THE DIVERSION AND DISPOSITION OF YOUNG ABORIGINAL OFFENDERS IN WESTERN AUSTRALIA
A human rights perspective

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This article discusses some of the diversional and dispositional aspects of the juvenile justice system with an aim to reveal the human rights abuses of Aboriginal juvenile offenders that are inherent in Western Australia's current legislation.

Introduction

The focus of this article is on the failure of the Western Australian (WA) criminal justice system to recognise the context within which young Aboriginals offend. This failure has resulted in the entrenchment of young Aboriginals in the criminal justice system and an abuse of their human rights.

These abuses ultimately stem from the criminological viewpoint of the wider community which is reflected in both the *Young Offenders Act* 1994 (WA) (hereafter 'YOA') and the *Criminal Code* 1913 (WA) (hereafter 'the Code'). This viewpoint is based on three notions. First, responsibility for a crime lies squarely with the offender (there is no call for community responsibility), secondly, the only effective solution to crime is punishment; and thirdly, the most appropriate form of punishment is detention. This 'get tough' approach has been especially popular in the public domain and its electoral utility has proved attractive. Both Labour and Liberal governments in WA have campaigned on promises of 'getting tough' on crime with the *Crimes (Serious and Repeat Offenders) Act* 1992 (WA) and the YOA, respectively.

Such legislation takes a sensationalised approach to crime. The community is encouraged to be less amenable to the concept that offenders themselves may be victims. This in turn generates a polarisation of the community and offenders. The problem with this approach is that it ignores issues of race and class by emphasising the actions of the individual as well as imposing simplistic solutions.

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997, found that one in five Indigenous young people detained in WA police cells was 14 years of age or younger.[1] Of these, 92% already had an arrest history.[2] Aboriginal juvenile

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1 In this article, the term 'Indigenous' (in reference to Australia) is used to refer to Aboriginal and Torres Strait Islander peoples.

offenders are being entrenched in the criminal justice system which in turn feeds into their over-representation in that system.

Aboriginal youth are being institutionalised at an inordinate rate as a result of the process of criminalisation which has replaced the previously overt genocidal doctrine of 'breeding out' Aboriginality. 'Aboriginal youth are no longer institutionalised because they are Aboriginal but because they are criminal.'[3] Research indicates that not only are Indigenous youth over-represented in the juvenile justice system, but also that they are most over-represented at the punitive end of the system: in detention centres.[4]

This notion of 'criminalisation' is not blatant; many of the people responsible for its implementation are quite likely not to be racist at all. The racism discussed here is indirect and inherent in the system itself. The system, whilst not overtly racist, targets and places Aboriginals at a disadvantage when they come into contact with it. This is because it fails to recognise that the impact of colonisation is still being felt today and that culturally inappropriate solutions only magnify the disadvantages Indigenous people must deal with. Whether this discrimination issues out of a benevolent intention is irrelevant. In international legal usage, the term 'discrimination' refers to distinctions which have the purpose or *effect* of impairing the enjoyment or exercise, on an equal footing, of human rights. The purpose or intention of the alleged discriminator is not decisive.[5]

International Standards and Obligations

International standards and their obligations represent a general consensus in both Australia and the rest of the world as to what the minimum standards embodied by the actions of governments in relation to the people whom they govern should be. Regardless of whether they are enforceable or not, they should be used as a yardstick against which the legislation and policies that affect Aboriginal young offenders are measured.

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2 Human Rights and Equal Opportunity Commission (1997) *Bringing them home*, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (hereinafter cited as SGR ('The Stolen Generation Report'), April, Human Rights and Equal Opportunity Commission.

3 C Cunneen (1994) 'Enforcing Genocide? Aboriginal Young People and the Police' in R White and C Alder (eds) *The Police and Young People in Australia*, Cambridge University Press, p 129.

4 F Gale et al (1990) *Aboriginal Youth and the Criminal Justice System*, Cambridge University Press; M Wilkie (1991) *Aboriginal Justice Programs in Western Australia*, Research Report no 5, Crime Research Centre of WA; Crime Research Centre of WA (1995) *Aboriginal Youth and the Juvenile Justice System of WA*, Royal Commission into Aboriginal Deaths in Custody, vol 3, Aboriginal Affairs Department.

5 SGR, p 269.

Australia's international obligations

International Covenant on Civil and Political Rights (ICCPR) The ICCPR was ratified by Australia in 1980. In 1986, it was incorporated into Federal law by the *Human Rights and Equal Opportunities Commission Act* 1986 (Cth) Sch 2. The ICCPR condemns discrimination on the basis of race in Part II, Article 2(1).

Convention on the Rights of the Child (CROC) Despite Australia's extensive and positive involvement in the drafting of the CROC, and the ratification of the instrument in 1990, it has not yet been implemented.

Implementation is a positive obligation of the Federal Government. Article 4 of CROC states that:

> parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

The instrument focuses on the best interests of the child[6] and recognises that everyone is entitled to the rights and freedoms outlined in United Nations' instruments, without distinction of any kind.[7]

Other international standards

The instruments outlined below represent an expansion on the principles outlined in the instruments above. They are directly related to young Aboriginal offenders and are the result of general consensus in the international community. Thus they are highly persuasive and authoritative.

UN Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules') this instrument aims to promote juvenile welfare so as to minimise the necessity for intervention by the juvenile justice system, and in turn reduce the harm which may be caused by any intervention. Australia was a leading participant in the drafting of this instrument and a sponsor at the General Assembly approval stage.

UN Draft Declaration on the Rights of Indigenous Peoples (UNDDRIP) UNDDRIP condemns doctrines advocating superiority of peoples or individuals on the basis of racial, religious, ethnic or cultural differences as 'racist, scientifically false, legally invalid, morally condemnable and socially unjust'.[8]

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6 Article 3(1).

7 Preamble.

8 Preamble.

Recommendations of the Royal Commission into Aboriginal Deaths in Custody Report 1991 (RCIADIC)

Consideration of the RCIADIC recommendations is vital.[9] First, it is one of the two most comprehensive examinations of issues affecting Aboriginal and Torres Strait islander peoples ever undertaken in Australia.[10] Secondly, regular inquiries are taken into the implementation of its recommendations, and thirdly, the aims behind its recommendations are in line with Australia's international obligations. That is, its main thrust was to address and overcome the disadvantages faced by Aboriginal and Torres Strait Islander people in all aspects of their lives.

Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families[11]

One of the terms of reference for the Human Rights and Equal Opportunities Commission (HREOC) in its 'Stolen Generations Report' (SGR) was to:

> examine the adequacy and need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress, or undue influence of Aboriginal and Torres Strait Islander children from their families.[12]

The SGR also examined 'current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children'.[13]Again, the recommendations embodied by the SGR must be viewed as important. HREOC consulted widely with the Australian community, in particular the Aboriginal and Torres Strait Islander communities. HREOC also consulted various non-government organisations, relevant Federal, State and Territory authorities and considered relevant laws, practices and policies of other countries.

