keen to return to their communities to assist in alcohol rehabilitation programs and particulary to keep young people from going to prison. They wanted to make a video with themselves in it, explain what prison life is like and why young people should turn from crime. The inmates also wanted art materials as they could not afford sufficient quantities and requested more visits from Aboriginal organizations. They wanted to see more training and employment opportunities on their communities and saw boredom of the young as an issue that needed addressing.

Families and Prisoner Support Group:

The Families and Prisoner Support Group (FAPS) provides an invaluable cell visitor service to people in watchhouses in the Cairns region and Lotus Glen prison. They see that people have legal assistance, attend court, contact families for them, keep an eye on their health, provide someone to talk to and do some basic shopping for them. FAPS also assists families with transport to visit relatives in Lotus Glen.

CRIME PREVENTION

This section is a reproduction of a paper written by Barbara Miller after she left the employ of the ACC. It was presented to the Australian Institute of Criminology Conference on Aboriginal Justice Issues in Cairns, June, 1992 and entitled "A Community Development Approach To Crime Prevention In Aboriginal Communities". She had the permission of Chairlady Allison Woolla to present the paper.

Every culture has had its own system of law and order to protect the person and property of individuals and families and when we look at the situation of crime in Aboriginal communities, we must place our discussion within the context of the colonization of Aboriginal people and their consequent loss of their land, their right to govern themselves, and their authority to dispense justice. Added to this has been immense stress on their ability to practice their culture and religion and to be self-sufficient economically. Institutionalized racism and discrimination have continued to marginalize Aboriginal people so that they have little committment to abide by the imposed law and order system of the colonial power. [See Miller, (1986) and Miller 1991C)].

The question "what constitutes crime on an Aboriginal community?" is a political one. What meanings are given by Aboriginal people themselves to the actions construed by outsiders as crime? Sometimes what is considered as crime by a European police officer or magistrate may in fact be connected with fulfilling kinship obligations or be a way of satisfying customary law punishments.

What this paper proposes to do is to look at a case study of a North Queensland Aboriginal community which is trying to come to grips with a number of problems threatening its social order. In response to community unrest and high levels of juvenile offending, the Council closed its

canteen in April, 1991. However the sly grog trade increased. Later in the year in response to growing community violence, the government told the school's 13 state teachers they could leave Aurukun if they felt unsafe. The eight who took up the offer have not been replaced.

The Council and the government agreed to send in a task force or support group of three people to come up with recommendations to deal with the situation. John Adams, Phil Venables and myself who became the support group, took a community development approach because of our firm belief that the community themselves had the answers to their own problems and that unless solutions were generated by the community, they would not own these solutions and not have the will to make them successful.

A fundamental issue, however, was that this community had a large number of clan groups and their culture was still strong, so the settlement could not be treated as a single community. We need to see people as they see themselves. People in this community identify with family, clan and regional ceremonial associations. The church with government support created an artificial community and this is one of the major causes for present tension within the settlement or township.

When we talk of community development we have to determine which community we are talking about. Our approach then was to have discussions with all the major clan groups, and families in the settlement, as well as "community" organisations like the womens clan group, and the church group, the Aboriginal Shire Council, the Aboriginal company - Aurukun Community Inc., and government representatives - teachers, nurses and police. We also made outstation or homeland visits.

After a one week visit in September, 1991 we sent a letter to the "community" outlining our preliminary findings. In October we made another one week's visit for extensive consultations with the people in their natural groupings. A draft report was prepared and we returned for a final week in November to gain feedback on the draft report. The people chose their own language name for the report and decided to go to Brisbane to present it themselves to government in December, 1991. This demonstrates community ownership of the report. Instead, however, a number of government Ministers including the Deputy Premier decided to visit Aurukun, especially after further trouble erupted. Uncontrolled juvenile violence including vandalism and break and enters in January, 1992 resulted in six Council workers going on strike. In February about 40 rioters, mainly juveniles caused some residents to fear for their safety. Alcohol was not involved but family feuding is believed to be partly responsible. This increased the government's committment to respond to the demands of the Aurukun people. The Aurukun Council have done a trememdous job under a great deal of pressure and are happy to share their power and responsibility with clan leaders.

Some representatives of government departments on the "community" felt left out because they thought we were a government appointed team who should have been acting on their behalf rather than promoting Aboriginal views. This arose because part of the tension in the settlement was around not knowing where the roles of various government departments and of the Aboriginal Council began and ended and a situation of unmet expectations had arisen on both sides. Role clarificiation was needed.

The Council was feeling pressured to be all things to all people and had a much wider role than mainstream local government authorities. The implicit question was should the Council take on responsibilities normally met by state and commonwealth governments (for which it was not resourced) in the interest of self-determination and did it want to?

Our report entitled Woyan Min Uwamp Aak Ngulakana or Finding the Right Road Ahead pointed out that "Divisions within the community are often viewed by outsiders as a breakdown of law and order and social cohesion. In reality, they are part of the order of social organization at Aurukun. Even though conflict and hostility might be heightened by excessive alcohol consumption and associated violence, the origins of the social divisions are historically and culturally based." (Aurukun Support Group. 1991:26)

Efforts at crime prevention or any service delivery must work within these social structures to be effective. Conflict between some groups existed before the mission was established at Aurukun and is basic to their relationship. The clan or land owning group is the primary focus of spirutal and social identity at Aurukun and there are over 30 clans.

Added to this artificial community is a situation of overcrowding, few community amenities and alcohol. So it is no wonder that long standing hostilities between family and clan groups are played out in ways outsiders see as crime, and community breakdown or law and order crisis.

The usual approach to crime is to treat its results through rehabilitation - community service orders, alcohol treatment centres, victim support groups, male perpetrator groups etc., all of which are important. However it is also important to take a primary prevention approach to find the social and personal causes of crime. It is important not just to aim at stopping negative incidents but to promote good things happening in the community - to promote harmony, good things, wellness and healing on all levels - physical, mental, spiritual, cultural, social, economic and political.

I want to digress for a moment and look at crime prevention generally before returning to the situation at Aurukun. Kayleen Hazlehurst has written a useful manual on Crime Prevention in Aboriginal Communities which is adapted from a Canadian Indian Manual. She says "The choices we make in life are based on our image of ourselves. When we choose to prevent crime in our community, we first need a vision of what our community would be like without crime. We see what is possible, then use our desire to become what we see. We use our ability to become what we desire. And we use our desire and ability to provide opportunities in real life to realize our vision.

