

# Indigenous self-determination within the justice context:

# Literature review

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## Introduction

The Victorian Government has announced its commitment to self-determination as the primary driver of Aboriginal affairs policy.<sup>1</sup> More specifically, it has agreed to enter into treaty negotiations with the Aboriginal peoples of Victoria, recognise Indigenous self-government and develop options for a permanent Aboriginal representative body.<sup>2</sup> The Government has begun engagement with Victorian Aboriginal communities to identify and deliver outcomes that empower them to exercise their right to self-determination, and autonomy for self-government in matters relating to their internal and local affairs.<sup>3</sup>

The work to progress self-determination across government is being guided by the United Nations Declaration on the Rights of Indigenous Peoples, which defines self-determination as being able to freely determine one's political status and economic, social and cultural development.<sup>4</sup>

Self-determination was a foundation principle for the Victorian Aboriginal Justice Agreement (AJA), established in 2000 in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>5</sup> It will be a crucial component of the next (fourth) phase of the Victorian AJA (AJA4), to be launched in 2018, and future AJAs.

This literature review is the first part of a project to explore how the Victorian Koori community wish to build on current efforts to support self-determination in the justice context. It will to explore national and international examples of self-determination, particularly in the justice context. The literature review will help inform a potential suite of options to be proposed to the Koori community in a consultation process that will help guide Koori community perspectives of reforms they would like to see across the justice system.<sup>6</sup>

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<sup>1</sup> Aboriginal Victoria, 'Self-Determination for Aboriginal People' <<http://consult.aboriginalvictoria.vic.gov.au/Open-Meeting>>.

<sup>2</sup> Sarah Maddison, Kirsty Gover and Coel Kirkby for Aboriginal Victoria, 'Treaty Fact Sheet' (2016). <<http://consult.aboriginalvictoria.vic.gov.au/Open-Meeting>>.

<sup>3</sup> Koori Justice Unit, 'Request for Quotation – Self-determination within the justice space' (on file with authors) 4.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 3.

## I Background:

### A. Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody<sup>7</sup> was established in 1987 and published as a report to the Federal Parliament in 1991. The RCADIC investigated 99 deaths, of which nearly two thirds (63) occurred in police custody. The Final Report consisted of 5 volumes, 99 individual reports and 339 recommendations. The Royal Commission found that the high number of Aboriginal deaths in custody was due to the over-representation of Aboriginal people in custody. The RCIADIC did not find that the deaths were the result of deliberate violence or brutality by police or prison officers. However, the Commission found that there was little understanding of the duty of care owed by custodial authorities (including police) and there were many system defects in relation to exercising care.

The message of these reports is well-known and has been stated many times: Indigenous peoples come into contact with the criminal justice system at vastly disproportionate rates relative to the non-Indigenous population. Figure One shows the rate of imprisonment of Indigenous Australians per 100,000 compared with non-Indigenous Australians. Current statistics indicate that Indigenous Australians comprise 2.3 per cent of the total Australian population, yet account for 24 per cent of the total prison population and 33 per cent of the total number of persons held in police custody.<sup>8</sup> This figure becomes more dramatic when broken down by jurisdictions where Aboriginal persons make up a large proportion of the total population. For example, within the Northern Territory where Aboriginal persons represent 28 per cent of the total population, Aboriginal persons make up 83 per cent of the prison population. Table 1 below shows the breakdown of this figure among states and territories.