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9 Royal Commission Into Aboriginal Deaths In Custody, 1991, Reports 1-5. Canberra, Australian Government Publishing Service

10 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (1996) *Justice Under Scrutiny*, Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Australian Government Publishing Service, p 9.

11 SGR.

12 Ibid, 'Terms of Reference'.

13 Ibid.

Context: What is Different or Unique about the Relationship Between Aboriginal Young People and the Criminal Justice System?

It has been suggested that the argument that Aboriginal children should be treated differently is a form of reverse racism. This can be refuted on the basis that to recognise cultural differences is not racist unless it advocates a notion of the superiority of one race over another.

It is, however, racist *not* to recognise differences and thereby perpetuate the disadvantage of one race relative to another. It is racist to treat Aboriginal children in the same manner as non-Aboriginal children without accounting for the historical and cultural context into which they were born. Therefore, it is important to recognise the context within which Aboriginal children offend.

Over-policing

Inappropriate policing methods stereotype young Aboriginals, fail to recognise the context within which Aboriginal children grow up and are overly pro-active. They have, in part, resulted in the criminalisation and marginalisation of Aboriginal youth.

The wider community tends not to acknowledge these effects. This lack of recognition is due principally to two factors; the lack of voice and status of Aboriginal children,[14] and the political shift toward the right and its 'get tough on crime' approach.[15]

Findlay ascribes the over-representation of Aboriginal people in the criminal justice system to over-policing which involves an overtly pro-active stance.[16]

> The concept of over-policing involves a pro-active response by the police to behaviour they perceive to be disorderly or offensive. This means that, when dealing with Aboriginal people there is a tendency to initiate confrontation with them.[17]

'Most Aboriginal communities expect negative interaction with police as a matter of course'.[18] A result of this has been the internalisation by

14 Few formal complaints are ever made. It has been noted in both the Human Rights Inquiry (HREOC (1997a)) and the RCIADIC (p 173) that 'children seem to think its normal' and that they fear retribution.

15 See Q Beresford and P Omaji (1996) *Rites of Passage: Aboriginal Youth, Crime and Justice*, Fremantle Arts Centre Press, p 71.

16 M Findlay et al (1994) *Australian Criminal Justice*, Oxford University Press, p 272. This pro-active tendency has also been recognised by researchers overseas in relation to the over-policing of ethnic minority groups: eg R Hood (1992) *Race and Sentencing*, Clarendon Press.

17 Findlay et al (1994) p 272.

18 H Wootten (1991) *Report of the Inquiry into the Death of Lloyd James Boney*, Royal Commission into Aboriginal Deaths in Custody, Australian Government Publishing Service, p 19.

Aboriginal children of a hostility towards white society, furthering an in-built fear and hatred of police.[19]

Over-policing is a major problem in many Aboriginal communities and whilst recommendations of RCIADIC addressed this issue,[20] the SGR found that these directions have been poorly implemented.[21]

The SGR advocated the need for protocols to address over-policing. These protocols should include procedures for negotiation and Aboriginal involvement in decisions relating to policing priorities and methods.

Public order offences High rates of arrests for public order offences may indicate the existence of over-policing. Arrests for public order offences constitute a major contribution to the involvement of young Indigenous people in the juvenile justice system.[22] The percentage of Aboriginal juveniles charged with public order offences has increased since 1990.[23] This supports the notion that the police are using such charges to remove Aboriginal youth from public areas.

The SGR noted the finding of Beresford and Omaji that: 'the juvenile justice legislation has done little to discourage the tendency to lock up children suspected of having a social problem' in WA.[24]

A common illustration of over-policing is the trifecta charge. This describes a situation where individuals or groups are apprehended by police in a manner that engenders hostility and which results in charges such as disorderly conduct, resisting arrest and assault.

The practice of frequent name-checking by police often ends in the application of a trifecta charge on young Aboriginal offenders.

> If it happens to the same young person by the same police officers two, three or five times in the space of a couple of hours — which is quite a common occurrence — by the end of that time, the young person will lose his temper and refuse to give his name.[25]

This is when the youth may start to swear at the police officer and is charged with disorderly conduct. If they pull away from the police officer or make bodily contact with them, they are charged with resisting arrest and/or

19 Parliamentary Select Committee on Youth Affairs (1991) *Youth and the Law*, Report no 1, Australian Government Publishing Service.

20 Recommendations 88, 214, 215 and 223.

21 SGR, p 510, agreeing with submissions by the WA Aboriginal Legal Service and also citing C Cunneen and D MacDonald (1997) *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, Aboriginal and Torres Strait Islanders Commission.

22 SGR, p 511.

23 Ibid.

24 Ibid, p 512, citing Beresford and Omaji (1996) p 115.

25 Beresford and Omaji (1996) pp 29–30.

assaulting a police officer (a serious charge that will be considered by the courts in relation to other offences).

The trifecta charge is suggested by many youth workers, lawyers and Aboriginal people to be used by police as a control device to clear Aboriginal youth from the streets.[26] The SGR detailed evidence that young Aboriginals are consistently the targets of name-checks.[27] Interviews by Beresford and Omaji also revealed this.[28]

Police discretion Australian studies since RCIADIC document a persistence of discriminatory attitudes in the police force.[29] These have resulted in informal policies and practices based on stereotypes of young Aboriginals as *a priori* suspects and deserving closer surveillance.[30] Empirical evidence suggests that the use of police discretion generally disadvantages Aboriginal youth.[31]

A survey in 1995 by the Australian Institute of Criminology looked at the extent to which police custody of juveniles is utilised.

Australia

- 40% of all young people held in police custody during the survey period were Indigenous.
- Indigenous children and young people comprise only 2.6% of the national youth population.[32]

Western Australia

- 61% of young people held in police custody in WA were Aboriginal young people.
- WA accounted for 32% of all Indigenous young people in Australia who were held in police custody.[33]

The Australian Institute of Criminology stated that 'police custody can rarely be justified' and that 'apart from the most exceptional circumstances (and that surely can't be 61% of the time in WA!) police custody of juveniles breached Recommendation 242 of the RCIADIC'.[34]

26 Crime Research Centre of WA (1995) p 33.

27 SGR, p 512.

28 Beresford and Omaji (1996) p 83.

29 SGR, p 518.

30 H Blagg and M Wilkie (1995) *Young People and Police Powers*, Australian Youth Foundation, p 144.

31 SGR, p 13. See also M Dodson (1991) *Regional Report into Underlying Issues in WA*, Australian Government Publishing Service, p 200.

