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ABSTRACT

During the 1980s the impact of the criminal justice system on the indigenous peoples of Australia began to receive unprecedented attention. The most significant feature of this recent profile has been growing recognition that relatively minor reforms to existing policing, court and corrections structures are unlikely to alleviate the conditions under which Aborigines and Torres Strait Islanders currently suffer. Over-representation and systemic discrimination will continue unless federal, state and territorial governments support a fundamental realignment of the nature of indigenous involvement in the justice process. This realignment must be consistent with the legal principle and political objective of self-determination.
ABORIGINAL HUMAN RIGHTS, THE CRIMINAL JUSTICE SYSTEM AND THE SEARCH FOR SOLUTIONS: A CASE FOR SELF-DETERMINATION

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Introduction

The release of the National Report of the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991) can be seen as the culmination of a growing recognition in Australia that the gross over-representation of Aborigines at all stages of the criminal justice system was an intolerable situation which required serious and ongoing attention. The establishment of the Royal Commission followed a long period of public agitation and relentless pressure by Aboriginal individuals, communities and organisations, which eventually generated substantial domestic publicity and international attention concerning the incidence and circumstances of Aboriginal deaths in custody. Federal, state and territory governments were forced to confront the most vivid and tragic manifestation of the fundamental problems which have arisen since a European system of law, social control and 'justice administration' was imposed on sovereign indigenous peoples.

Particularly during the last 20 years, substantial resources have been utilised to examine the 'fallout' which has resulted from the collision between Australian Aborigines and the various state agencies that constitute the Australian criminal justice system. At the same time Aboriginal groups and various human rights advocates and organisations have registered their growing frustration with the consistent failure of Australian governments to confront the fact of systematic and
institutionalised violations of both individual and collective Aboriginal human rights in many forums of state regulation, including the delivery of health care and educational services, and of course in the operation of social control mechanisms such as the criminal justice system, which is frequently the end-product of a pervasive pattern of social, economic, and political deprivation.2

The apparent futility of attempting to have these issues recognised as fundamental problems worthy of serious political consideration and positive and constructive action, has prompted the Aboriginal community to look beyond the limitations of arguing for much needed but relatively short term and minor reforms, and to develop concrete proposals for a dramatic readjustment of the role of Aboriginal peoples in the political structures of Australian government. The ultimate aim of control, by Aboriginal communities, over all basic elements of their economic, social and cultural existences — variously discussed in terms of 'self-management', 'self-government', and 'recognition' of Aboriginal law — draws heavily for its justification from an increasing acceptance world-wide of the entitlement of indigenous peoples under international law to the basic human right of 'self-determination' as expressed in article 1 of the International Covenant on Economic, Social and Cultural Rights.

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

A detailed examination of the various ways in which Aborigines suffer disproportionately as a result of contact with the agencies of criminal justice administration is not possible in the context of this discussion
paper. A brief overview of some of the key issues in this respect will be followed by an analysis of the largely misdirected and ineffective attempts to identify and solve the 'problem', with which non-Aboriginal Australia has experimented in recent decades. Attention will then be focused on those strategies which may genuinely be considered to hold the potential for a substantial alleviation of the conditions and incidence of Aboriginal contact with the criminal justice system. It will be argued that the starting point for the implementation of strategies which carry this possibility must be the creation of an institutional framework which is shaped by an endorsement of Aboriginal self-determination aspirations.

**The treatment of Aborigines by the criminal justice system**

Police play a pivotal role in relation to the cycle of Aboriginal contact with the criminal justice system, operating as they do, at the preliminary stage of 'selecting' participants for the subsequent stages of judicial determination and incarceration. The social status of many Aborigines is such that they are deemed to be a threat in terms of social control and therefore appropriate targets for a 'law and order' campaign (Cunneen 1990a). This factor is particularly apparent in rural towns where Aborigines are often a substantial proportion of the local population, but it also comes into play in urban areas and in more isolated Aboriginal settlements. Aborigines have been routinely targeted under strategies designed to maintain social order. Entrenched community and police attitudes concerning race and the nature of criminality are manifested in policing practices (Goodall 1990).

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

In April 1991 a report commissioned by the Human Rights and Equal Opportunity Commission's (HREOC) National Inquiry into Racist Violence (Cunneen 1990b) found 'compelling reasons for considering the use of violence against Aboriginal youth as part of an institutionalised form of racial violence' (Cunneen 1991a, 8).

The suggestion that violence is 'part of the routine practices of policing' (Cunneen 1991a, 6–7) is particularly disturbing in relation to Aborigines, not simply because of their gross over-representation which makes them even more vulnerable to this type of conduct, but also because it is both legitimated by the racism which pervades the 'police mentality', including social attitudes about the entitlement of Aborigines to 'equal treatment', and exacerbated by other, less overtly violent, discriminatory manifestations of institutionalised racism.

A survey conducted by the research unit of the Royal Commission into Aboriginal Deaths in Custody in 1988 (McDonald 1990) found that during the period monitored, Aboriginal people constituted 29 per cent of the persons held in police custody, although they are only 1.1 per cent of the Australian population aged 15 years and above. Apart from the sheer extent of detentions, it is important to observe that a vast majority of Aborigines are detained for public order offences, often related to drunkenness. Ronalds, Chapman and Kitchener (1983, 170–1) concluded that

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

Policing of this type is a central component of the 'process of criminalisation', or of 'maintaining law and order' which, as Carrington (1990, 4) points out, 'is predominantly concerned with policing public
space ... regulating public conduct and protecting property ...' Aborigines are particularly vulnerable to policing practices which reflect these priorities. A product of the poor social conditions in which many Aborigines live is that a great deal of time is spent in public areas (Milne 1983). But overpolicing is not simply a problem of the large number of Aborigines detained or arrested. It also involves the methods which police employ to achieve their aim of 'public order', and in particular, the routine use during the late 1980s of paramilitary methods (Goodall 1990; Cunneen 1990a; Wootten 1991).

This experience continues during the post-arrest phase of the criminal justice system and during court proceedings. For example, the vulnerability of Aborigines in the context of police questioning as identified by Foster J in R v Anunga manifests itself in a number of ways including the opportunity for 'bulk billing' of Aboriginal offenders in order to achieve a higher clear-up rate (Rees 1982), an apparent tendency of many Aborigines to provide the 'expected response' to police in order to avoid any sanctions which may result from non-compliance (Rees 1982), and at least in relation to Aboriginal youth, police exercising their discretion at the point of apprehension in a discriminatory manner (Gale & Wundersitz 1989).