**Table 1: Indigenous over-representation in custody**

Indigenous persons as a percentage of total:	population	police custody incidents	prison population
New South Wales	2.1	16.5	20.4
Victoria	0.6	9.0	5.8
Queensland	3.3	31.4	27.0

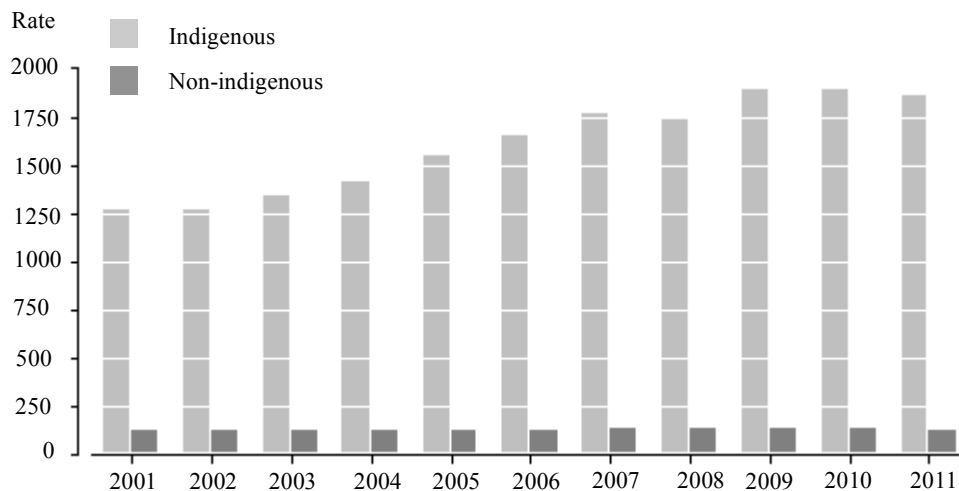
<sup>7</sup> Elliott Johnston (1991), National Report of the Royal Commission into Aboriginal Deaths in Custody, Canberra: Royal Commission into Aboriginal Deaths in Custody.

<sup>8</sup> Chris Cunneen and Juan Tauri, *Indigenous Criminology* (2016, Policy Press).

Western Australia	3.0	45.7	41.2
South Australia	1.7	45.5	20.6
Tasmania	3.5	16.7	12.6
Northern Territory	27.8	94.4	83.2
Australian Capital Territory	1.2	19.4	10.4
Australia	2.3	33.1	24.3

Source:  
Adapted from  
Lyneham et

al.<sup>9</sup>



**Figure 1: Indigenous over-representation in custody (rate per 100,000 adult population)**

Source: Australian Bureau of Statistics<sup>10</sup>

Indigenous Australians are similarly over-represented as victims of crime. In New South Wales, research data demonstrates that Indigenous women are more than twice likely to be the victim of sexual assault than non-Indigenous women and seven times more likely to suffer grievous bodily harm in an assault than non-Indigenous women.<sup>11</sup> Research data demonstrate that Indigenous women are 30 times more likely to be hospitalised for assault than non-Indigenous women in Australia.<sup>12</sup> Similarly Indigenous males are over-represented as victims of violence.<sup>13</sup> Aboriginal Australians are hence over-represented at all stages of the criminal justice processing, both within the criminal ('adult') and juvenile justice systems, both as perpetrators and as victims of crimes.

<sup>9</sup> L Beacroft, M Lyneham and M Willis, 'Twenty Years of Monitoring Since the Royal Commission into Aboriginal Deaths in Custody: An Overview by the Australian Institute of Criminology' (2012) *Australian Indigenous Law Review* 15.

<sup>10</sup> Australian Bureau of Statistics, *Prisoners in Australia 2010. Report No 4517* Australian Bureau of Statistics.

<sup>11</sup> Chris Cunneen, 'Criminalisation and Policing in Indigenous Communities', in C. Cunneen, L. Behrendt and T. Libesman (eds) *Indigenous Legal Relations in Australia* (Oxford University Press, 2009), 125.

<sup>12</sup> *Ibid.*

<sup>13</sup> Australian Institute of Criminology, *Indigenous Victims of Violence* (Canberra: Australian Institute of Criminology).