32 Cited by SGR, p 492.

33 Ibid, p 493.

34 Ibid.

Police violence Aboriginal children are also the victims of police violence. The HREOC *National Inquiry into Racist Violence* found that, in WA, 94% of Aboriginal juveniles interviewed by the commission reported being assaulted by police.[35] There were also allegations of sexual harassment and racist abuse (important when considering the likelihood of further charges, such as offensive language and assaulting a police officer).[36] Across Australia, there were reports of suggestions by police officers about suicide and threats in relation to hanging. In WA, 21% of Aboriginal children interviewed said they had been the subject of such suggestions or threats.[37]

Family

> I would not hesitate for one moment to separate any half-caste from its Aboriginal mother, no matter how frantic her momentary grief might be at the time. They soon forget their offspring.
>
> **James Isdell, WA traveling protector, 1909**[38]

It is widely acknowledged by both Aboriginals and those who work closely with them that a substantial number of Aboriginal children regularly coming into contact with the criminal justice system come from families where the parents and/or the grandparents were removed from their families as children.[39]

There are three characteristics which can be attributed to cultural dispossession and forced institutionalisation: 1) difficulties in the role of parenting; 2) a pattern of domestic violence; and 3) a lifestyle of material disadvantage. All of these are known to correspond with the involvement of children in crime.[40]

Many Aboriginal parents have grown up with no model of what a parent's role should be and no concept of a family unit. A corresponding lack of identity and cultural knowledge has led to domestic violence, alcoholism and welfare dependence.

> I look at my son today who had to be taken away because he was going to commit suicide because he can't handle it; he just can't take any more of the anxiety attacks that he and Karen have. I have passed that on to my kids because I haven't dealt with it. How do you deal with it? How do you sit down and go through all those years of abuse? Somehow I'm passing down negativity to my kids'.[41]

35 Human Rights and Equal Opportunity Commission (1991) *Racist Violence*, Report of the National Inquiry into Racist Violence, Australian Government Publishing Service.

36 Ibid.

37 Ibid.

38 Ibid, p 276.

39 SGR, pp 34, 190–1, 225.

40 Ibid, p 34.

41 Ibid, p 222 (confidential evidence 284, South Australia).

> That's another thing that we find hard is giving our children love. Because we never had it. So we don't know how to tell our kids we love them. All we do is protect them. I can't even cuddle my kids 'cause I never ever got cuddled. The only time was when I was getting raped and that's not what you'd call a cuddle, is it?[42]

Genocide

'Genocide' was explicitly defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide.* Australia ratified the Convention in 1949 and it came into force in 1951.[43] 'Genocide is a coordinated plan of different actions aimed at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.'[44]

Manifestations of genocide include the removal of children and the policy of assimilation. These ostensibly humane policies were primarily for the purposes of genocide. For example, the aims the New South Wales Aborigines Protection Board were identified as:

> [t]he reduction of Aboriginal birth-rate by removal of adolescents, particularly girls; [the] prevention of Aboriginal children's identification with the Aboriginal community by isolating them from their families and communities through adolescence; [and] preventing or hindering their return to their families of the Aboriginal community.[45]

It was noted by Commissioner Wootten in the Royal Commission that 'such a policy would today be internationally condemned as genocide'.[46]

A State cannot justify genocidal practices by asserting that they were lawful under its own laws or that its people did not (or do not) view these practices as a form of genocide, or that policies were instigated with good intention.[47]

Aside from the argument of whether today's non-Aboriginal people should feel responsible for past government policies, some points remain which are indisputably fact.

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42 Ibid, p 225 (confidential evidence 689, New South Wales: woman placed in Parramatta Girls Home at 13 years in the 1960s).

43 See 'Recommendations, Standards and Obligations' with regard to the implementation of this Convention.

44 SGR, p 271, citing Polish jurist Raphael Lemkin as the author of the term and as a major proponent of the UN Convention. Lemkin's definition was adopted in the Convention: R Lemkin (1944) *Axis Rule in Occupied Europe,* Carnegie Endowment for International Peac.

45 Wootten (1991) p 19.

46 Ibid.

47 SGR, p 273.

- Successive WA and Australian Governments have been responsible for instituting genocidal practices.
- A result of those policies has been the disfunctionalisation of Aboriginal families.
- A substantial number of Aboriginal young offenders come from families affected by policies of separation/assimilation and the current legislation fails to recognise this.

It is submitted that:

- This lack of recognition has resulted in the criminalisation and institutionalisation of today's Aboriginal children.
- The over-representation of Aboriginal children in detention represents a continuation of earlier removal policies by way of a process of criminalisation; this notion is supported by the SGR.48
- Each of the above points constitutes an abuse of human rights.

The Diversion of Young Aboriginal Offenders

Recommendation 92 of RCIADIC, Rule 19.2 of the Beijing Rules and Article 37(b) of CROC assert that detention should be used only as a last resort. Furthermore, Article 40 of CROC calls for parties to treat a child offender in a manner which 'takes into account the child's age, the desirability of promoting the child's reintegration and the child's assuming a constructive role in society' and also requires that diversion measures be provided wherever possible.

The WA legislation dealing with diversion is the YOA. It makes an effort at implementing diversionary schemes, advocating the use of cautions[49] and juvenile justice teams.[50] These efforts are, however, ineffective because WA police are less likely to use these diversionary schemes when the offender is Aboriginal and the schemes are culturally inappropriate with little Aboriginal involvement and therefore ineffective. A consequence of this is that Aboriginal children are not being diverted away from the criminal justice system, which in turn results in their over-representation in that system.

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48 Ibid, p 489. See also C Cuneen (1990) *A Study of Aboriginal Juveniles and Police Violence*, Human Rights and Equal Opportunity Commission; Cuneen (1994); and I O'Connor, 'The New Removals: Aboriginal; Youth in the Queensland Juvenile Justice System' (1994) 37 *Intl Social Work* 197. See also the following submissions to SGR: Aboriginal Legal Service of WA submission 127; Aboriginal Legal Service of WA (Broken Hill) submission 775. See also Gale et al (1990); Wilkie (1991); and Crime Research Centre of WA (1995).

49 ss 22A, 22B.

50 ss 27, 28.

Cautions

Section 22A of the YOA gives police a discretion as to whether to caution an offender or to charge them and start proceedings. Police must consider the child's offending history and the seriousness of the offence. Other factors to consider are 'extra-judicial', such as family background, school attendance and employment.

Order J101 of the Commissioner's Orders and Procedures Manual[51] indicates that diversion is an appropriate option; however, there is no obligation on a police officer to comply with this and it is ultimately left to his/her individual discretion.

Given the historically bad relationship between police and Aboriginals and the fact that the exercise of discretion to caution relies on an entirely subjective analysis of the above criteria, these factors are exactly of the kind that are liable to cause discrimination against Indigenous youth.[52]

Of all Aboriginal youth in WA who are formally processed by the police, around one-third receive a police caution and the remaining two-thirds are charged with an offence. Conversely, two-thirds of non-Aboriginal young people are cautioned and the remaining one-third is charged.[53]

Police discretion in WA operates essentially without hindrance by any subsequent screening processes directed at dis-empowering the effect of over-policing. Examples of screening processes used in other countries include compulsory inter-agency discussion and the Crown Prosecution Service in the UK and Youth Justice Coordinators in New Zealand, who screen the use of police discretion.