Desire + Ability + Opportunity = Realizing our Vision.

To realize our visions, we have to make a choice to pursue our vision - and then act on that choice." (Hazlehurst, 1990:3)

The manual suggests crime prevention proceed by three avenues:

1. Remove people's desire to commit crime through personal growth and providing alternatives e.g. recreation for bored youth.

2. Remove their ability to commit crime via jail.

3. Remove their opportunity by locking buildings, community policing, neighbourhood watch, women's shelters etc. (situational crime prevention).

I have a number of concerns with this approach. While I agree it is important to have a vision of the future we want, I believe Aboriginal people at places like Aurukun look more to their past and to their cultural traditions for inspiration and guidance and this strength needs to be utilized by them in developing crime prevention programs.

Secondly, I cannot agree with the suggestion implicit in Hazlehurst's position that individual factors are the most salient in the commission of crime and therefore a personal development approach would be the best way to prevent crime. Her emphasis on environmental manipulation similarly tends to ignore the social and structural causes of crime.

While personal development is important, unless Aboriginal people regain their land which is their spiritual force and key to economic self-sufficiency, and unless they are empowered to regain control over their communities i.e. self-government, Aboriginal people will be over-represented in the lower socio-economic group and be at more risk of committing crime. There is a resistance by Aborigines to conforming to the norms and obeying the laws of white Australian society when they do not have a stake in it. Marginalized by disadvantage and discrimination, they have little committment to white society's goals and methods.

The structured use of violence as a means of social control in Murri communities prior to colonization has eroded under the impact of colonization to produce the current high rate of crimes of violence in Murri communities (see Miller. 1991a). Disputes used to be sorted out in public with blockers to control the level of violence. However, with the advent of alcohol and European law and order, this process has been interferred with. The agression of the colonizers which included murder, rape, castration, poisoning waterholes and lacing flour with arsenic has led to feelings of anger, powerlessness and agression. However, as Aborigines are a minority, this aggression has been displaced onto other Aborigines through homicide, assault, domestic violence and child abuse.

While my work has focused on socio-historical and inter-cultural factors as more salient, it is necessary to take cognizance of individual factors. "To understand Aboriginal personal violence, it is necessary to take a functional, eco-cultural view on Aboriginal intra-cultural aggression and violence and to focus on socialization, structural variables and parenting styles. Factors such as compensatory machoism, an attitude that boys can develop in absent father households, a view of the environment as threatening due to discrimination, availability of aggressive models, learned helplessness and a lack of perceived control over the environment, the development of aggressive habits and beliefs, poor self-esteem, psychological reactance and confrontive coping mechanisms all contribute in varying ways to Aboriginal intra-cultural aggression and violence. Socialization of Aboriginal children, in particular boys, in a colonized discriminatory environment has led to the above individual factors interacting with frustration and conflict to cause aggression and violence." (Miller,1992a:314).

Hazlehurst has further suggested the formation of community crime prevention groups which would undergo teamwork training, survey their community resources, gather statistics, target the crimes to be dealt with and target the group to be reached. Establishing goals, action planning, implementation and evaluation are discussed. Planning action revolves around finding out why the target group commits crime e.g. youth may be bored and find other ways they can deal with their boredom e.g. learning traditional dance. Opportunities to reduce crime are also decreased e.g. lights are installed around the store. This approach which is similar to the Community Approach to Drug Abuse and Prevention Project (CADAP) has successully been operating at Weipa Napranum under the guidance of Jean Jans. The TWAL action group was formed about two (2) years ago and there has been a decrease in domestic violence and youth offending in the community.

Applying such a model to Aurukun however would have its problems unless at least two community justice committees were formed - one for top end and one for bottom end of the community. There is one basic social division between "top-end" and "bottom-end", between inland and coastal or eastern and western peoples respectively. However, more than two

committees may have to be formed as other major groupings exist regionalized around river systems or between north and south, or by nearness of land to the township. Although the strength of the community development approach is that people own their problems and own their solutions and it is empowering, the way of involving people must be culturally appropriate and this needs to be negotiated with people rather than assumed.

The Aboriginal Co-Ordinating Council (ACC) for which I worked in a management and research role for 2 1/2 years until last November followed an integrated community development approach to crime prevention dealing with personal, social and political factors, prevention, treatment and rehabilitation. For a more detailed discussion of this see ACC's Annual Reports 1989 - 1991.

One of the important elements of this approach was setting up mediation or alternative dispute resolution training for local Aboriginal people living on communities as this approach is an empowering one where mediators are neutral third parties who aid disputants to work out their own solutions both or all parties can agree on. This means they are more likely to abide by agreements reached. Mediation can be used to prevent the occurrence of crimes and it can also be used as a sentencing option of community courts. Victims and offenders may work out reparation or restitution agreements. Care must be taken once again to work within appropriate "community" structures and bolster rather than weaken traditional modes of dispute resolution. Aurukun people for example have been keen for some time to have local people trained as mediators but decided last December during a visit by the Aurukun Support Group, the ACC and the Attorney-Generals Department that tensions were such that they preferred to have outside mediators come in for some time who would be more able to be neutral. They would then have their own people trained later. Although the ACC's community mediation project began before the Community Justice Program of the Attorney-General's Department was set up, ACC decided in a joint meeting of the organizations in September, 1991, to invite the Attorney-General's Department to work with the ACC in a joint project because the ACC's funding was limited and the Community Justice Program could offer accredited courses and back-up support services.

Discussions of the extent of crime on Aboriginal communities in Queensland and community based solutions are covered more fully in Miller (1990), Miller (1991a) and Miller (1991b). Work I did for the ACC in 1990 showed that in 1986 - 1987, Aborigines in Queensland communities were seven times more likely to appear on homicide charges, fifty times more likely to appear on major assault charges, thirty-seven times more likely to be charged with rape, thirty-one times more likely to appear on break and enter and twenty-two times more likely to appear on Liquor Act offences. Juvenile crime rates are also high with Aboriginal children in Queensland under the age of 15, being 21 times more likely to be the subject of a court order for an offence than a non-Aboriginal in that age group.