Unfortunately, twenty years on from the publication of the RCIADIC, the rate of over-representation has actually increased in most jurisdictions. The Australian Prisons Project has shown Indigenous imprisonment rates have grown significantly.<sup>14</sup> Research from the Bureau of Crime Statistics and Research ('BOCSAR') suggests that the rate of Indigenous imprisonment is rising; between 2001 and 2008 the adult Indigenous imprisonment rate rose by 37 per cent nation-wide and 48 per cent in New South Wales.<sup>15</sup> The rate of imprisonment of Indigenous women and Indigenous young people in particular has risen considerably in recent years.<sup>16</sup> The phenomenon of over-representation is particularly pronounced among Indigenous young people.<sup>17</sup>

Indigenous young people are significantly over-represented within the juvenile justice system and the rate of Indigenous juvenile offending is much higher than the non-Indigenous rate. The rate of over-representation of Indigenous young people has steadily increased since 1994 (Richards, 2011). In the year 2005/2006 there were 44 Indigenous youth per 1,000 under juvenile justice supervision compared with 3 per 1,000 for non-Indigenous youth (Australian Bureau of Statistics, 2008). Indigenous youth comprised a larger share of those in detention, and made up 56.3 per cent in 2008/2007, compared with 47.5 per cent in 2006/2007 and 45 per cent in 2005/2005.<sup>18</sup>

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<sup>14</sup> Chris Cunneen, 'Punishment: two decades of penal expansion and its effect on Indigenous Imprisonment' (2012) *Australian Indigenous Law Review* 15(1).

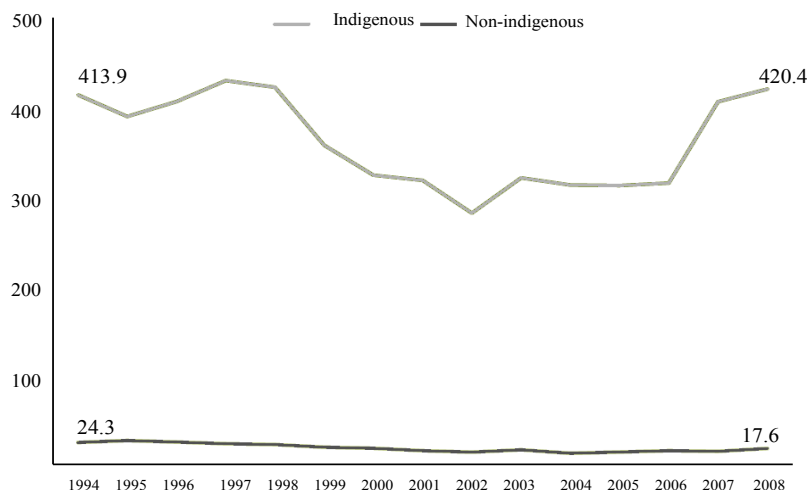
<sup>15</sup> Jaqeline Fitzgerald, 'Why are Indigenous Imprisonment Rates Rising?' NSW Bureau of Crime Statistics and Research (2009).

<sup>16</sup> E Crawford, *Aboriginal Young People and Crime* (2011, Sydney Institute of Criminology).

<sup>17</sup> Kelly Richards, 'Trends in Juvenile Detention in Australia' (2011) *Trends and Issues in Crime and Criminal Justice* May 2011. A higher proportion of juvenile than adult detainees is Indigenous. According to data from the Australian Bureau of Statistics, as at 30 June 2008, 54.7 per cent of juvenile detainees were Indigenous, compared with 24.3 per cent of adult prisoners in Australia (Australian Bureau of Statistics, 2008a).

<sup>18</sup> Crawford, above n 15.

**Figure 2: Rate of juveniles in detention per 100,000 population at 30 June, 1994-2008**



A.