Recommendation 239 of RCIADIC called for:

> governments to review relevant legislation and standing orders ... so that police proceed by way of formal or informal caution ... unless there are reasonable grounds for believing that such action is necessary.

It stated that the test should be more stringent for juveniles than for adults and that:

> the general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time, then arrest should not be effected.

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51 R Falconer, Commissioner of Police, approved The Hon. RL Weise, Minister for Police , pursuant to s 9 of the *Police Act 1892* (WA), East Perth, WA, Western Australian Police.

52 Gale et al (1990) pp 56–8, cited by SGR, p 514.

53 Crime Research Centre of WA (1995) p 18, cited by the SGR, p 514. Although the YOA did not come into force until 1995, there is nothing to suggest this situation has changed; the police cautioning system has had legislative backing since 1991.

The abuse of rights inherent in the failure of the system to divert Aboriginal children away from the courts can lead to a further abuse of rights through entrenchment and labelling. This is partially because the courts may see Aboriginal youth as having failed to respond to diversionary options and 'up-tariff' them.[54] This point has some validity, in that it can be seen as an illustration of the 'amplification process' whereby' even small racial effects at the earliest decision points are amplified to larger significant differences at later stages, where the consequences are more serious and potentially harsher'.[55] This concept of 'amplification' is supported by other research, both in Australia and in the UK with regard to Afro-Caribbean youth.[56]

Juvenile justice teams

The WA Juvenile Justice Teams ('JJTs') were designed to reflect the New Zealand family group conferences.[57] The New Zealand model is often referred to as a 'shaming process', whereby an offender is 'shamed' into rehabilitation by the victim and their respective communities. The patron of the theory of 'reintegrative shaming', Braithwaite, admits to being 'regularly surprised' by the 'imaginative' ways in which his idea is being interpreted and applied.[58]

The introduction of JJTs appears to contemplate a non-Aboriginal Australia resolving its Aboriginal juvenile crime problem, without actually empowering Aboriginal people.

The major criticism of the application of Braithwaite's shaming model as it relates to Australian Aboriginal people is that the theory cannot necessarily be extrapolated to fit within the Australian Aboriginal context and still remain effective.[59] Australian Indigenous people do not necessarily conduct their lives within a 'shaming' paradigm of cultural restraints, as non-Indigenous people interpret the term. 'The savagery of white colonialism has left a situation where, as one anthropologist[60] expressed it, "Aboriginal people are not shamed by having white values shouted at them".'[61]

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54 Up-tarriff: give them a more severe punishment than would otherwise be given had the offence been considered alone.

55 M Fitzgerald (1993) *Ethnic Minorities and the Criminal Justice System*, RCCJ Research Study no 20, RCCJ, p 104.

56 G Luke and C Cuneen (1993) 'Aboriginal Juveniles and the Juvenile Justice System in New South Wales' in L Atkinson and S Gerull (eds) *National Conference on Juvenile Justice: Conference Proceedings*, Australian Institute of Criminology, pp 255–68; and Fitzgerald (1993) p 150, respectively.

57 SGR, p 524.

58 J Braithwaite, 'Beyond Positivism: Learning from Contextual Integrated Strategies' (1993) 50 *J Research Crime & Delinquency* 383, p 387.

59 Ibid.

60 B Sansom (1983) *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin*, Australian Institute of Aboriginal Studies, personal communication to

Furthermore, it is argued by both the Aboriginal Legal Service of WA and Beresford and Omaji that these teams are inadequate because police have control over who is referred to the scheme and JJTs have a restricted membership, meaning that the Aboriginal community is not empowered to deal with its youth.[62]

Police have control over who is referred to the scheme JJTs are restricted to minor non-scheduled offences by first offenders.[63] Moreover, s 29 states that discretion should be exercised in favour of diverting a child to a JJT where that child is a *first* offender. Beresford and Omaji argue that this implies that the discretion to refer a child to a JJT should *only* be exercised where the child is a first offender.[64] In light of the evidence of systematic racism in the police force, this is not an altogether insubstantial argument.

Hence, there are serious and/or repeat offenders effectively barred from diversion.[65] *Prima facie*, there is an abuse of rights and, moreover, when we look into the workings of the legislation further, it is clear that Aboriginal children are primarily the subjects of this abuse because they are associated mainly with offences which do not attract the application of JJTs and the majority of young Aboriginal offenders are recidivists.

This is evidenced by statistics which show that only 15% (gradually decreasing) of Aboriginal youth are referred to JJTs and cautions,[66] compared to up to 80% who are held in detention.[67]

JJTs have a restricted membership: The Aboriginal community is not empowered to deal with its youth The cultural inappropriateness of the make-up of JJTs becomes apparent on examination of Article 22 of the Beijing Rules, which requires that juvenile justice personnel should reflect the diversity of juveniles who come into contact with the juvenile justice system and that minorities should be fairly represented in these juvenile justice agencies.

Blagg cited in H Blagg, 'Just a Measure of Shame' (1997) 37(4) *Brit J Criminology* 481, p 489.

61 Blagg (1997) p 489.

62 Aboriginal Legal Service of Western Australia (1996a) *After the Removal*, Submission to the National Inquiry into the Separation of Aboriginal and Torres Strait Islanders Children from their Families, p 348, cited in SGR submission 127, p 524; and Beresford and Omaji (1996) pp 103–5, respectively.

63 25(1) *Young Offenders Act* (1994) (WA) rules out diversion to a juvenile justice team where the offence committed is a Schedule One or Two.

64 Beresford and Omaji (1996) p 105.

65 See also Cunneen and MacDonald (1997) p 172.

66 SGR, Exhibit 19, Appendix 4, p 524 (WA Government submission); see also Crime Research Centre of WA (1995) p 6.

67 Figures provided by the Ministry of Justice 1994 and cited in Aboriginal Legal Service of Western Australia (1996b) *Striving for Justice*, Report on the WA Governments Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody, vol 3, p 45.

The legislation dealing with JJTs leaves significant discretion with the police who ultimately control access to them.[68] Even if the police do include an Aboriginal community worker, it is 'too little, too late'. It is submitted that the first step towards an effective scheme and a culturally appropriate solution is JJTs that consist largely of Aboriginal elders of the same kinship to the offender.

Observations of conferencing in South Australia (noted also by the SGR and Wundersitz)[69] have suggested that 'the most striking aspect of the model developed for Indigenous people are the problems encountered with cultural difference'.[70] These problems 'include inadequate understanding of Indigenous social structure, language barriers, different communication patterns and different spatial and temporal patterns which derive from cultural obligations'.[71]

This lack of negotiation with, and representation of, Aboriginal people is contrary to UNDDRIP, which calls for self-determination, and in particular, Aboriginal participation in legislative or administrative decisions which affect them.[72] It is submitted that this would include those decisions which affect individuals or individual groups within the Indigenous community, such as young Aboriginal offenders.