When an alleged Aboriginal offender is brought before a magistrate or judge, many of the problems which are evident at the interrogation stage re-occur. The basic problem of incomprehension becomes more acute, a situation which has been explained by the 'complexity of court procedure' (Eggleston 1976, 155). Perhaps the most damaging consequence is that the reliability of Aboriginal testimony is thus undermined (Kearins 1991; Eades 1992).

The application of culturally inappropriate criminal laws in Australian courts perpetuates many of these procedural difficulties (Daunton-Fear & Freiberg 1977).
McCorquodale (1987, 51) has argued that it is possible to identify several aspects of judicial racism in Australia:

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

The cumulative effect of these various features of systemic discrimination is vividly illustrated by data on rates of incarceration. A study carried out for the Royal Commission into Aboriginal Deaths in Custody found that Aboriginals are conservatively estimated to be 10 times more likely than non-Aborigines to be in prison (Biles 1989). In various parts of the country, and in specific forms of custody such as police lock-ups, the extent of over-representation is much greater (Biles 1985; Brown et al 1990).

Despite the massive over-representation of Aborigines in Australian prisons, it is in relation to Aboriginal offenders that the inadequacy of the philosophy of deterrence is best illustrated. As Hazlehurst (1987a) has concluded, there is strong evidence that for many Aboriginal people, short term prison sentences are simply not a deterrent. The real danger is, as Hazlehurst (1987a, 227) points out, that 'arrest, fines and imprisonment will become a way of life' for Aboriginal people.

It is equally clear that imprisonment can be a particularly traumatic experience for many Aboriginal people (Barry 1988). The argument that imprisonment is not a deterrent including the suggestion that some Aboriginals deliberately set out to commit offences which will allow them to enter prison, does little to weaken the evidence which shows that most Aboriginals find imprisonment to be a negative experience. Alexander (1987) has described a more philosophical rationale for the fact that many Aboriginal people do not see gaol as a deterrent: the feeling they are already imprisoned by white society.
The catalyst for the recent Royal Commission into Aboriginal Deaths in Custody was growing national (Hogan 1988) and international (Burger 1988; Suter & Stearman 1988) publicity over the extent to, and circumstances in, which Aboriginals were dying while in state custody. There has been considerable debate over the question of whether Aborigines actually face a greater risk of custodial death (Biles, McDonald & Fleming 1989; Goldney & Reser 1989; Broadhurst & Maller 1990). Perhaps the most significant point of this debate is that Aboriginal deaths in custody cannot be considered in the abstract, but must be seen in their wider context. They must be seen as a fundamental feature of the criminal justice system as it impacts on Aborigines. As Hogan (1988, 41) has observed, they must also be seen against the historical background of black-white relations in Australia:

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

Conventional responses to the problem of Aboriginal contact with the justice system

'Special treatment' for Aborigines

Strategies designed to 'alleviate' the harshness of the operation of the criminal justice system have traditionally proceeded on the presumption that while the established procedures and law were, for the most part, effective, the circumstances of some Aborigines were such that special rules might be needed to protect them from the harshness of the criminal law. Significantly, these approaches involved no substantial criticisms of the criminal justice system but rather, reflected a paternalistic notion that Aborigines were something of a 'special case' in need of 'special care'.
Reforms of this type included police guidelines based on the comments of Foster J in *R v Anunga* ((1975) 11 ALR 412); modifications of rules of substantive law (eg 'the test of reasonableness'); treating Aboriginality as a factor in mitigation of sentence; and the imposition of special codes of conduct on police. It may be that these reforms have at some level increased the chance that Aborigines will gain a 'higher' level of 'justice' during their passage through the criminal justice system. But they in no way challenge the relevance of criminal laws and procedure to Aboriginal people. Consequently, their capacity for genuinely reducing the level of discrimination within the system is severely limited.

The guidelines offered in *Anunga* included the presence of a 'prisoner's friend' and/or an interpreter (where necessary), special care to ensure the suspect understands the standard caution, efforts to obtain corroborating evidence, provision of food and clothing and access to legal representation, and a requirement that suspects not be interrogated while drunk or otherwise disabled ((1975) 11 ALR 412).

However favourable rules of this type are considered, their impact on the large numbers of Aborigines who come into contact with the police can only be minimal. Further, the relevance of the Anunga guidelines to many urban-dwelling Aborigines must be questioned (McCorquodale 1987).

Many judges have demonstrated a willingness to take the defendant's Aboriginality into account when applying Anglo legal concepts and principles, and when determining an appropriate sentence. In the former case, this tendency has been most common in relation to the availability of various defences and mitigating factors such as self-defence, duress and provocation.

The fact of Aboriginality is more frequently taken into account at the sentencing stage, particularly where judicial notice is taken of the serious doubts which exist about the constructiveness of a prison sentence for Aborigines (McCorquodale 1987). Sentencing practice in relation to Aboriginal offenders is a serious and complicated problem which raises a
whole range of social, economic and cultural factors. However, mitigating factors which have been recognised as peculiar to traditionally oriented Aboriginals include:

i) where the defendant has acted in accordance with tribal customs;
ii) where the defendant's conduct will attract 'pay-back' or some other sanction from his/her community; and
iii) where the offence involves over-use of alcohol (Daunton-Fear & Freiberg 1977).

Although there may be quite specific instances where the defendant's level of culpability or severity of sentence is reduced by the court because of factors relating to his/her Aboriginality, it is important to note that these individual 'reprieves' occur within the context of institutionalised judicial racism. As McCorquodale (1987, 51) concludes:

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

**Decriminalisation of public drunkenness**

The repeal of the *Summary Offences Act* 1970 and the introduction of the *Intoxicated Persons Act* 1979 promised to be particularly constructive in relation to reducing Aboriginal contact with the criminal justice system. For as Eggleston (1976, 14) concluded after extensive research in this area, '[t]he Aboriginal offence par excellence is drunkenness'. This statement reflects not only the enormous problems of alcohol abuse in Aboriginal communities, but also, as discussed earlier, the public nature of much Aboriginal drinking.