(2011)

Source: Richards

Research indicates that Indigenous young people still receive more referrals to court and fewer police cautions when compared with non-Indigenous young people.<sup>19</sup> Statistics from the NSW Bureau of Crime Statistics and Research ('BOCSAR') indicate that Aboriginal young people are more likely to have their matters to go to court, more likely to plead guilty and are more likely to receive more serious and heavier penalties than non-Aboriginal youth.<sup>20</sup> Luke and Cunneen note that Indigenous young people are less likely to get bail because they are more likely to have a record of previous offending and/or failing to meet bail conditions.<sup>21</sup> The *Young People in Custody Health Survey*, found high rates of drug and alcohol use, mental illness and parental imprisonment among juveniles in custody, with some differences between the Aboriginal and non-Aboriginal populations.<sup>22</sup> Some of the indicators from the survey are shown in Table 2 below:

**Table 2: Young People in Custody Health Survey**

Indicator	Aboriginal	Non-Aboriginal
Alcohol and Substance Abuse		
One or more parents with an alcohol or drug problem	40%	26%
Drank alcohol at risky levels prior to imprisonment	81%	67%
Reported alcohol had caused problems in the last year	70%	51%
Reported committing crime to get alcohol or drugs	72%	58%
Reported being drunk at the time of offence	60%	49%
Mental health		

<sup>19</sup> Chris Cunneen, *Conflict, Politics and Crime* (2001, Allen and Unwin).

<sup>20</sup> N Taylor, *Statistics on Juvenile Detention in Australia: 1981-2005. Technical and Background Paper no. 22.* (2006, Australian Institute of Criminology).

<sup>21</sup> Garth Luke and Chris Cunneen, *Sentencing Aboriginal People in the Northern Territory: A statistical analysis* (1998, North Australian Aboriginal Legal Aid Service), 20.

<sup>22</sup> C Vechchiato et al, *NSW Young People in Custody Health Survey Full Report* (2009: justice Health and Juvenile Justice).

Reported ever self-harming	18%	15%
Parental Imprisonment		
Had a parent who had been to prison	61%	29%

Source: Adapted from Justice Health (Vecchiato et al, 2009)

The principles of the Indigenous right to self-determination runs through the pages of the RCIADIC as well as its Final Report's 339 recommendations.<sup>23</sup> Many of the recommendations either implicitly or explicitly refer to the need for negotiation with Indigenous people and organisations. Perhaps the most cohesive encapsulation of this sentiment is reflected in recommendation 188 of the RCIADIC:

That governments negotiate with appropriate Aboriginal organisations 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.<sup>24</sup>

The overarching importance of self-determination is enshrined in key documents under international law.

## **B. Implementing RCADIC: Victorian Aboriginal Justice Agreement**

The Victorian Aboriginal Justice Agreement (AJA) is an agreement between the Victorian Government and the Aboriginal community of Victoria which aims to improve justice outcomes and minimise the over-representation of Aboriginal people in the justice system by improving access to justice and through effective justice-related services and programs.

The first agreement, in 2000, was a response by the Victorian Government to a review of the implementation of the RCIADIC report. The second phase of the agreement was launched in 2006 and the third in 2013 with each phase building on the previous one:

- First phase – 2000: laid the foundation for improved justice outcomes for Aboriginal people in Victoria by developing partnerships and infrastructure and putting in place a range of new justice initiatives;<sup>25</sup>

<sup>24</sup> Elliott Johnston, above n 7, vol 5, 111.

<sup>25</sup> Aboriginal Justice Agreement: An partnership between the Victorian Government and the Koori Community (Victorian Department of Justice, 2004) <<http://assets.justice.vic.gov.au/justice/resources/802c8052-893e-428f-9546-bb42a55e6371/aja1.pdf>>



- Second phase – 2006: with a strong place-based approach, it focused on the prevention of young Aboriginal people entering the justice system, reducing reoffending, and making the justice system more responsive and inclusive of Aboriginal Victorians;<sup>26</sup> and,
- Third phase – 2013: continued the work of the previous phases but includes a long-term change strategy. This phase concludes and is to be evaluated in June 2018.<sup>27</sup>

An important aspect of the AJAs has been that they understand the need for the Aboriginal community to be centrally involved in the attempts to address these issues and that partnership with government is an effective strategy for achieving systemic change.