Furthermore, Recommendation 235 of RCIADIC has not been fulfilled, this being:

> the primary sources of advice about the interests and welfare of Aboriginal juveniles should be the families and community groups of the juveniles and specialist Aboriginal organisations, including Aboriginal Child Care Agencies.

The report *Indigenous Deaths in Custody 1989 to 1996* calls for juvenile justice panels and family conferencing schemes with adequate cultural adaptation, stating that Indigenous involvement can create effective solutions to juvenile crime problems.[73] It states further that current schemes increase the alienation felt by young Aboriginal offenders and are not succeeding.

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68 M Hakiaha (1994) 'Youth Justice Teams and the Family Meeting in Western Australia' in C Alder and J Wundersitz (eds) *Family Group Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?,* Australian Institute of Criminology.

69 J Wundersitz (1996) *The South Australian Juvenile Justice System: A Review of Its Operation,* Office of Crime Statistics, p 204.

70 M Dodson (1996) *Aboriginal Torres Strait Islander Social Justice Commissioner,* Fourth Report, Australian Government Publishing Service.

71 SGR, p 523.

72 Article 20.

73 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) *Indigenous Deaths in Custody 1989 to 1996,* October, Aboriginal and Torres Strait Islander Commission, p 214.

Detention of Young Aboriginal Offenders

The criminal justice system in WA is failing to divert young Aboriginal offenders away from detention.[74] They are instead being institutionalised at a disproportionate rate,[75] contrary to Recommendation 92 of RCIADIC, Rule 19.2 of the Beijing Rules and Article 37(b) of CROC, which assert that detention should be used only as a last resort.

Empirical evidence supports this view that the system is failing.

- Aboriginal juveniles in WA are 31.6 times more likely to be imprisoned for the same offence than a non-Aboriginal juvenile who is charged with the same offence.[76]
- Aboriginal youth comprise up to 65% of juveniles in detention.[77] Disproportionality is illustrated by the fact that Aboriginal youth comprise only 4% of the WA youth population;[78] and
- Aboriginal youth in WA are six times more likely to be in juvenile corrective institutions than Aboriginal youth in Victoria.[79]

The abuse inherent in the fact that various human rights instruments are breached and recommendations of RCIADIC and the SGR are ignored is compounded in that 'incarceration completes the process of entrenching Aboriginal youth in the juvenile justice system'.[80]

The degree of this entrenchment is reflected in the high rates of recidivism among Aboriginal detainees. One in five Aborigines detained in 1994 was 14 years old or under. Of these, 91.6% already had an arrest history.[81] 65% of Aboriginal young offenders graduate into the adult prison system.[82] 'The process of institutionalisation begins as young as 10 and was nowhere more dramatically revealed than the comment of one youth who said about detention "I've got my food, my fags, my bed".'[83]

The primary pieces of legislation that deal with juvenile offenders are the YOA and the Code. An examination of these pieces of legislation reveals

74 Ibid, p 28. See also R Harding et al (1995) *Aboriginal Contact with the Criminal Justice System*, Hawkins Press, p 63.

75 Ibid *Indigenous Deaths in Custody 1989 to 1996;* See also Crime Research Centre of WA (1995) p 7.

76 SGR, p 496.

77 Figures provided by the Ministry of Justice 1994 and citied in Aboriginal Legal Service of Western Australia (1996b) p195.

78 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) p 212.

79 SGR, p 495.

80 Standing Committee on Social Issues (1992) Report, Australian Government Publishing Service, p 123.

81 Crime Research Centre of WA (1995) p 68.

82 Dodson (1991) p 499.

83 Beresford and Omaji (1996) p 92.

not only the human rights abuses inherent in them, but also how they contribute to the entrenchment and over-representation of young Aboriginal offenders in the criminal justice system.

Special Order: Young Offenders Act

Sections 124–130 of the YOA provide that where a young person is found guilty of an offence which attracts a custodial sentence and that person has already served two previous custodial sentences, the court can impose a Special Order of 18 months' imprisonment or detention *cumulative* to the custodial sentence for the last offence.

Section 46 of the YOA states that 'accepted notions of justice' must be incorporated into sentencing decisions.

> Accepted notions of justice include those standards set by Human Rights Instruments and as such the concept that detention should be a last resort. A Special Order sets the protection of the community *ahead of all other* sentencing principles for juveniles, including 'accepted notions of justice.

'Protection of the community' includes a requirement to consider whether the offender has a history of re-offending within a short time of release. The notion excludes the requirement that the court considers whether any efforts have been made to divert an offender away from the criminal justice system and whether such effort would be appropriate in the case before them.

Conversations[84] with the Aboriginal Legal Service of WA and the Youth Legal Service indicate that this section has not been used yet. Although this bodes well for its repeal, whilst it remains in force and the calls from the community for tougher sentencing continue, the human rights abuses inherent in the Special Order cannot be ignored.

Chapter XXXIX of the Criminal Code Act 1913 (WA)

Section 401(4) of the Code[85] (hereafter 's 401') imposes a mandatory 12-month detention or imprisonment[86] where the offender is convicted of their third break and enter[87] in a place used for ordinary human habitation.

The ambit of s 401's application is wider than a Special Order because it does not require two previous custodial sentences to have been served. A result of this is that more children are predicted to end up in detention. It is likely that Aboriginal children will suffer even more adversely because of their already early involvement with the criminal justice system. On the other hand, s 401 is restricted to offences of or in respect to burglary, whereas the 'SO' covers a whole range of offences, including burglary.

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84 Personal conversation with Aboriginal Legal Service of WA, June 1999.

85 Amended in 1996: *Criminal Code Amendment Act (No. 2)* 1996 (WA).

86 Applies to both adults and children: *Criminal Code* s 401(4)(b).

87 Includes intent.

Anecdotal evidence indicates that the provision is targeting both Aboriginal and Non-Aboriginal children, aged between ten and fourteen, and that the majority of offences are for stealing food.[88]

Human rights abuses embodied by mandatory sentencing legislation: The application of a Special Order or s 401 of the Criminal Code An examination of the Special Order and s 401 will reveal not only the human rights abuses inherent in them, but also how they contribute to the entrenchment and over-representation of young Aboriginal offenders in the criminal justice system.

The dubiousness of a conviction Convictions of Aboriginal children are often unreliable because of a tendency on their part to plead guilty. These guilty pleas may be due to:

- lack of an acceptable understanding of the language used throughout the process and of the process itself;
- no legislative requirement for independent witnesses during an interrogation;
- a general fear of white authority; and
- fatalistic attitudes towards prison.