Returning to the case of Aurukun, the people themselves say the right road ahead is for the government to support their homeland movement. There are already twelve main outstations or homelands and another nine that are occupied from time to time. These people have moved out of the township back to their own traditional land. Homelands have two-way radios, access to tractors for transport and are supplied with provisions by light plane from Aurukun. They are well serviced by their own company which is run by the various clan leaders. However, basically they live off the land and live in basic shelters made of bush timber and tarpaulins.

No alcohol is allowed on these homelands and no crimes are committed because people live in their traditional social groupings and the traditional social controls operate well. The people believe this is the answer. However there will probably also be some people still living in Aurukun because there are more amenities there and people are used to settlement life so crime prevention strategies

need to be developed for the township. Government agencies need to change their strategies and priorities to provide health, education, housing and infrastructure services to these homelands. Also government agencies need to negotiate with appropriate family and clan leaders as to the how, when, where and why of providing these services.

The truancy rate of the Aurukun school was so high that attendance rates have been as low as 6%. Children cannot sit in the same classroom because of inter-clan differences. Schooling is not working because:

1. Elders and parents have little say over the running of the school.

2. The school is structured in such a way that is culturally unworkable because it assumes the co-operation of socially incompatible groups.

3. Children on homeland centres receive no schooling.

The Education Department need to negotiate with each of the major family groupings at Aurukun to establish the most suitable structures for group schools and the content and method of schooling to which families are committed.

Because of the desire of the Aurukun people for greater community control of health services, the Finding the Right Road Ahead Report recommended the establishment of a local Aurukun Health Authority, to be formally recognized and placed within the new Regional Health Authority structure. The powers and responsibilities of such a group need to be negotiated but should include establishing local health policy, employment of nursing staff, provision of health services to homeland centres and training Aboriginal health workers.

Aurukun people want to employ a community development worker to work with clan and family groups around alcohol issues. In a submission to the Alcohol Audit Committee, the Aurukun Council requested legislative changes to give greater community control over alcohol including requests for:

(a) The Council to operate a permit system for people wishing to bring alcohol into Aurukun.

(b) For more effective policing of the sly-grog trade.

The Council also wants to be able to declare alcohol free areas on homelands and in the township.

Aurukun people have requested the Department of Family Services and Aboriginal and Islander Affairs to provide services to deal with child abuse and neglect and juvenile offending. However this statutory service would be used to empower the decisions of families not override them. Co-operation is occurring between the Corrective Services Commission and Aurukun on the sending of youth offenders to Wathaniin homeland centre for rehabilitation.

Further community consultations need to occur as to what extent customary law shoud be recognised by European legal structures at Aurukun and Shire Council by-laws need to be reframed so that they are culturally appropriate, not framed in legalise, irrelevant provisions are cut out and provisions are inserted relating to community control of social issues. The Aboriginal Co-Ordinating Council has been trying to work on both of these issues for the last three years without specific funding for that purpose. A number of clan leaders who are Uniting Church members

have formed a group called Woyan Min to work with the youth and it is closely liaising with Corrective Services Commission re co-operating with community service orders etc.

The Aurukun people have the cultural strength to find the "right road ahead" and need to be supported to do so by government agencies who treat them as equals, as partners, not as part of the white man's burden. A community development approach to crime prevention means the people themselves creating their vision for the future based on their strengths from their past and continuing traditions. White Australia needs to support that process as much as possible given a situation of internal colonialism and ethnocentrism that is embedded in the Australian way of life. In the long run we need to go beyond crime prevention to creating whole, healing, just, harmonious communities within black Australia, within white Australia and between black and white Australia.

REHABILITATION AND REGAINING SOCIAL CONTROL

All prisoners from North Queensland had been imprisoned in Townsville prior to Lotus Glen opening in Mareeba in 1989. Although most peninsula prisoners are now in Lotus glen, it is still a long way from home. Visits to communities to service those on parole, probation, community service or fine option orders were made to Palm Island from Townsville to Doomadgee and Mornington Island from Mt. Isa and to Yarrabah, Wujal Wujal, Hopevale, Lockhart River, Bamaga, Weipa, Aurukun, Kowanyama and Pormpuraaw from Cairns. These visits were made during the court circuit every 1 - 2 months. The Probation Officer would fly into the community with the magistrate, see people before, during and after court and provide some form of counselling before flying out again the same day.

Kennedy Report:

The Kennedy Review into Corrections 1988 resulted in the combination of the two services - prisoners and probation and parole into the Queensland Corrective Services Commission as of December, 1988. The disadvantaged situation of Aboriginal people which had led to their disproportionate representation both in custodial and non-custodial areas was recognized by the Kennedy Report which recommended:

"75. The Queensland Corrective Services Commission develop a comprehensive database relating to the situation of Aboriginals in custody in Queensland;

. The Commission immediately appoint an Aboriginal and Islander Policy and Liaison Officer; and

. The Commission to carry out a series of workshops, to inter alia:
  - Closely involve the Aboriginal community;
  - Address the problems facing Aborigines in prisons; and
  - Address the problems of Aboriginal communities in their interaction with Corrective Services in this state.

76. The QCSC allow correctional centres to develop areas or sections which can become centres for the Aboriginal and Islander culture and community with accommodation in these areas to be totally voluntary."

(Commission of Review into Corrective Services in Qld., 1988:xi)

Yalga-binbi Report:

While progress is being made on these recommendations, the QCSC became aware of the failure of traditional correctional intervention and the need for community based solutions. The Yalga-binbi Institute for Community Development was asked to assess the attitudes of the people in the inmates home communities, the structure of the communities and the social resources within the community to assist prisoners and supervise released offenders.

Yalga-binbi came up with a very useful community development model that was accepted by QCSC but has, as yet, barely gotten off the ground because community development is, by nature, a slow process. Their report described the state of anomie in the community:

> "The result is not a social audit outlining assets which can be utilized by the Corrective Services Commission; rather it demonstrates how the immense pressures on community resources mean that little social or personal energy is available to serve offenders of any age. Instead people feel that their energies must be saved for their own survival needs and that of the group in their community which most directly serves their needs; groups such as shire or council or the school or the church or the canteen. The research shows there is little knowledge of or commitment to the rehabilitation of prisoners in the communities. Even close relatives have little idea of their experience in prisons or their needs on return. In particular cases, people fear the return of prisoners and would much prefer they never returned at all."
>
> (Blackman and Clarke, 1991:8)

The Report found this sense of overload on the family unit leaves parents feeling powerless to control their children. Older teenagers and young adults use violence or the threat of violence to get their way. This is exascerated by alcohol abuse so families do not get sufficient food, rest or recreation. Many offenders are unsupervised by their kin, depend on peers for survival and become a nuisance to the community. The family unit needs to be supported in the consequences of their actions if they are going to take responsibiliy for disciplining offenders.