Cornish (1985, 73) has described the motivation for decriminalisation legislation in Australian states as 'bourgeois humanitarianism'. In the context of a history of government 'paternalism' towards Aboriginal
people, this philosophy takes on a particular significance. For by introducing a 'welfare-management' scheme (Egger, Cornish & Heilpern 1983) based on the power to detain intoxicated persons in a 'proclaimed place' (frequently, the local police station), the *Intoxicated Persons Act* maintained a level of discriminatory intervention into the lives of Aboriginal people. Indeed, although 'public drunkenness' is no longer deemed to be criminal in New South Wales, it is still the behaviour which most frequently leads to Aboriginal contact with the criminal justice system (Milne 1983; McDonald 1990). According to Munro and Jauncey (1990):

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

In the *Report of the Inquiry into the Death of Edward James Murray*, Commissioner Muirhead (1989, 139) commented:

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

As an attempt to reduce the problem of Aboriginal contact with the criminal justice system, the decriminalisation of public drunkenness in New South Wales must be seen as a failure. As Bird (1987, 68) commented in relation to the equivalent South Australian legislation, it is 'unlikely to change the status of Aborigines as objects of policing'. The failings of the *Intoxicated Persons Act*, the use of local government by-laws and regulations to prohibit public drinking (Cunneen 1991b), and the reintroduction of the *Summary Offences Act* 1988 (Bonney 1989), have ensured the accuracy of this prediction in New South Wales.

The recommendations contained in the *Interim Report of the Royal Commission into Aboriginal Deaths in Custody* (Muirhead 1988) provide an illustration of the way in which non-Aboriginal responses to the problem of Aboriginal contact with the criminal justice system have failed to address the fundamental conflict which lies at the core, and
which exposes Aboriginal people to human rights violations, and in particular, to discrimination at every stage of the criminal justice system. Commissioner Muirhead recommended:

i) the decriminalisation of public drunkenness in those jurisdictions where it was still an offence. He indicated that this reform must be accompanied by adequately funded programs to support treatment facilities for intoxicated persons, along with the imposition of statutory obligations on police officers to utilise alternatives to the detention of intoxicated persons in police cells;

ii) that all jurisdictions adopt procedural changes in relation to the use of police custody, the recruitment of police and prison officers, and in the delivery of medical attention to detainees; and

iii) that police cells be modified and upgraded in design, including the installation of alarm and intercom systems, so that the opportunity for death by suicide is substantially reduced (Muirhead 1988).

Well intentioned but relatively minor changes to the various agencies of criminal justice administration are simply inadequate as a means of dealing with what is a basic human rights problem. Aboriginal people will continue to suffer unnecessarily and in large numbers until non-Aboriginal Australia is forced to recognise as a general policy, the importance of recognising the right of Aboriginal peoples to control their own lives.

The value of autonomy: constructive 'solutions' for a reduction in the violation of Aboriginal human rights

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

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

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

The recognition of Aboriginal customary law

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

Unfortunately, those recommendations that related to the substantive criminal law and the sentencing of Aboriginal offenders offered little advance on the extent to which the law already accords some recognition to Aboriginality and the relevance of tribal laws and customs. The Commission did recommend that a partial customary law defence be created which, in the same way as diminished responsibility, would reduce murder to manslaughter (ALRC 1986). The defence would apply if the defendant could establish, on the balance of probabilities, that the act which caused the death of the victim was done because of a well-founded belief that the customary laws of the Aboriginal community to which the defendant belonged, required the act to be done (ALRC 1986). The Commission also recommended that customary laws may be relevant to the exercise of prosecutorial discretions, particularly where the Aboriginal community in question has resolved the matter through its own processes (ALRC 1986).

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

The Commission's failure to recommend any major changes to the way in which criminal law and the formal criminal justice system treats Aboriginal people on account of customary law, is disappointing, but not
surprising. Indeed, any recognition within the existing structure was likely to be minimal, when measured in terms of its capacity to achieve justice for Aboriginal people. On the other hand, the question of local justice mechanisms for Aboriginal communities held a great deal more promise in this regard. The very notion of seeking alternatives to a criminal justice system which has consistently failed to respect the human rights of Aboriginal individuals and communities, represents a fresh approach to the problem and a major advance on the inadequate 'solutions' which have generally been adopted to date. The Commission undertook a detailed study of dispute settlement processes in Aboriginal communities, proposals for special Aboriginal courts and justice schemes, and the experience of other nations which have recognised various indigenous justice mechanisms (Hennessy 1984).

In considering the appropriateness of local justice mechanisms, the Commission identified this approach as only one of the many which could be applied to the 'problems of law and order' in Aboriginal communities (ALRC 1986). Indeed, the Commission took the position (ALRC 1986, para 1009) that 'there is only limited scope or demand for new official local justice mechanisms in Aboriginal communities' and that 'there should be no general scheme of Aboriginal courts established in Australia'. It did conclude, however, that Aboriginal courts or similar official bodies might be appropriate in certain circumstances. The Commission laid down a number of basic principles for their operation, but stressed the need for local input into, and acceptance of, any scheme. Local by-laws would be the source of any rules relating to alternative justice mechanisms.

Finally, the Commission concluded that there was considerable scope for administrative recognition at the level of policing. Strategies to be investigated and encouraged included improved communication between police and local Aboriginal communities (via, for example, police liaison committees), forms of self-policing (as an adjunct to regular police) and regular police training on Aboriginal issues (ALRC 1986).
In general, therefore, the Law Reform Commission took a conservative position in relation to the recognition of Aboriginal customary law. With respect to issues surrounding the administration of criminal justice, the Commission was at pains to distinguish what recognition could achieve, from the autonomy rights which Aboriginal people are increasingly seeking to assert. In the Commission's view (ALRC 1986, para 1037):

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

The approach of 'searching for justice' within the current criminal justice system reflects a failure to grasp the nature of the Aboriginal experience with non-Aboriginal law enforcement structures. As Sykes (1989, 118) has commented, '[t]he Black community sees the white legal system as part of their oppression. That legal system did not (in 1788) and does not (in 1988) protect the interests of the Black community.'

Viewed in this light, the Australian Law Reform Commission's rather limited recommendations in relation to policing, criminal law, court procedure and sentencing, along with its cautious discussion of various community justice proposals, are disappointing. What is even more disappointing is the Federal Government's response to the 1986 Report. As Brennan and Crawford (1990, 153) have observed, the Law Reform Commission's relatively modest proposals 'have disappeared in a morass of inter-Departmental consultation, with increasing emphasis on the difficulties of implementation'. Although this reflects a disappointing government response, it is revealing of the Commission's failure to identify an obligatory or even compelling reason for recognition of Aboriginal customary law.