The right to be fully informed of the nature and cause of a charge in a language an accused understands was ratified by Australia in Article 14 (3) of the ICCPR.[89] The House of Representatives report *Justice Under Scrutiny* found that in areas where traditional languages are still strong, Aboriginal people are being convicted on criminal offences without an acceptable understanding of the language used.[90] Even among urban Aboriginals, there are 'significant differences in the use of grammar, syntax and modes of speech from "white" Australians'.[91]

It stands that Aboriginal children who don't understand the criminal justice processes are more likely to plead guilty. The SGR has called upon WA to legislate to protect this basic right.[92]

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88 Conversations with Aboriginal Legal Service of WA; at the time of writing, no data had been gathered on the application of either a Special Order or s 401.

89 Although Australia has implemented the ICCPR through the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) Sch 2, the fact that the ICCPR and other human rights instruments are an unadulterated international consensus of the minimum standards required has led to a decision that it is more appropriate to use these standards as a yardstick within the context of human rights than legislation with all its legal technicalities.

90 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 1996, *Justice Under Scrutiny,* p 188.

91 Beresford and Omaji (1996) p 76.

92 Where the child does not speak English as a first language.

The Beijing Rules,[93] recommendations of RCIADIC[94] and the SGR[95] require a child to be accompanied by an independent adult during questioning by police. There is no legislative requirement for this principle in WA,[96] where it appears only as a guideline.[97] Whilst mental and physical intimidation may not always be the intent of the interrogating police officers, there is certainly room for perceived intimidation on the part of the Aboriginal child and a tendency to want to plead guilty.

Studies have also revealed that there is a tendency among Aboriginal people not to make direct requests. Subsequent deferment to powerful authority figures can lead to them pleading guilty to the police version of events even if their own account is not in line with that of the police.[98] Research by Beresford and Omaji also indicates that Aboriginal juveniles often have a fatalistic attitude towards judicial outcomes, often expressed as 'just lock me up'.[99] This of course leaves them vulnerable to duress by police to plead guilty to offences they might not have committed.

In summary, Beresford and Omaji found a lack of cultural sensitivity in a court process, whose application of 'justice' was superficial. They summed up well.

> In most instances, the police press upon the magistrates to apply the full force of the law and lawyers press upon their clients the need for full cooperation, including pleas of guilty supplemented by appeals for leniency to magistrates. For their part, magistrates have a range of sentencing options available, few of which are linked to the underlying problems and stresses of youth. Obligatory admonishments from the bench complete the mostly meaningless and ineffective court process.[100]

An evaluation of independent witness requirements is not the focus of this article. Suffice to say that guilty pleas are extremely common and questions of admissibility of confessions are rarely raised. It is submitted that an almost total absence of adherence to procedural fairness raises questions as to the validity of at least a few convictions. To base the severity of a sentence on whether or not there have been any prior convictions where there is a

93 Rule 7.1 guarantees basic procedural safeguards, including presence of parent or guardian.

94 Recommendations 243, 244 and 245 call for the presence of a parent/guardian or, in their absence, an officer of an agency or organisation charged with the responsibility of the care and welfare of Aboriginal juveniles.

95 SGR, p 48.

96 As apart from other state jurisdictions.

97 Commissioner's Orders and Procedures Manual, Routine Order 3-2.20 and 3-2.21.

98 State Advisory Committee on Young Offenders (1991) *Pilot Priority Projects for Local Involvement in Juvenile Justice*, Government of Western Australia, p 14.

99 Beresford and Omaji (1996) p 109.

100 Beresford and Omaji (1996) p 110.

serious question as to whether those convictions adhered to procedural fairness is an abuse of human rights.[101]

Breach of Article 37(b) of CROC Article 37(b) of CROC states that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The SGR reported that the *Sentencing Act 1995* (WA) (through which offenders of s 401 are sentenced) does not recognise the principle of imprisonment/detention as a punishment of last resort.[102] This principle has also been deleted from the Code in 1995.[103] It is useful to examine Article 37(b) of CROC in several steps in order to ascertain a breach by s 401 and a Special Order.

a) No child shall be deprived of his or her liberty arbitrarily This is also provided for by Article 9(1) of ICCPR. Detention is arbitrary if it is imposed by a process contrary to 'accepted notions of justice'[104] or is 'incompatible with the dignity of the human person'.[105] Given that human rights instruments represent an international general consensus on human rights issues and that the principle is itself a standard set by a human rights instrument, it is submitted that the term 'accepted notions of justice' refers to minimum standards embodied by the ICCPR, other instruments and other studies that reference them.

- Recommendation 92 of RCIADIC, Rule 19.2 of the Beijing Rules and Article 37(b) of CROC assert that detention should be used only as a last resort.
- Article 40 of CROC calls for parties to treat a child offender in a manner which 'takes into account the child's age, the desirability of promoting the child's reintegration and the child's assuming a constructive role in society' and also requires that diversion measures be provided wherever possible

101 Beijing Rules 7, 14 and RCIADIC Recommendation 244 (presence of an independent witness, legal representation); Article 14(3) ICCPR (right to be fully informed of the nature and cause of a charge in a language that the accused understands).

102 SGR, p 48.

103 Ibid.

104 Ibid, p 530.

105 M Bossuyt (1987) *Guide to the 'Travaux Preparatories' of the International Covenant on Civil and Political Rights*, Nijhoff, p198

It is submitted that both the Special Order and s 401 are arbitrary in the sense that detention is mandatorily imposed without reference to the context in which they have offended and without consideration of whether an alternative disposition would be more effective.

Special Orders A Special Order imposes an additional penalty on prior convictions. This is contrary to the ethos of Australian common law sentencing principles, where there is an aversion to imposing a fresh penalty for an offence which has already been punished.[106]

Section 401 Section 401 can be identified as arbitrary because it is applied without reference to sound criminological understanding. A court is not required to consider any mitigating circumstances under s 401, and even if it does, is not permitted to impose either an alternative disposition, a suspended sentence[107] or anything less than 12 months.

It is submitted that whilst some Aboriginal children may receive Conditional Release Orders (CRO),[108] only a small proportion will have the necessary supportive structures in the community which would enable them to fulfil the onerous conditions, and a substantial proportion of them will end up in detention for breach of the order.

b) The detention or imprisonment of a child shall be used only as a measure of last resort The failure to use non-custodial options as often as possible was raised by the SGR.[109] Part of this failure is related to sentencing disparities between specialist Children's Courts, primarily in large cities, and rural courts comprised of non-specialist magistrates or lay Justices of the Peace.

Even supposing that CROs are an effective means of alternative disposition,[110] non-specialist magistrates and Justices of the Peace have indicated, through their decisions, that they are less likely to see the circumstances of Indigenous young people as meriting a community-based order, given the strong emphasis of the legislation on 'protection of the community' ahead of all juvenile justice sentencing principles, including detention as a last resort. The bulk of Indigenous young people appear in non-specialist country courts; thus, any sentencing dissimilarity disproportionately influences the detention rate of Indigenous children.[111] Detention is not being used as a measure of last resort.

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106 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477 per Mason CJ, Brennan, Dawson and Toohey JJ.