Durkheim (1953) described anomie as a state of normlessness which has been associated with suicide

The need for a community vision has been expressed by the Native Counselling Services of Alberta (1989) and Hazlehurst (1990). Yalga-binbi also drew attention to this need for vision and noted a lack of it in communities visited:

> "Any community, no matter how depressed, has visions of a different future, but we were not able to explore the visions articulated in the communities we visited. Instead, we would catch incomplete glimpses, usually based on past experience, of a hope for the future. The visions within a community are critical.....
>
> This process of developing new role models could be supported by commissioning a series of videos based on the stories of people who have been in prison, but who have changed their behaviour and gained vision and hope."
>
> (Blackman and Clarke, 1991:11)

A malaise of the spriit was identified by Yalga-binbi, whether spirituality was expressed as a traditional Aboriginal would or in Christian congregations, the holistic Aboriginal world view had been challenged by a divorce between material and spiritual realities, particularly the

individualism of Australian society and compartmentalization engendered by different government departments whose accountability is outside the community.

With the canteen as the focus of social interaction, an alternative needs to be found by local people to fill the void met by alcohol and create healthier forms of interaction. Ceremonial groups and kin groups need to be strengthend on communities where this is appropriate eg: traditionally, mother's brother is the person responsible for disciplining his sister's child.

Yalga-binbi Proposal:

The QCSC has adopted the Yalga-binbi proposal which is as follows:

"1. First there needs to be a process which identifies key Aboriginal leaders who would be willing to form the core of a Commuity Task Group designed to overcome the problems of discipline. The group would work to strengthen the norms which already exist and which give authority to members of the Aboriginal community. Such a Task Group would work to ensure that persons responsible for the behaviour of undisciplined people are made aware of their duties, and supported when they act responsibly. This support is essential in a context where many fear that to discipline bad or violent behaviour is to invite a violent response. It will work to strengthen the structures of social control in the community by breaking the present divisions between institutions and by providing a community wide network.

2. Secondly, the Corrective Services Commission would appoint an officer to each of the most seriously disrupted communities to be a resource person to the Task Groups. This person will bring the authority of Government to support the Task Group and to empower it. The person will work with the Task Group constantly to plan what is to be done and to reflect on the success or failure of the plan. The person will refuse to be the focus of responsibility by working with people of the community to plan their response to each situation and to assume responsibility for all who are involved.

3. Together, the Corrective Services Facilitator and the group will plan the involvement of other community institutions in the resolution of behaviour problems in the community. They will involve the police, the Shire/Council, the Church, the school and the hospital in creating a new consensus for acceptable patterns of behaviour in the community; and seek their support in specific situations.

This model has four objectives:

1. To motivate the total community (Aboriginal people of the communiy and all others from outside the community) to accept responsibility for law and order within the community;

2. To identify and motivate those persons who have been traditionally responsible for leadership and discipline;

3. To identify existing functional groups still involved in trying to maintain social control in their part of the community's life;

4. To co-ordinate the resources of the community as a whole to confront their own dysfunction. That is to bring together those with traditional authority, statutory authority, moral and religious authority and financial power to work towards a new pattern of expectations all accept to be a reasonable basis of social interaction."
(Blackman and Clarke, 1991:19-20)

This model for the work of QCSC in the communities and most importantly how the communities can be re-empowered to take over their own social control mechanisms has a lot of potential. It was developed from community consultations and is a process where the community can continue to be empowered. Yalga-binbi have been given a consultancy to implement the proposal and so far two trips have been made to Palm Island (March and April 1993) to develop a Community Justice Task Group. The process by which the group will be chosen is still being discussed. A visit will be made to Kowanyama by Yalga-binbi soon to help facilitate the formation of a Task Group. QCSC appointed Community Service Facilitators to both communities about six months ago.

CONCLUSION

In conclusion, I would like to repeat earlier comments that Aboriginal people have the spiritual and cultural strength to find the "right road ahead" and need to be supported to do so by goverment agencies who treat them as equals, as partners, not as part of the white man's burden. A community development approach to crime prevention means the people themselves creating their vision for the future based on their strengths from their past and continuing traditions. White Australia needs to support that process as much as possible given a situation of internal colonialism and ethnocentrism that is embedded in the Australian way of life. In the long run we need to go beyond crime prevention to creating whole, healing, just, harmonious communities within black Australia, within white Australia and between black and white Australia.

RECOMMENDATIONS

General:

1. That the Qld government urgently produce a position paper and provide the ACC with a legal opinion on the effects of the Mabo decision and the Aboriginal Land Act 1991 (Qld) on Aboriginal Council's local government functions and their responsibilities for by-laws, community courts and community police.

2. That the Australian government urgently provide a legal opinion to the ACC as to the effects of the Mabo decision on Aboriginal Councils local government functions and their responsibilities for by-laws, community courts and community police.

3. That the Queensland Office of Cabinet Mabo Committee urgently meet with the ACC Executive to discuss the issues raised in recommendation1.

4. That Frank Walker, the Special Minister of State advising the Prime Minister on Mabo meet urgently with the ACC executive to discuss the issues raised in recommendation 2.

5. That the Queensland Government respond to the report of the Legislation Review Committee 1991.

6. That the Queensland Government remember to consult with the ACC on Justice and other issues as it is the peak body for Aboriginal local government councils on trust communities which have a wide range of responsibilities. This includes sending to ACC discussion papers and draft legislation as well as having meetings with ACC.

7. That ACC secure funding to form a Community Justice subcommittee to advise the ACC executive on Community Justice matters. That Sylvia Reuben as ACC's nominee on the Aboriginal Justice Advisory Committee to the Aboriginal Deaths in Custody interdepartmental committee be asked take part in ACC 's subcommittee.

Aboriginal Community Courts:

8. That the community court system be maintained as it enables trial by peers, unless an individual community wishes to discontinue the court in their area.