The Law Reform Commission also considered the relevance of international human rights law in relation to the recognition of Aboriginal customary law. After discussing a number of international instruments considered relevant to indigenous people, the Commission concluded that 'Australia is neither required to recognise Aboriginal customary laws in
any general way ... by any international obligations on minority or indigenous rights' (ALRC 1986, para 1005). Whether this statement is entirely accurate may be debatable, but it does focus attention on the capacity of international law to support Aboriginal assertions for greater control of their lives, particularly in light of recent developments at the United Nations level, including the drafting of a Universal Declaration on the Rights of Indigenous Peoples. By implication, it also highlights the importance of identifying the source of, and motivation for, initiatives designed to alleviate the Aboriginal criminal justice system experience, such as the recognition of customary law.

At the domestic level, Chisholm (1988) has compared the paternalistic 'demonstrated benefit' approach to recognising Aboriginal customary law, with an approach based on a potentially more constructive policy of 'self determination'. Although the parameters of this concept need to be fully explored before it is endorsed, the idea that Aboriginal people should be in a position to determine the application of laws across a range of issues, including those which are currently inadequately dealt with by the criminal justice system, represents a much more promising way of dealing with the current problems of injustice and discrimination, and is more consistent with the claims which Aboriginal people have been advancing recently in international forum.

Chisholm (1988) has attempted to explain the conservative position taken by the Law Reform Commission in relation to these issues, by suggesting that perhaps it was not the task of the Commission to address these underlying issues, which it accurately perceived as strongly connected to broader Aboriginal claims for self-government (Crawford, Hennessy & Fisher 1987). However, the Commission's refusal to recognise that Aborigines in Australia have any right to have customary laws recognised, nor any right to autonomy, even in the specific area of dispute resolution and local justice mechanisms, is perhaps the most disappointing aspect of the Australian Law Reform Commission Report. For although the formulation of government policy on recognising the Aboriginal right of self-determination was clearly beyond the mandate of
the Commission, a firm recommendation that community justice mechanisms should be encouraged in the interest of achieving justice for, and protecting the human rights of, Aboriginal people, where the criminal justice system has failed in this respect, would have been the most useful contribution that the Law Reform Commission could have made in this vital aspect of the Aboriginal struggle.5

Community justice mechanisms

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

Perhaps motivated, at least in part, by mounting evidence of the devastating consequences of Aboriginal contact with non-Aboriginal police, courts and prisons, the potential of community justice mechanisms has attracted greater attention in the last decade (Hazlehurst 1988).

Community justice mechanisms were the subject of considerable investigation by the Law Reform Commission, and also figured prominently in discussions relating the 'improvement of the criminal justice system' in the National Report of the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991). Some of the existing and proposed schemes will be discussed here. The aim of this analysis will be to identify those features of this particular form of alternative dispute
resolution which, in response to the unacceptable experience of Aboriginals within the criminal justice system, should be encouraged because of their genuine capacity for achieving Aboriginal justice. These programs will be assessed in terms of their capacity for achieving justice for Aboriginal people, and in terms of their compatibility with Aboriginal aspirations generally.

In the context of a discussion of her work with the Yolngu community at Yirrkala on the Gove Peninsula in north-eastern Arnhem Land, Williams (1987, 227) has stated:

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

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

**The Yirrkala Scheme:** This particular model for a community justice system was developed by a group of elders at Yirrkala, and was considered in detail by the Law Reform Commission (ALRC 1986). It has been described by one of the scheme's main advocates, HC Coombs (1985, 205) as 'a contemporary Aboriginal reaction to over 100 years of social control by outsiders'. According to Coombs (1985, 205), the aim of these proposals was to work towards

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

The structure of this form of community justice is based on using local councils, and in particular, a 'Law Council' to exercise the primary responsibility for local justice and a community court (ALRC 1986).
Under the Yirrkala scheme the Law Council and the community court would operate as an independent entity. However, there would be a 'considerable degree of interaction with the general legal system' (ALRC 1986, para 823).

Significantly, under the Yirrkala proposals, the Council would exercise a level of involvement in all matters ranging from simple disputes or public order offences, to serious crimes (ALRC 1986). This jurisdiction would include both federal and political laws, and rules formulated by the community based on customary laws and current concerns amongst the community about social order and the regulation of unacceptable behaviour (Coombs 1985). The community court would have the power to impose a range of sanctions, with emphasis on the provision of compensation. Other possible punishments would include compulsory residence at a homeland centre, temporary banishment, or even overnight imprisonment in a 'lock-up' situated at the community (ALRC 1986; Coombs 1985).

The Australian Law Reform Commission (1986) recommended that '...the scheme be implemented, with appropriate legislative backing, for a sufficient trial period (at least three years)' (ALRC 1986, para 832). Given the generally modest nature of the recommendations contained in The Recognition of Aboriginal Customary Law, the Australian Law Reform Commission's endorsement of this particular initiative was an encouraging sign that a constructive change in direction in relation to problems encountered by Aborigines in the criminal justice system might be possible. Williams (1987, 237) commented with optimism that the proposed Yirrkala community justice system 'is most likely to succeed in enabling effective social control because it embodies Aboriginal mechanisms of authority and dispute settlement, and supports rather than impedes their operation'.

Unfortunately, the Yirrkala scheme has suffered the fate of almost all of the Law Reform Commission's recommendations. In the National Report of the Royal Commission into Aboriginal Deaths in Custody,
Commissioner Johnston (1991) noted that the community justice scheme had failed to gain the support of the Northern Territory Government, and, therefore, had not been effectively implemented.

Hazlehurst (1988, 309) has challenged 'the tardiness and conservatism of governments in developing community justice options for Aboriginals throughout Australia'. Given the overwhelming evidence which shows that the formal criminal justice system is routinely inadequate in dealing with Aboriginal people, the failure to support constructive alternatives such as the Yirrkala proposal is difficult to comprehend.

The Yirrkala experience offers a lesson for the purportedly community-based reform initiatives. The fundamental characteristic of such proposals must be the capacity for attributing to Aboriginal people the power to control their own lives. As Williams (1987, 237), has concluded, '[t]he viability of Aboriginal community justice mechanisms depends on aboriginal autonomy'.

The Aboriginal Justice of the Peace Scheme: Against this yardstick the adequacy of the Aboriginal Justice of the Peace Scheme which developed in Western Australia in the early 1970s must be questioned. In 1979 the Aboriginal Communities Act was, according to the preamble, enacted to 'assist certain Aboriginal communities to manage and control their community lands'. This objective was to be achieved via two basic strategies. The Act:

i) authorised community councils to make and enforce by-laws covering a range of specified subject matters; and

ii) established 'Aboriginal courts', consisting of Aboriginal Justices of the Peace, Bench Clerks and Probation Officers.