107 *Criminal Code* s 401(5).

108 A release of an offender on prescribed conditions: see 'Alternative Dispositions: Supervised Release And Conditional Release Orders' below.

109 SGR, p 532.

110 See 'Alternative Dispositions: Supervised Release And Conditional Release Orders' below

111 G Luke (1988) 'Gaol as a Last Resort' in M Findlay and R Hogg (eds) *Understanding Crime and Criminal Justice*, Law Book, cited in SGR, p 532.

Contravention of Articles 40.4 and 37(c) of CROC

Article 40.4 of CROC provides that: 'A variety of dispositions ... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'. Article 37(c) of CROC provides that 'every child deprived of his or her liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a persons of his or her age'. Several necessary implications can be drawn from these provisions.

Sentences should take into account the circumstances of an individual The word 'appropriate' in Article 40.4[112] suggests that this is something to be decided in the individual case. It is guided by the 'best interests of the child'[113] and not by blanket statutory rules such as in the Special Order and s401. Furthermore, all action must be consistent with promotion of the child's sense of dignity and self worth and must take into account the child's age with the aim of rehabilitation in mind.

Both the Special Order and s 401 impose a mandatory period of detention or imprisonment on an offender. Neither require a court to consider the individual circumstances of the child. The only thing the court is required to consider in relation to an offender, where an Special Order is applicable, is whether they are likely to re-offend soon after release.[114] Section 401 doesn't even require the court to consider the likelihood of re-offence. It simply imposes a mandatory penalty which can't be altered or suspended.

Given that the sentences are mandatory, it is submitted that there will be some children, particularly those affected by s 401, for whom a shorter sentence would be more appropriate.

Sentences must take into account the importance of the family unit. Beijing Rule 18.2 stresses the importance of the family unit. Neither the Special Order or s 401 allow for this consideration, given that the bulk of Indigenous young people appear in country courts.[115]

Despite recommendation 62 of RCIADIC,[116] the only custodial facilities for young offenders are in Perth. Youth in non-metropolitan regions are moved hundreds, if not thousands, of kilometres away from support. The Aboriginal Legal Service of WA stressed that despite this, further custodial facilities are not wanted but that alternatives to custody are required in non-metropolitan areas.[117]

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112 This idea is also echoed in Article 37(b) of CROC.

113 Article 3(1), CROC.

114 YOA, s 124 (d).

115 Luke (1988) cited in SGR, p 532.

116 Calls for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are separated from their families, whether by detention or otherwise.

117 SGR, p 46.

The use of adult prisons

A further breach by the Special Order and s 401 of the human rights of Aboriginal young offenders is the use of adult prisons.

Article 37(c) CROC provides '[e]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'. This is echoed by Beijing Rule 26.3 and Article 10 of the ICCPR. The ICCPR goes further and states that accused juveniles should be separated from convicted juveniles.[118]

Australia has a reservation on both Article 10(2)(3) of the ICCPR and Article 37(c) of CROC. The Commonwealth Government has stated that:

> due to Australia's demographic and geographical features it is difficult to achieve total segregation of accused and convicted prisoners and children or juvenile prisoners and adult prisoners. Furthermore the Australian Government remains convinced that it is appropriate to allow the responsible authorities discretion as to *whether it is beneficial for a child or juvenile to be imprisoned with adults.*[119]

The available empirical evidence suggests that the 'discretion' disadvantages Indigenous young people.[120] There are claims that authorities are not making this decision in a considered manner or exercising their discretion on the basis of 'whether it is beneficial for the child'.[121]

If the logistics are such that there is no room in available detention centres, should not some consideration be given to a non-custodial disposition? Five Aboriginal children died in institutional settings between May 1989 and May 1996. Of these five children, four committed suicide in adult prisons.[122] Although none of these deaths occurred in WA, they raise questions as to whether there should be a reservation on Article 10(2)(3) of the ICCPR and Article 37(c) of CROC.

Alternative Dispositions: Supervised Release and Conditional Release Orders

Given that detention of young Aboriginal offenders is simply contributing to their institutionalisation, the next viable consideration is that of alternative forms of disposition.

Article 40(4) of CROC and Rule 18.1 of the Beijing Rules advocate a 'variety of dispositions' as alternatives to institutional care. Rule 18.1 provides examples of alternatives such as community service orders, group counselling, fines etc, which have in common an appeal to the community for effective implementation and success.

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118 Article 10(2), ICCPR.

119 Australia (1994) *National Action Plan Australia*, Australian Government Publishing Service, p 8 (emphasis added).

120 SGR, p 494.

121 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) p 206.

122 Ibid, p 330.

The present legislation in WA provides alternatives to detention; however, assuming an Aboriginal young offender is given the option of such a disposition, the chances are that it will be largely ineffective and will still result in breaches of various human rights. This is because they either end up back in detention for failure to fulfil conditions or they re-offend after completion. Young Aboriginal offenders have the highest level of non-completion in every community based order.

However, it does not follow that alternatives to detention should not be implemented. This present failure is largely due to a lack of cultural appropriateness. Again, culturally appropriate solutions will only be instituted with significant Aboriginal involvement.[123]

Two forms of alternative disposition will now be discussed, these being CROs and Supervised Release Orders (SROs). Both are the major forms of alternative disposition applicable to juvenile offenders.

Conditional release orders

Under a CRO,[124] the court sets the detention sentence at the outset and then immediately releases the offender on prescribed conditions. If the conditions are breached, the balance of the original detention sentence is imposed.

The practical application of s 401 is affected by the 1997 decision of *The Police v DCJ*.[125] This case held that s 401 does not exclude the placement of a defendant on a CRO.[126] The Court noted that for it to conclude otherwise would be:

- contrary to the principles of juvenile justice set out in s 7 of the YOA;[127]
- contrary to the long accepted theory that when sentencing juvenile offenders, rehabilitation is of prime importance;[128] and
- to ignore Article 37(c) of CROC.[129]

This decision is to be welcomed in that it places the concept of detention as last resort ahead of the notion in s 125 of the YOA that 'protection

123 Aboriginal Legal Service of WA (1996a) p 267, cited at SGR, p 532.

124 YOA, ss 73–97.

125 Unreported, Children's Court of WA, 10 February 1997.

126 The sentencing of the defendant to 12 months' detention, but then a further order that s/he be released under intensive supervision.

127 A young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult (YOA, s 7(b)) nor are they to be dealt with in time frame that is inappropriate to a young person' sense of time (YOA, s 7(c)).

128 *The Police v DCJ* (unreported, Children's Court of WA, 10 February 1997, p 5.

129 Every child deprived of liberty shall have the right to maintain contact with his or her family through correspondence and visits.

of the community' should be paramount to all other principles of juvenile justice.

Supervised Release Orders

A Supervised Release Order works much like parole and a young offender becomes eligible after serving 12 months' imprisonment/detention, if subject to an SO or 6 months if subject to s 401.