9. That the Legislation Review Committee's recommendation that a comprehensive study of the jurisdiction, powers and procedures of community courts be undertaken is supported. This should include appointment procedures and qualification of JP's. Communities need to be advised through community education programs of the conclusions of this study so communities can decide what changes, if any, are required to improve community courts.

10. This study be undertaken by the Aboriginal Co-ordinating Council and funded by the Department of Family Services Aboriginal and Islander Affairs (DFSAIA) and results be forwarded to an interdepartmental justice committee.

11. That urgent training of all current Aboriginal JP's should begin and an induction course prepared for new JP's. There needs to be continuing in-service training for JP's. This training needs to be especially geared to the Community court system and be culturally appropriate.

12. That adaquate resourcing of community courts by the Department of Family Services and Aboriginal and Islander Affairs occur including payment of JP's, support staff and office facilities.

13. That more JP's should be appointed so court can be held more regularly.

14. That Aboriginal Communities be involved in the selection process of JP's with all major clan groups nominating JP's in communities where this is appropriate eg. Aurukun needs at least both top end and bottom end JP's for their magistrates court.

15. That Legislative change to the Community Services (Aborigines) Act 1984 to begin so that Aboriginal councillors cannot sit on community court as there is a conflict of interest. Councils make by-laws, employ community police who enforce them and then sit on court in their own right or as a JP.

16. That an allowance be made for traditional dispute resolution methods to be used as part of the court process.

17. That a defendant have the right to have a friend speak on their behalf or an Aboriginal and Torres Strait Island Legal Services (ATSILS) field officer .

18. That the Juvenile Justice Act 1992 be amended to enable Community Courts to deal with juveniles who breach by-laws. Where a community group exists that deals with juvenile offending, this group should be able to advise the court.

19. That Community courts be able to impose conditions such as attendance at a camp or rehabilitation scheme and that the offender refrain from:

    (a) entering licensed premises.
    (b) possessing, buying or consuming alcohol.
    (c) entering designated areas.
    (d) approaching specific persons.
    (e) holding or discharging a firearm.

20. That Community courts be able to order compensation and restitution.

21. That Community courts have relevant services available to them including a range of non-custodial options such as community service.

Dispute Resolution (Mediation):

22. That if a community chooses to do so, mediation be used as an alternative to the community court.

23. That communities who choose to do so, amend their by-laws so that community courts can order mediation either before they hear an offence, with the dispute coming back to the court if not settled or as a sentencing option of community courts.

24. That the co-operation between the Community Justice Program of the Alternative Dispute Resolution Section of the Attorney-General's Department and the Aboriginal Co-ordinating Council as the peak body for Aboriginal trust communities in Queensland continue.

25. That the Community Justice Program continue to train Aboriginal mediators on those communities who request it.

26. That where appropriate, elders of all major clan groups and Aboriginal councils assist the Community Justice Program (CJP) in selecting mediators to be trained and that care is taken that mediation does not interfere with traditional dispute resolution mechanisms.

27. That outside mediation services be provided to the communities by the CJP at their request.

28. That the Crime Reparation Program of the CJP be trialled in an Aboriginal community who requests it.

29. That the Police Complaints Mediation Initiative of the CJP be trialled in an Aboriginal community who requests it.

30. That discussions occur between ACC, CJP, DFSAIA, and the Queensland Corrective Services Commission (QCSC) on the possible use of mediation in corrections.

31. That the facilitation services of the CJP continue to be available to those communities who request it to assist in community decision making in areas of dispute eg. over use of

alcohol, or law and order issues or land ownerhsip issues.

Community By-Laws:

32. That as a matter of urgency, recommendations 50,51 and 52 of the Legislation Review Committee 1991 should be implemented:

- That a comprehensive study of current powers to make and enforce by-laws be conducted, to ascertain the current law and legal status of by-laws. The conclusions of this study need to be provided to communities in the form of Community Awareness Programs, in order for the community to decide what changes, if any, are required to improve the by-laws.

- That the Queensland Government, its departments and agencies should provide the necessary assitance to draft model by-laws appropriate to Aboriginal and Torres Strait Islander communities. Model by-laws should be optional and incorporated as a schedule to the new legislation. The individual communities must then be assisted in the tailoring of the model by-laws to suit their particular needs.

- That, in the event that by-laws are subject to government ministerial or departmental veto or amendment, Recommendation 15 (c) and (d) apply to the approval of by - laws". (recommendation 15 (c) is to the effect that any veto on amendment to by - laws should only be on the grounds of being beyond the power of the community to enact and 15 (d) gives the overseeing person or body a 3 month time limit on their amending or veto power with a further one month time limit for gazette purposes).

33. That this review be a joint DFSAIA/ACC project with appropriate resourcing from DFSAIA to the ACC as the peak body for Aboriginal Communities.

34. That now that Community By-laws re. alcohol use can take precedence over the Liquor Act where they are inconsistent, communities should review their by-laws regarding alcohol.

35. That the communities of Hopevale, Wujal Wujal, Kowanyama, New Mapoon, Umagico and Pormpuraaw be urgently assisted, by the DFSAIA to develop by-laws including law and order by-laws and powers of arrest (with the exception of Hopevale which has powers of arrest.)

36. That current and new by-laws be culturally appropriate, and take into account customary law where communities consider it appropriate and reflect community opinion.

37. That current and new by-laws be framed in simple language, not legalise and irrelevant provisions pertaining to mainstream councils be cut out.

38. That communities amend their by-laws to give community police power to release people on bail as they do not have this power under the Bail Act and that this power be incorporated in new by-laws.

39. That councils consider by-laws for control of pornographic videos.

Customary Law:

40. That the Queensland Law Reform Commission undertake a joint project with the ACC to look at how the recommendations of the Australian Law Reform Commission on Aboriginal Customary Law could be implemented on Aboriginal Communities in Queensland.

41. That each community consider codification of local customary law either for incorporation into by-laws or simply as an aid to courts. That where this is appropriate, a council of elders of all major clan groups be the body to develop this code and then negotiate with Aboriginal Councils as to its use. On communities where this is not appropriate, Aboriginal councils would develop the code. That in either case, community consultation would be part of the process.

42. That the Queensland Govenment provide resources and legal advice to communities who decide to codify their customary law.

Australian Courts:

43. That cross-cultural training or training in Aboriginal culture, contact history, and cross-cultural communication be provided to the judiciary, court, QCSC, the Justices Department, the Attorney-General's Department, the DFSAIA and community legal services. Aboriginal people should design these courses and provide the training.