The scheme was initially introduced on a pilot basis at two Kimberley communities: the Bidyadanga Aboriginal Community Incorporated at La Grange, and the Bardi Aborigines Association Incorporated at One Arm Point; and later attracted the attention of several other communities.
Syddall (1985, 169) described the scheme as a major success evidenced by 'a reduction in the incidence of antisocial behaviour, ... a marked improvement in Aboriginal and police relations' and a trend towards 'synthesis of customary law and by-laws'.

In contrast, Hoddinott (1985a, 173) argued that the scheme, 'whilst promising in its inception, has developed serious difficulties in application [which] ... urgently need to be rectified if the scheme is to continue'. In particular, Hoddinott (1985a) reported that it has become apparent to elders of several communities participating in the scheme that the superimposition of a second value system on top of Aboriginal values and laws raised serious difficulties. According to Hoddinott (1985a), instead of fostering Aboriginal autonomy, the community courts were operating in such a way that Aboriginal Justices of the Peace felt themselves to be little more than advisers, even five years after the introduction of the Justices of the Peace Scheme.

In 1986 the Government of Western Australia commissioned a review of the Act (Hedges 1986). Despite a moderately optimistic evaluation, the minimal level of autonomy which characterises the Western Australian Justices of the Peace Scheme, seriously weakens the viability of this particular scheme as a model for Aboriginal community justice. It fails to offer a genuine and constructive alternative to the 'processing' of Aboriginal offenders through the formal criminal justice system. Unfortunately, this weakness is shared generally by the various other community-based schemes which operate in various parts of Australia.

**Aboriginal Courts in Queensland:** The court system which has operated on Aboriginal reserves or 'trust areas' in Queensland, originally under the *Aborigines Act 1971* (Qld) and the *Torres Strait Islanders Act 1971* (Qld), and more recently under the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld.), has been widely criticised (Nettheim 1981). The major
criticisms which have been made of the Queensland Aboriginal court system include:

i) that the courts are inferior or 'second-class' institutions;
ii) the lack of real Aboriginal influence or control;
iii) the courts' inability, or failure, to take into account local customs and traditions; and
iv) the courts' location within the reserve system as a whole, which has been seen as an imposition of alien structures and values (ALRC 1986).

McRae, Nettheim and Beacroft (1991, 229) have concluded that prior to the legislative changes in 1984:

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

Miller (1991) has suggested that despite the introduction of new legislation in the mid-1980s, along with more recent reforms, the Queensland system has improved little in many of these respects.

In 1991 a Legislation Review Committee completed an assessment of the legislation relating to the management of Aboriginal and Torres Strait Islander communities in Queensland. The Committee (Qld Legislation Review Committee 1991, 8) recommended that

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

Consistent with this approach, the Committee (1991, 34) recommended that 'the Aboriginal and Island courts remain unless individual communities agree to dismantling of the community court in their area'. Several areas where improvements and assistance from the Government of Queensland might be needed were identified by the Committee. It recommended (1991, 34) that the Queensland Government should
[u]ndertake a comprehensive study of the jurisdiction, powers and procedures of the Aboriginal and Island courts. Communities need to be advised through community education programs of the conclusions of this study, in order for communities to decide what changes, if any, are required to improve the aboriginal and Island courts.

The Committee further recommended that the courts be empowered to operate in a manner more consistent with Aboriginal and Islander customary law, and the court structure be available to communities which seek to develop and expand community justice schemes (Qld. Legislation Review Committee 1991).

Community-based policing and sentencing: Other community oriented approaches in Australia have tended to take much less autonomous forms than independent indigenous courts (ALRC 1986). As Keon-Cohen (1981, 253) observed in the context of a comparative study of native justice in Australia, Canada and the USA, 'there remains a deeply ingrained reluctance in all three countries to cut the Gordian knot and allow separate, parallel native justice systems to develop'. This attitude has, for the most part, placed major limitations on the emergence of potentially effective community justice mechanisms for Aboriginal people. In the result, apart from the schemes discussed above, along with similar proposals in isolated parts of the Northern Territory,6 'community-based' initiatives have tended to be located within the context of the formal policing structure, or as an added component of sentencing options for Aboriginal offenders.

One notable exception, the system which has been developed by the Julalikari Council in Tennant Creek — including a program of council patrols and a commitment to Aboriginal-police cooperation — illustrates the value of initiatives which challenge in some way, the generally subordinate position of Aboriginal people in relation to law enforcement strategies (Edmunds 1991).7 An Aboriginal Issues Unit report to the Royal Commission into Aboriginal Deaths in Custody (Johnson 1991,
Vol 4, 91-92) described the Julalikari Council program in the following way:

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

... They are attempting to resolve conflicts in an Aboriginal way rather than having the police simply arrest a person or persons, sometimes the wrong person, without solving the problem. Councillors are able to speak to Aboriginal people and reprimand them with success.

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

As Hazlehurst (1987a, 265) states:

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

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

The specialised community service program for Aboriginals which has been introduced by the South Australian Department of Correctional Services in recent years (Maloney 1990) is a practical example of the
direction which needs to be pursued in response to the currently unacceptable levels and conditions of Aboriginal incarceration. Although such programs are to be encouraged, pre-trial diversionary schemes linked to other community justice strategies would be perhaps the most constructive way in which diversion could be introduced as a major policy within the criminal justice system, particularly where Aboriginal offenders are involved (Hazlehurst 1985a). In this process, mediation (Miller 1991), both as a way of settling disputes and of determining an appropriate sanction where a breach of the law has been established, can play an important role in injecting community attitudes and values into the justice administration process.

Again, the emphasis must be on encouraging Aboriginal autonomy. As Hazlehurst (1988, 311) puts it:

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

While there are strong grounds for asserting a wider scope for community justice programs than Hazlehurst advocates here, her identification of the need to focus on self-determination is supported by recent developments at the international level, as well as in the final report of the Royal Commission into Aboriginal Deaths in Custody, which in its comprehensive recommendations, provides a significant, if not entirely satisfactory, link between the tragedy of Aboriginal over-representation and suffering within the criminal justice system and the importance of self-determination as the core of all 'solutions'.
National Report of the Royal Commission into Aboriginal Deaths in Custody

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

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

In the National Report of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Johnston produced 339 recommendations for adoption and ultimately, implementation by the federal, state and territory governments.