Problems specific to the application of SROs to Aboriginal Young Offenders

Articles 37(c) and 40.4 of CROC imply that sentences imposed on juvenile offenders, must take into account the fact that they are not adults. It follows that sentences should not be harsher than those imposed on adult offenders; if anything, they should be more lenient.

Adults are eligible for parole after serving only one-third of their sentence if the term is 6 years or less.[130] Thus, if an adult and a juvenile are sentenced to 12 months under s 401,[131] the adult will become eligible for parole after serving 4 months while the juvenile must serve 6 months before s/he becomes eligible for an SRO.

This is an obvious breaches of CROC. Aboriginal children are much more likely to be convicted under s 401, they are punished in a harsher manner than they would be if they had been adults and, even assuming they are released on an SRO, many are likely to end up back in detention/prison because of culturally inappropriate condition requirements.

Further breaches of CROC arise in the event of a breach of parole or SRO. There is no legislative requirement for either the Parole Board or the SRO Board to consider mitigating circumstances in the event of a breach. Reports from Aboriginal Legal Service of WA indicate that, at present, the SRO Board does consider the mitigating circumstances that caused the breach, although what constitutes a 'mitigating circumstance' is likely to be qualified by the underlying philosophies of the YOA and the Code.

Hence, there are various abuses of rights here: 1) a disregard for the concept of detention as a last resort; 2) a punishment that would actually be administered in a more lenient manner if the offender was an adult; and 3) the Board, contrary to Articles 7 and 14 of CROC, is under no obligation to observe the rules of natural justice, including procedural fairness.[132] Given that Aboriginal offenders are most likely to breach SROs, they are disproportionately affected by these abuses.

130 *Sentencing Act* 1995 (WA) s 93 (1)(a), provided it is a parole term (ie a term for which a parole eligibility order applies under s 89 of the same Act).

131 s 401 also applies to adults.

132 YOA, s.163.

The Supervised Release and Community Release Orders: Why are Young Aboriginal Offenders Consistently Breaching Them?

The extent to which CROs and SROs are failing to divert young Aboriginal offenders is illustrated by the statistics released by Beresford and Omaji.[133] 94% of Aboriginal children in detention had previously breached a court order at some stage. 58% of Aboriginal children in the community had also breached court orders in the past.

Although, nowhere near as draconian as actual detention/ imprisonment, these orders fail to reflect the difficulties many Aboriginal youth face in fulfilling their terms, such as unfamiliarity with routine and discipline and a lack of family support. The reality is that Indigenous youth often don't have the structures to fall back on that would allow them to fulfil these orders. Ultimately, these children are still ending up in detention.

One respondent in an interview by Beresford and Omaji put it aptly.

> The order could be far from home, they lack shoes, no one in the house may get up before 11am. You can't expect a fourteen-year-old to get up, arrange their own bus money and get the bus. They breach their order, they are set to fail.[134]

The fact that s 401 is targeting children younger than 14 suggests that breaches of order will become commonplace. This is already well recognised by Aboriginal children in detention who are withholding their consent to these orders with the idea that they may as well get the sentence 'out of the road all at once'.[135]

This fatalistic attitude was also revealed in the research by Beresford and Omaji.[136] In their view, 'they know they won't be getting into any big trouble. They will just be put back in jail'.[137]

The SGR was advised 'of a great need to find alternative placements and programs for Aboriginal juveniles'.[138] Suggested alternatives included placement within Aboriginal communities and work on Aboriginal-owned stations.[139]

The Lake Jasper project is a widely recognised Aboriginal-run program in WA.[140] It assists Aboriginal young people with social, cultural and spiritual problems. State support has been withdrawn from this project. The WA Government told the SGR that the Division of Juvenile Justice does not

133 Beresford and Omaji (1996) p 113.

134 Ibid.

135 Conversations with the Aboriginal Legal Service of WA.

136 Beresford and Omaji (1996) p 109.

137 Ibid. p 112.

138 Aboriginal Legal Service of WA (1996a) p 374, cited in SGR, p 533.

139 SGR, p 533.

140 Ibid.

refer young people to the Lake Jasper project. Mike Hill concluded in his submission to the SGR:

> I believe the government has a political problem with the project and it's about self-determination. I don't think the government likes or wants to have Aboriginal people in autonomous areas of self-determination. It far too dangerous.[141]

It is submitted that referrals to Aboriginal-managed (and thus culturally appropriate) programs as alternatives to detention are a highly effective method of combating the entrenchment of young Aboriginal offenders in the criminal justice system.

Conclusion: Entrenchment in the Criminal Justice System

What is sadly ironic about the retributive measures under the YOA and s 401 is that the wider community will ultimately pay the price. It is widely acknowledged that detention has detrimental effects on criminal behaviour.[142]

- There is greater recidivism of offenders after institutionalisation than there is of offenders put on probation.
- Institutionalised young offenders commit more car thefts and break, enter and steals after releases than did probationers after their orders.
- Recidivists who had been institutionalised commit more malicious damage than those placed on probation.

This can be attributed not only to the influences these children are surrounded by in detention, but also to the build-up of aggression they experienced whilst detained and its expedition 'through alcohol and drug binges on release; these children are at their most dangerous at this time'.[143]

Unfortunately for these children, the irony can only be short-lived. The over-representation of Aboriginal children in detention is a trend that is unlikely to change in the future. The majority of recidivists are and will be Aboriginal. A public, ignorant of the larger issues, will continue to perceive the crime problem as being one of Aboriginality; it is more than likely that its response will be to call on politicians for tougher crime control.

Cultural isolation is a key factor in the undesirability of sentencing Aboriginal youth to custodial sentences. In *Jabaltjari v Hammersly*,[144] Justice Muirhead stated that: 'the young Aboriginal is a child who requires

141 Ibid, p 534 (Mike Hill evidence 416).

142 Beresford and Omaji (1996) p 118.

143 State Government Advisory Committee on Young Offenders (1991) p 12.

144 (1977) 15 CLR 94.

tremendous care and attention, much thought, much consideration'.[145] His Honour concluded:

> that the prospects of this boy's rehabilitation by training and discipline administered by his own people are much greater than a gaol experience which is quite barren and which serves, if anything to, weaken his ties with his own people and culture — ties which at the present time may offer him some prospects of a decent existence.[146]

The writer does not aspire to have the solution to the over-representation of young Aboriginal offenders in the criminal justice system. It is submitted, however, that Australian society must grant Aboriginal children the right to be treated in a culturally appropriate manner.

This necessarily calls for more Aboriginal involvement in the drafting of legislation and policies affecting them[147] and in the implementation of those instruments. Until this happens, it is submitted that we will continue to see the entrenchment and over-representation of Aboriginal children in the criminal justice system and the abuse of rights this entails.

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145 Ibid at 98.

146 Ibid at 101.

147 This is in line with the spirit of RCIADIC and UNDRRIP, Article 20.

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