44. That Aboriginal elders sit on magistrates courts held in Aboriginal communities to advise magistrates and be part of court advisory services.

45. That Aboriginal Assistants to the court - Magistrates courts, District courts, Supreme courts and Court of Criminal Appeal - be appointed to assist the court in sentencing and to assist Aborignal persons who are illiterate, uncomprehending or reticent to express themselves.

46. That Aboriginal and Torres Strait Islander Legal Services (ATSILS) especially those dealing with remote communities like Tharpuntoo should be better resourced.

47. That ATSILS such as Tharpuntoo be resourced by the Aboriginal and Torres Strait Islander Commission to train and employ part-time Aboriginal Field Officers on each community.

Community Police:

48. That the current Queensland Police Service Review into policing needs in Aboriginal communities provide ACC with a draft report for discussion at a full ACC meeting of all Community delegates before a final report is given to government.

49. That the present situation where community police are employed by councils and directed and trained by the Queensland Police Service continue.

50. That the Legislation Review Committee's recommendation that urgent attention be given to negotiating protocols between police and communities to clarify community policing functions, including chains of command be given urgent attention at interdepartmental level.

51. That community councils be better resourced by DFSAIA so they can better resource community police with pay, uniforms, boots, two-ways, vehicles etc.

52. That regular meetings between councils, community and state police occur to encourage co-operation.

53. That community police be selected in consultation between councils, elders and state police.

54. That more women need to be appointed as community police.

55. That the Queensland Police Service and DFSAIA assist Aboriginal councils to provide a career structure for community police so that increases in wages can be paid to community police as they complete various training modules and increase in competency.

56. That Johnstone College of TAFE provide their Certificate of Tertiary Prepartion (ATSI - Justice Studies) Course, a bridging course to the Police Academy, in an Aboriginal community, on a trial basis, with a view to providing community-based training on a similar basis to Cairns TAFE's Aboriginal Ranger Training Course.

57. That the Queensland Police Academy and the ACC meet with James Cook University (JCU) Cairns to negotiate whether the university training which is part of the Academy course for new recruits could be based in Cairns at JCU rather than in Brisbane for both Aboriginal and non-Aboriginal recruits from North Queensland.

58. That Queensland Police Service (QPS) training of community police be further developed so that it can articulate with Queensland Police Academy training for those who want to go this far. This could happen via the Johnstone TAFE course or via QPS training.

59. That community police be trained in literacy and computer skills.

60. That community police be trained in personal skills such as self-esteem, assertiveness, stress management, etc, preferably provided through the TAFE system after discussions with QPS and ACC.

61. That community police training and supervision by QPS encourage community police to support the use of traditional methods of dispute resolution and social control.

State Police:

62. That appropriate screening procedures be implemented to ensure that potential officers who will have contact with Aboriginal people in their duties are not recruited or retained by Police (and QCSC) while holding racist views which cannot be eliminated by training or retraining programs. Such officers already in the service should be moved to areas of low Aboriginal population.

63. That cross-cultural and custody training packages be made available to ACC for comment.

64. That Aboriginal men and women be actively recruited into the QPS.

65. That State police follow a more proactive approach to policing on Aboriginal communities.

66. That discussions be held between the QPS, ACC and other departments as necessary as to the desirability of introducing the Anunga guidelines to Queensland.

67. That violent treatment, verbal abuse or racist comments (verbal or written) directed towards Aboriginal persons by police should be considered a serious breach of discipline. That in adjudication of complaints made by Aboriginal people, one member of the independent review or adjudication panel should be Aboriginal. This is in line with Royal Commission Into Aboriginal Deaths In Custody (RCADIC) recommendation.

68. That Recommendation 225 of the RCADIC is supported:

> "That Police Services should consider setting up policy and development units within their structures to deal with developing policies and programs that relate to Aboriginal people. Each such unit should be headed by a competent Aboriginal person, not necessarily a police officer and should seek to encourage Aboriginal employment within the unit. Each unit should have full access to senior management of the service and report directly to the Commissioner or his or her delegate."

Custody and Non-Custodial Altenatives:

69. That the recommendations of RCADIC re custodial and non-custodial issues which are numberous are all supported.

70. That drunkenness be decriminalized and sobering-up centres on each communiy set up to take drunks for the night.

71. That new watchhouses be built at Pormpuraaw, Kowanyama, Bamaga, Hopevale and Napranum.

72. That the Bail Act 1980 be amended to take into account RCADIC recommendtions and to enable community police to let people out on bail.

73. That ATSIC provide financial support to the ACC to assit Lotus Glen Aboriginal inmates to make a video on what it is like in prison and portray Aboriginal people who have successfully rehabilitated and are living back in their communities.

74. That when police intervene in a situation,use of offensive language not normally be occasion for arrest and charges.

75. That imprisonment be a last resort for a breach of a community service order.

76. That part of a community service order be satisfied by attending personal development courses to provide offenders with knowledge, skills and counselling. Such rehabilative programs are not available on remote communities but QCSC should make an effort with the assistance of TAFE to provide them.

77. That QCSC improve the supervision of community service, probation and parole on Aboriginal communities.

78. That work of more personal and community value be part of community service (and

CDEP) projects.

79. That juveniles who offend should be kept in the community either at outstations or half-way houses in the community which the QCSC should fund rather than sent out to institutions. This will mean that the reward of a trip out of the community will not be given for offending behaviour.

80. That juvenile offenders be put in custody only as a last resort. That community service be used, preferably directly compensating individuals or organisations who have been offended against.

Crime Prevention:

81. That the 'Crime Prevention for Aboriginal Communities' package prepared by Kayleen Hazlehurst for the Australian Institute of Criminology be recommended to Aboriginal communities who want to form a local crime prevention action group.

82. That alcohol rehabilitation and co-dependency programs be provided on Aboriginal communities through the ACC and State Health Department on a "train the trainer" basis. That ACC receive adequate funding for this.

83. That outstation movements should be supported so that clan groups can move back to their own land and establish alcohol-free bases away from the conflict caused by having a number of clan groups in close proximity in an artificial settlement.

84. That Aboriginal land rights and self-determination are supported because the dislocation caused to Aboriginal society by colonization has resulted in the use of drinking as a way of defying white authority and passive resistance towards enforced assimilation.