Chief Commissioner Johnston (1991) devoted five volumes to confronting, explaining, and mapping a chart for altering, the pattern of Aboriginal suffering at the hands of Australian police, courts and prisons. The National Report of the Royal Commission into Aboriginal Deaths in Custody contains a broad range of recommendations, but three primary emphases can be identified:

i) the specific issue of deaths in custody;
ii) the frequency and circumstances of Aboriginal contact with the various agencies of the criminal justice system, from police intervention to incarceration; and
iii) the underlying issues which, according to the Commission, may explain 'what it is about the interaction of Aboriginal people with the non-Aboriginal society which so strongly predisposes Aboriginal people to arrest and imprisonment' (Johnston 1991, Vol 5, 147).

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

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

Several recommendations reflected the aim of diverting Aboriginals — and particularly those that are being held as a result of public drunkenness — from police custody. Specifically, it was recommended that 'all Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders' (Johnson 1991, Vol 5, 87). Legislative amendments to facilitate greater access of Aboriginals to bail were recommended. The Commission also encouraged various community policing strategies, particularly those which involve direct participation by Aboriginal people. It recommended that community justice proposals receive adequate funding and that the Australian Law Reform Commission's recommendations on the recognition of customary law be implemented.

In relation to the sentencing of Aboriginal offenders, the Commission made several recommendations based on 'the principle that imprisonment should be utilized only as a sanction of last resort' (Johnson 1991, Vol 3, 64). These included proposals for the training of Court and Probation and Parole Service Officers in Aboriginal society, customs and traditions, the
consultation of community members before determining sentence in cases where the defendant is from a discrete or remote community, and expansion of the range of non-custodial sentencing options and of pre-release and post-release support schemes, and the encouragement of Aboriginal community participation in community service programs. Other recommendations were aimed at alleviating the particularly damaging impact of imprisonment on many Aboriginals, by stressing the value of detaining prisoners in a prison close to families wherever possible, recognising the importance of encouraging the maintenance of kinship and other family obligations, providing a more adequate and accessible complaints procedure, and increasing the availability of skills training and general educational facilities.

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

Significantly, in the context of this examination of 'underlying issues', the Commission stressed the importance of Aboriginal political activity and economic management in all areas of what were formerly seen as federal or state governments' 'Aboriginal affairs'. In particular, Johnston (1991, Vol 4, 7) recommended:

That government negotiate with appropriate Aboriginal organizations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.
Formal recognition that self-determination is 'central to the achievement of the profound change which is required in the area of Aboriginal affairs', represents, along with the emphasis on 'addressing land needs', (Johnston 1991) one of the most significant features of the Commission's recommendations. The difficulty, and the Commission does not fail to recognise this problem, is that 'little agreement exists as to the definition of self-determination and the processes available to implement a policy of enhanced levels of self-determination' (Johnston 1991, Vol 4, 5) The term 'self-determination' has been used to describe a range of situations from the principle (more accurately referred to as self-management) which has informed government policy in relation to 'Aboriginal affairs', at least since the 1970s (McRae, Nettheim & Beacroft 1991), through to the right of self-determination under international law, which gives 'all peoples' the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.

While describing self-determination as an 'evolving concept', the Commission identifies a 'solid core of common ground' on the basis of its consideration of a number of perspectives including a recent report of the House of Representatives Standing Committee on Aboriginal Affairs (1990) and submissions by NAILSS (1991), and the Aboriginal Law Centre, University of New South Wales (Hookey 1990). According to the Commission, this common ground covers three 'crucial points':

i) that Aboriginal people have the control 'over the decision-making process as well as control over the ultimate decisions about a wide range of matters including political status, and economic, social and cultural development ...';

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

iii) that Aboriginal people have the right to make the choice as between the 'spectrum of possibilities' in terms of political status.\(^8\)

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

Many Aboriginal people initially expressed disappointment that the Royal Commission failed to recommend that criminal charges be laid against those individuals alleged to be responsible for the deaths of Aboriginal people (Paxman 1991). Shortly after the release of the report, the Chair of the National Committee to Defend Black Rights (NCDBR) (Corbett in Wockner 1991, 10) stated that '[t]he Commission has failed to bring to justice those responsible for the deaths of our people in custody'.

On 31 March 1992 the Government of Australia announced its decision to commit $150 million to support its first stage response to the Report of the Royal Commission into Aboriginal Deaths in Custody. Consistent with the breadth of the Royal Commission's recommendations, the strategy adopted by the federal, state and territory governments targets a number of areas both within and outside the criminal justice system (Joint Ministerial Forum 1992).

Almost half of the financial support allocated will fund programs designed to address Aboriginal alcohol and substance abuse following the model established by the Central Australian Grog Strategy (Millett 1992a). Funding will also be provided for a range of other initiatives including plans to: assist state and territory governments to increase Aboriginal representation in police departments and other enforcement agencies; support an annual conference of all police services throughout the country to help improve 'cross-cultural awareness' (Millett 1992b); and to enable Aboriginal Legal Services to expand their activities into areas identified by the Royal Commission. Funding for the latter initiative
has been described as 'the central plank in the Government's strategy to reform the justice system and end the over-representation of Aborigines in custody' (Kirk 1992, 4).

An Aboriginal Social Justice Unit to be established within the Human Rights Commission will oversee the implementation process, monitor the conditions of Aborigines and Torres Strait Islanders, and release an annual report to be tabled in Federal Parliament (Joint Ministerial Forum 1992). The Minister for Aboriginal Affairs stated (Millett 1992c, 4):

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

The federal government's Aboriginal justice strategy has been applauded for reflecting a serious commitment to implementing the recommendations of the Royal Commission. However, a Sydney Morning Herald editorial (1 April 1992, 14) questioned 'whether the Federal Government has chosen the right measures' to alleviate the conditions which has tragically resulted in so many Aboriginal deaths in custody? With specific reference to the government's plan for confronting alcohol abuse, the editorial states:

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

In the final section of this paper, the broader question of Aboriginal self-determination, including relevant international law developments, will be addressed. Initially this may appear to be a dramatic change in direction. Certainly the debates in Australia over justice reform and political autonomy have generally been conducted in a parallel fashion, only infrequently intersecting or being advanced as complimentary developments. The limited attention given to the development of international standards on the recognition of indigenous self-
determination by the National Report of the Royal Commission into Aboriginal Deaths in Custody — despite the report's constant references to Aboriginal self-determination as the ultimate solution to the multitude of problems which are currently manifested in the gross over-representation of Aborigines within the criminal justice system — is indicative of the tendency to treat political autonomy and justice reform as if they were unrelated issues.