85. That alcohol-free sporting events and cultural events be organized on communities and encouragement given to traditional and other arts and crafts activities so that other ways of achieving group solidarity and identity besides drinking alcohol can be experienced.

86. That the DFSAIA or another appropriate body fund each Aboriginal council with wages and equipment for a Recreation Officer. They would train local people to take over their jobs. That the Recreation Officer promote alcohol-free familiy activities like camping, fishing, hunting and a wide range of activities for men and women, young and old.

87. That crisis counselling be available in the evenings at a sobering up centre or crisis accommodation centre to help prevent suicide, self-mutilation, etc. That family support workers provide counselling and self-help programs during the day.

88. That the DFSAIA provide funding for women's shelters for those communities who request it and do not have them, and that local Aboriginal women be trained to staff such shelters.

89. That such "train the trainer" programs include assertiveness, self-esteem, marriage guidance, conflict resolution, counselling skills and stress management courses taught in culturally appropriate ways preferably by Aboriginal people.

90. That perpetrator programs be set up for men to enable them to form a support group and

work through their problems with a trained counsellor and learn alternate strategies to cope with anger and conflict.

91. That the DFSAIA fund extended family homes for children who are abused on neglected in those communities who request it.

92. That short couses in child development, counselling skills, etc be run on communities for the staff of these homes or shelters and members of committees dealing with child abuse and neglect.

93. That counselling and other support be provided to both parents and children to try to reunite families.

94. That parenting skills be taught in community schools in culturally appropriate courses delivered preferably by Aboriginal people.

95. That the Qld Education Department extend Human Relationships Training to Aboriginal Community schools to encourage healthy mental, emotional and sexual relationships. Aboriginal people need to be trained to deliver these courses in a culturally appropriate manner.

96. That community elders be brought into the shools (where this is not already happening) and teach their culture, arts, crafts and dance so that children learn to respect themselves and their culture and see more integration between the school and the community which should reduce truancy. It is possible to use CDEP to resource this step.

97. That as juvenile offenders often offend to get a holiday out of the Community, the DFSAIA should fund councils or child care committees or justice committees, as appropriate, to bring at risk children to Cairns and other places on excursions. (This would reverse the reward process and when ACC used it at Aurukun it worked temporarily but needed to be on-going.).

98. That more community control of government service provision on communities needs to occur eg health, education etc.

99. That Aboriginal - police liason committees look at situational crime prevention measures such as improving lighting near schools, stores, council workyards and locking buildings etc.

<u>Regaining Social Control:</u>

100. That the Yalga-binbi/QCSC proposal be supported.

(a) That on each community a task group would be set up in consultation with the community of key Aboriginal leaders who would ensure that persons traditionally responsible for the behaviours of undisciplined people are made aware of their duties and supported when they act responsibly.

(b) That the QCSC would appoint an officer to each of the most seriously disrupted communities to be a resource person to the task groups and bring the authority of government to support it. However, social control would be a community responsibility.

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CHAPTER 40-42

Pursuant to By-law 26 of Chapter 2 the following Chapters 40–42 (inclusive) are the adopted by-laws of the Yarrabah Aboriginal Council.

Chapter 40—Fire-fighting Service;

Chapter 41—Emergency Services;

Chapter 42—Guests.

CHAPTER 43

MISCELLANEOUS OFFENCES

Definitions

1. In this Chapter unless the contrary intention appears—

"article" includes a gun, weapon or other article whatsoever capable of causing bodily harm;

"assault" has the meaning ascribed to that term by section 245 of The Criminal Code;

"bodily harm" means any bodily injury which interferes with health or comfort;

"Public place" includes every road and also every place of public resort in the Area open to or used by the Community as of right: the term also includes any building, room, licensed premises, wharf, pier, jetty, vessel, vehicle, field, park or other place whatsoever for the time being used for a public purpose or open to access by the Community, whether on payment or otherwise, or open to access by the Community by the express or tacit consent or sufferance of the owner, and whether the same is or is not at all times so open.

Obstruction, Intimidation or Assault of Officers

2. A person shall not unlawfully assault or wilfully obstruct or intimidate an Aboriginal policeman or an officer or employee of the Council in the discharge or exercise of his functions, duties or powers under these by-laws.

Common Assault

3. A person shall not unlawfully assault any other person.

Limitation of Jurisdiction

4. The Aboriginal Court shall not have jurisdiction to deal with a complaint of an assault—

(a) if in the opinion of the Court the assault complained of has occasioned bodily harm of such a nature that the matter is a fit subject for prosecution in a Magistrates, District or Supreme Court;

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(b) in any case where, by virtue of the provisions of section 342 or 343 of The Criminal Code, a Magistrates Court would be precluded from dealing with such a case summarily.

Drunken and Disorderly Persons

5. Any person found drunk or creating a disturbance in any public place or on any premises other than a private dwelling house shall be guilty of a breach of these by-laws.

Obscene, Abusive Language, etc.

6. A person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear—

(a) uses any profane, indecent, or obscene language;

(b) uses any threatening, abusive, or insulting words to any person;

(c) behaves in a riotous, violent, disorderly, indecent, offensive, threatening or insulting manner, shall be guilty of a breach of these by-laws.

Unauthorised Damage to Property

7. A person who wilfully destroys or damages the property of another and without the consent, express or implied of the person in lawful possession thereof and thereby causes loss of $250 or less shall be guilty of a breach of these by-laws.

Further Power to Impose Penalty

8. (i) The Aboriginal Court convicting a person of a breach of By-law 7 may, in addition to any penalty imposed for such breach, impose by way of penalty an amount not exceeding the costs of bringing the charge, including the costs of all reasonable investigations relating thereto and the cost of compensating any person injured thereby.

(ii) The Aboriginal Court may make such order as it deems just for the payment of that part of the penalty representing compensation.

Possession of Dangerous Articles Restricted

9. A person shall not, without reasonable excuse (the proof of which shall be upon him) have an article in his possession in any place in the Area in a manner likely to—

(a) injure himself;

(b) injure any other person;

(c) unlawfully destroy or damage any animate or inanimate property; or

(d) subject to By-law 10, cause alarm to any other person.—

Offenders may be Cautioned

10. If an Aboriginal policeman has reason to believe that a person has an article in his possession in any place in the Area in a manner likely to cause alarm to any other person, the Aboriginal policeman shall caution that person and, if he immediately desists from the conduct the subject of the caution, he shall not be guilty of a breach of By-law 9.