Yet it is also clear that one of the strongest motivations for the articulation of self-determination aspirations by indigenous peoples of Australia is growing recognition of the absolute necessity of Aboriginal autonomy in relation to matters which are, for the most part, currently dealt with by the non-Aboriginal justice system with disastrous consequences.

**Aboriginal peoples in Australia and the right of self-determination under international law**

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

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

Further, Aboriginal assertions of the right of self-determination reinforce the strategy adopted by the Royal Commission into Aboriginal Deaths in Custody of addressing the underlying social, economic and political issues which are manifested in the context of Aboriginal contact with the criminal justice system. In particular, they are based on a recognition that no amount of 'reforming' the criminal justice system to take account of the various difficulties and forms of discrimination which Aborigines face, will 'solve' the basic contradiction of attempting to achieve justice for Aborigines in the context of an imposed legal system. To this end, acceptance of the right of Aboriginal people to develop and implement their own solutions is crucial.

In this respect there is a direct link between the consistent failure of white Australia to come to terms with the overwhelming evidence of Aboriginal suffering within the criminal justice system as described here, and Aboriginal efforts to assert their right of self-determination. This connection was illustrated in a submission to the Royal Commission into Aboriginal Deaths in Custody on behalf of the National Aboriginal and Islander Legal Services Secretariat (Pritchard 1990, 2):

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

Attempts by Aboriginal peoples in Australia to assert a broad Aboriginal right to autonomy have traditionally been stifled by the purported prerequisite of first establishing the indigenous peoples' sovereignty as an independent nation. Consequently, in Australia, autonomy claims have tended to be considered as based on something of a 'dead-end' argument
given both the High Court's position that the question of unextinguished and continuing Aboriginal sovereignty is non-justiciable\(^9\) and the credence which Australian courts generally have, until recently, insisted on giving to the fiction of *terra nullius*, particularly in the context of Aboriginal land rights at common law.

In June 1992 the High Court of Australia issued its long-awaited decision in the case of *Mabo v Queensland* ([1992] 66 ALJR 408). By a six to one majority the High Court held that Australian common law recognises a form of native title, which, where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands. According to Brennan J (with whom Mason CJ and McHugh J agreed) ([1992] 66 ALJR 408, 429):

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

A detailed analysis of this decision is not possible here, but preliminary assessments indicate that the decision in *Mabo* signals a new era for Aboriginal rights in Australia (Brysland 1992; Reynolds 1992).

**Indigenous peoples and self-determination**

More recently, indigenous peoples have turned, as an alternative foundation for their claims to autonomy, to the human rights which are protected by international law, and in particular, the collective right of self-determination. This shift carries some considerable significance because as Barsh (1984) has pointed out, a valid exercise of the right to
self-determination is not dependent on the recognition of that people's sovereignty. The historical status which non-Aboriginal Australia has endeavoured to impose on Aboriginal peoples is irrelevant under international law (Barsh 1988).

Although the 'sovereignty issue' in Australia does not in itself preclude a valid assertion by Aborigines of a right to self-determination (Clinebell & Thomson 1978), there are more fundamental obstacles to such a course of action, not the least of which is the narrow interpretation which has traditionally been given to the international law concept of self-determination based on the principles which support the integrity of state boundaries and the 'blue-water' or 'salt-water' doctrine which presumes that only non-self-governing colonial territories separated by water from the colonial power are entitled to exercise the right of self-determination (Ditton 1990; Pritchard 1990). As a result there has been considerable disagreement on the question of whether the right of self-determination can be asserted by an indigenous people living within the boundaries of a recognised sovereign state.

More recently indigenous groups around the world have begun to argue convincingly for a wider application of the right of self-determination, on the basis that it is, as described in the 1984 Martinez-Cobo Report (Ditton 1990, 90) 'the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future'.

Nettheim (1988) has recently articulated, in the context of a discussion of the rights of indigenous peoples, a theory first advanced by Pomerance (1982) which asserts that 'self-determination ... is a process, not one particular outcome of that process' (Nettheim 1988, 119). On this basis, Nettheim (1988, 120) argues that international law should be capable of satisfying the autonomy claims of indigenous peoples by supporting a concept of self-determination which, while not embracing the possibility of complete independence against the wish of the encompassing national State, does permit as wide a range of other forms of association as the self-determining people might select.
To ascribe the collective right of self-determination with both conceptual flexibility and the practical capacity for adaptation to specific circumstances is, from the perspective of the underlying rationale for the international human rights system, a far more acceptable approach than the artificial interpretation which has traditionally rendered it 'off-limits' to aboriginal peoples.10

The transformation of the Federal Department of Aboriginal Affairs into an elected Aboriginal and Torres Strait Islander Commission (ATSIC)11 and the establishment of a Council for Aboriginal Reconciliation,12 all point to an increased focus on Aboriginal autonomy claims as Australia moves towards the centenary of federation. However, although these two government 'initiatives' have deliberately been structured so as to facilitate the participation of Aboriginal representatives in recommendation and decision-making processes, the source of the power which they purport or propose to offer to Aborigines must raise serious doubts about their capacity to contribute to achieving the Aboriginal aim of self-determination (Brennan 1990; Lavery 1992). There must be serious doubts as to whether they represent anything more constructive than a decision by the federal government to continue to formulate policy on the basis of the 'slippery concept of "self-management"' which has been described by Pritchard (1990, 108) as 'hopelessly inadequate ... as a theoretical base for Aboriginal aspirations'. The involvement of Australian Aboriginal organisations in the international push for recognition of indigenous rights, appears to hold greater potential in this respect.

Building autonomy on an international law foundation

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

Although there are strong grounds for arguing that this basis already formally exists in the shape of the right of all peoples to self-determination, it is to be hoped that the efforts of the United Nations Working Group on Indigenous Populations can produce an even more concrete, and undeniable basis for the assertion of aboriginal autonomy rights. Given the aspirations which are embodied in Aboriginal assertions of a right to self-determination, it is crucial that international law concepts and instruments be expanded to take account of the legitimate autonomy claims of indigenous peoples.

Australian organisations seeking international recognition of indigenous rights, including the right of self-determination, have focused their efforts on the United Nations Working Group on Indigenous Populations. The Working Group, which was established by the Commission on Human Rights in 1981, has been described as 'one of the most accessible entities in the United Nations ...' (Nettheim 1987, 298). Aboriginal delegations, headed by the National Aboriginal and Islander Legal Services Secretariat (NAILSS) have regularly participated in the Working Group's activities (Ferguson 1989). Since 1985 the Working Group has been primarily concerned with drafting a Declaration on the Rights of Indigenous Peoples.