Trifling Offences

11. If the Aboriginal Court is of the opinion that a breach of any by-law of this Chapter was so trifling as not to deserve any punishment, the Court may convict the defendant, and discharge him without inflicting any penalty.

CHAPTER 44

RATES AND CHARGES

Definitions

1. In this Chapter save where the contrary intention appears "Resident" means any person who has their place of residence within the Area, who has resided within the Area for a period in excess of six months or who holds a lease or sub-lease of a portion of land within the Area.

Power to Levy Rates

2. The Council may—

(i) make and levy a rate (hereinafter in this Chapter referred to as "the General Rate"); and

(ii) impose the following charges and fees:—

(a) Cleansing Charges,

(b) Garbage Charges,

(c) Sewerage Charges,

(d) Water Charges,

(e) Other Charges and Fees referred to in By-law 6 of this Chapter.

General Rate and Minimum Rate

3. (i) The Council may in each year make and levy a general rate upon residents within the Area and such rate may be levied on residents on a per capita basis, or on the area of land leased or sub-leased. Such general rate shall be applied to the business and working of local government of the Area.

the Act and these by-laws, may enter at all reasonable times upon any land, structure or premises—

(a) to carry out any work, matter or thing above or under the land or in the structure or premises;

and

(b) where the Council or its authorized officers suspect on reasonable grounds that the provisions of the Act or these by-laws are being contravened, to search and examine the land, structure or premises for evidence of the contravention.

Division 3—Offences, etc.

1.16 Powers of arrest. An Aboriginal policeman may arrest any person, without any warrant or authority other than this by-law, if that Aboriginal policeman has reasonable grounds to believe that the person has committed an offence against these by-laws.

1.17 Detention of offenders. Any person arrested by an Aboriginal policeman is, as soon as possible, to be brought to and detained and kept in custody by a member of the Queensland Police Service stationed in the Area until the person can be brought before an Aboriginal Court or a Magistrates Court, as the case may be, to be dealt with according to law.

1.18 Supervision of detained offenders. Aboriginal Police appointed for an Area are to supervise persons kept in custody in a Police establishment within the Area.

1.19 How a person arrested to be dealt with. A person who has been arrested must be brought before an Aboriginal Court or a Magistrates Court, as the case may be, as soon as practicable after the person is taken into custody.

1.20 Obstruction, intimidation or assault of officers. A person must not unlawfully assault or wilfully obstruct or intimidate an Aboriginal policeman or an officer or employee of the Council in the discharge or exercise of his functions, duties or powers under these by-laws.

1.21 Common assault. A person shall not unlawfully assault any other person.

1.22 Jurisdiction of Aboriginal Court for assault. The Aboriginal Court does not have jurisdiction to deal with a complaint of an assault—

(a) if in the opinion of the Court the assault complained of has occasioned bodily harm of such a nature that the matter is a fit subject for prosecution in a Magistrates, District or Supreme Court;

or

(b) in any case where, by virtue of the provisions of section 342 or 343 of the Criminal Code, a Magistrates Court would be precluded from dealing with such a case summarily.

1.23 Drunk and disorderly persons. A person found drunk or creating a disturbance in any public place or on premises other than a private dwelling house commits an offence against these by-laws.

1.24 Liquor in a public place. A person found consuming liquor in a public place commits an offence against these by-laws.

1.25 Offensive language and behaviour. (1) A person who, in a public place or so near to a public place that a person could hear or view—

(a) uses profane, indecent, or obscene language;
or

(b) uses threatening, abusive, or insulting words to any person;
or

(c) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;

commits an offence against these by-laws.

(2) A person must not carry, in any park, reserve, road or other public place, any thing whatsoever which is offensive or which is annoying to any other person.

1.26 Damage to property. (1) A person who wilfully destroys or damages property without the consent, express or implied, of the person in lawful possession of the property, thereby causing loss of $250 or less commits an offence against these by-laws.

(2) The Aboriginal Court convicting a person of a breach of this by-law may, in addition to any penalty imposed for such breach, impose by way of penalty an amount not exceeding the costs of bringing the charge, including the costs of all reasonable investigations relating to the charge, and the cost of compensating any person injured by the defendant.

(3) The Aboriginal Court may make such order as it deems just for the payment of that part of the penalty representing compensation.

1.27 Possession of dangerous articles. (1) A person who, without reasonable excuse, has an article in his possession in any place in the Area in a manner likely to—

(a) injure himself;
or

(b) injure any other person;
or

(c) unlawfully destroy or damage any property;
or

(d) cause alarm to any other person;

commits an offence against these by-laws.

(2) The onus of proof lies upon the person asserting that he or she has reasonable excuse.

(3) If an Aboriginal policeman has reason to believe that a person has an article in his possession in any place in the Area in a manner likely to cause alarm to any other person, the Aboriginal policeman shall caution that person and, if he immediately desists from the conduct the subject of that caution, he does not commit an offence against these by-laws.

1.28 Dangerous implements on roads. (1) A person must not carry a dangerous implement on a road.

(2) A person must not carry anything on a road in such a manner as to be capable of being dangerous or injurious to a person or property.

1.29 Carrying or discharging firearms and other weapons. A person, unless empowered by statute so to do, is not to discharge or carry any loaded firearm or weapon or throw any stone or other projectile whatsoever, in or on any road park or reserve.

1.30 Damage to Council property. A person is not to damage or cause to be damaged any Council property whatsoever including any sign, notice or pole.

1.31 Throwing stones, etc. (1) A person is not to throw or discharge any stone or other missile or use any catapult to the damage or danger of any person or property.

(2) A person is not to trundle any hoop or fly any kite in or upon any road, or play any game to the inconvenience or annoyance of any person.

1.32 Giving name and address. (1) For the purpose of carrying out his functions and duties under the provisions of these by-laws, an Aboriginal policeman may require any person found committing an offence, or any person whom he believes on reasonable grounds to have committed an offence, to state and to provide evidence of his name and address.

(2) A person who when required, fails to state his name and address or to provide evidence thereof commits an offence against these by-laws.

1.33 Trifling offences. If the Aboriginal Court is of the opinion that any breach of these by-laws is so trifling as not to deserve punishment, the Court may convict the defendant, and discharge him without imposing any penalty.