At its ninth session in 1991, the Working Group considered a draft declaration which addresses a range of indigenous concerns including
spiritual and religious traditions, control of education systems, the ownership and control of land, the recognition of indigenous laws and customs, social and economic programs and political participation (Pritchard 1992). The key part of the declaration is a provision which guarantees the right of indigenous peoples to self-determination, which has long been the primary goal of indigenous organisations.

Paragraph 1 of the 1991 draft states:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

It is expected that the final draft declaration will be completed by the Working Group in 1993 (Sanders 1992), during the International Year for the World's Indigenous People. After obtaining the approval of the Sub-Commission, the draft will likely be considered by both the Human Rights Commission and ECOSOC before eventually coming before the General Assembly for proclamation as a Universal Declaration on the Rights of Indigenous Peoples (Sanders 1992).

It is difficult to avoid the fact that, within the United Nations system, indigenous groups must accept that member states will ultimately determine both the scope and the actual wording of the Declaration (Simpson 1991; Pritchard 1993). Clearly, this places limitations on what indigenous people can hope to achieve directly from the Working Group process. For example, the expansive formulation of the right of self-determination contained in the World Council of Indigenous Peoples' Declaration of Principles, is unlikely to be endorsed by the wider international community (Hannum 1990). However, the progress which is currently being made towards the formulation of a solid instrument which has the potential to prove acceptable to the majority of the world's indigenous peoples, and the high level of participation of indigenous
groups in the Working Group process, are encouraging indicators of the capacity of international law to provide a solid basis for Aboriginal assertions of their fundamental autonomy rights.

It is probably fair to say that the concept of formal self-government for Australian Aborigines is still in its infancy in this country. Indeed, formal recognition in Australia of Aboriginal rights under international law may be some way off. Despite its identification of 'self-determination' as the requisite feature of all government initiatives in relation to Aboriginal people, the Royal Commission into Aboriginal Deaths in Custody, gave only minimal attention to the potential of developments currently taking place with the United Nations Working Group on Indigenous Populations, describing these as 'the development of international law at a very tentative stage' (Johnston 1991, Vol 5, 43).

A fundamental lesson which may be borrowed from the Canadian experience with self-government is that the most important task at this preliminary stage is to establish a stable foundation on which the range of options can be rationally discussed (Hawkes 1989). A crucial principle of this platform must be that Australian Aborigines have the right to assert their autonomy. Unfortunately, the federal government has consistently refused to appreciate or accept this entitlement. Recent initiatives, both in relation to the criminal justice system, and Aboriginal political activity generally, have tended to continue this pattern of denial. Consequently, Australian Aborigines have been forced to turn to other forums for a recognition of their autonomy rights.

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

Conclusion

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

Recognition of the extent of Aboriginal suffering is now relatively widespread, as is the basic conviction that 'something must be done!' Indeed, the last two decades have witnessed a range of 'reforms' to the various agencies of criminal justice administration, designed to alleviate the conditions and frequency of Aboriginal contact with police, courts and prisons. Yet, while attempting to address the 'problem', these methods have generally failed to produce any significant change in the destructive experience of Aboriginal people, as individuals and communities. Attempts to combat police racism, the introduction of special rules to 'protect' Aborigines being interrogated by the police and examined by magistrates and lawyers, modification of substantive criminal law concepts in limited circumstances, and the decriminalisation of offences such as public drunkenness all represent specific responses to perceived 'problem areas'.

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

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

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

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

The success of developments currently taking shape within the United Nations is central to the political direction which indigenous peoples in Australia have elected to pursue in recent years. The focus of this strategy has been to assert a right, under international law, to the forms of autonomy which Aboriginal people consider necessary if the historical and contemporary experience of subjugation, most painfully illustrated in the context of contact with the dominant criminal justice system, is to be rectified. From a human rights perspective, changes within the non-
Aboriginal justice system in Australia have proven to be inadequate remedies. Aboriginal self-determination holds the promise of a providing a decisive step towards more enduring and constructive solutions.

Notes

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

2 It is not possible to discuss in any detail here the various forms of human rights abuse which occur in the context of the criminal justice system. In a submission to the Royal Commission into Aboriginal Deaths in Custody, Hookey (1990) outlined the numerous international human rights instruments which may be relevant in this area, particularly in relation to deaths in custody. Of particular relevance are the International Convention on the Elimination of All Forms of Racial Discrimination 1965, articles 6–10, 17 and 27 of the International Covenant on Civil and Political Rights 1966 and the collective right of self-determination expressed in article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

3 In the context of a discussion of the death of John Pat in Roebourne, Western Australia in 1983 (which was also the subject of an investigation by the Royal Commission into Aboriginal Deaths in Custody), Grabosky (1989, 83) comments that, 'The fact that [police] respond more vigorously to public drunkenness in Aborigines than to domestic violence in white society suggests something about their priorities.'

4 Public drunkenness is not a criminal offence in New South Wales, South Australia, the Northern Territory and the Australian Capital Territory. In Victoria, Western Australia and Tasmania, state governments have considered in recent years abolition of the offence, although decriminalisation legislation is yet to be enacted (McDonald 1990; Brown et al 1990).

5 At the time of writing, a Sessional Committee of the Legislative Assembly of the Northern Territory (1992, 1) was considering the question of whether 'Aboriginal Customary Law should constitutionally be recognised in some way in the Northern Territory and the option for doing this'.

6 For a discussion of the Aboriginal Communities Justice Project which was introduced by the Northern Territory Government in 1982, see Davis (1985). In the National Report of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Johnston (1991) noted that although initially hailed as a success, the pilot schemes at Galiwinku and Groote Eylandt no longer operate.

7 Other positive initiatives identified by Johnston (1991) include the work of the Tangentyere Council in Alice Springs and the Community Justice Panels which operate in Echuca, Victoria.
Although the spectrum was limited by the House of Representatives Standing Committee (1990, 219) to 'within the legal structure common to all Australians'.


Suzuki (1976, 848) has suggested that in international human rights law generally, the principles of 'territorial integrity' and 'domestic jurisdiction' are subservient to the overriding concern with human dignity.

Aboriginal and Torres Strait Islander Commission Act 1989 (Cwlth).

Council for Aboriginal Reconciliation Act 1991 (Cwlth).


WCIP Principle 1 stated *inter alia* that

All indigenous nations and peoples have the right of self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference (Hannum 1990, 95).
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