Other jurisdictions in Australia have also implemented Aboriginal Justice Agreements.<sup>28</sup>

Evaluations of these agreements have concluded that, generally, 'it is possible to conclude that IJAs have contributed to a more coherent government focus upon Indigenous justice issues and, in those jurisdictions where they exist, they have been associated with criminal justice agencies developing Indigenous-specific frameworks' and 'have led to development of a number of effective initiatives and programs in the justice area.' They can also 'advance principles of government accountability with independent monitoring and evaluation, with maximum Indigenous input into those processes' and 'have effectively progressed Indigenous community engagement, self-management, and ownership where they have set up effective and well-coordinated community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals.' The Victorian Aboriginal Justice Agreement was cited as the best example of these outcomes.<sup>29</sup> As the AJA enters its next phase, it continues to build upon the self-determining work of the previous plans.

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Queensland (the Queensland Aboriginal and Torres Strait Islander Justice Agreement (2000)); Victoria (the Victorian Aboriginal Justice Agreement (2000)); New South Wales (the New South Wales Aboriginal Justice Agreement (2003) and Aboriginal Justice Plan (2004)); Western Australia (the Western Australian Aboriginal Justice Agreement 2004-2009 (2004)); the ACT (the ACT Aboriginal and Torres Strait Islander Agreement (2010)) (ACT IJA)

<sup>29</sup> Fiona Alison and Chris Cunneen. *Indigenous Justice Agreements*. Indigenous Justice Clearing House. Current Initiatives Paper 4, June 2013. <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/initiative004.pdf>

## II Self-determination in international law

Self-determination is the most fundamental of all human rights and is grounded in the idea that peoples are entitled to control their own destiny.<sup>30</sup> It has been described by the United Nations Human Rights Committee as the 'essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.<sup>31</sup>

Self-determination is notoriously difficult to define and the concept defies any concrete definition.<sup>32</sup> Its meaning varies according to context and may refer to individual self-determination or collective self-determination. Indigenous sovereignty as encompassing a broad range of rights seems to underpin both concepts to enable Indigenous peoples to 'preserve their distinct identity and dignity and govern their own affairs'.<sup>33</sup> Ted Moses observes that Indigenous self-determination:

is a concept of sweeping scope that encompasses all aspects of human development and interaction, cultural, social, political and economic. It is not simply a political right as it is often characterized. And it is not exclusively an economic right. It is a complex of closely woven and inextricably related rights which are interdependent, where no one aspect is paramount over any other. It is a right that forms the basis of all other rights.<sup>34</sup>

Regardless of the chosen definition, there are common features to all definitions of self-determination: **control** and **consent**. For Indigenous communities and people, it will vary in form according to particular customs, needs and aspirations.<sup>35</sup> Perhaps most importantly, Indigenous peoples around the world have claimed their right to self-determination and have used it as a vehicle for re-imagining their relationships with the countries within which they live.

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<sup>30</sup> S James Anaya, *Indigenous Peoples in International Law (2<sup>nd</sup> ed)* (New York, Oxford University Press, 2004), 98.

<sup>31</sup> Human Rights Committee, *General Comment 12: Article 1*, 21<sup>st</sup> sess, UN Doc HRI/GEN/1/Rev.1 at 12 (1994).

<sup>32</sup> Antonio Cassese, *Self-determination of Peoples: A legal reappraisal* (Great Britain, Cambridge University Press, 1995), 41.

<sup>33</sup> Siegfried Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141, 1166-1156.

<sup>34</sup> Andrea Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism' (2003) 10 *Identities: Global Studies in Culture and Power* 241, 258-259 (reference omitted).

<sup>35</sup> Megan Davis & Hannah McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 10 (March 2005), 411.

## A. Self-determination as a concept in international law

Self-determination emerged as a concept and right in international law in the post-World War II period. Debates within the international arena during this time were concerned with restructuring Europe and developing a stable world order. Given the horrendous crimes that Europe had witnessed, discussions inevitably turned to human rights. From these discussions, a human rights framework emerged. At this time, the framework was focused on individual rights.

The right to self-determination emerged as a foundational principle of international law and is enshrined in a number of United Nations instruments including the:

- United Nations Charter;
- UN International Covenant on Civil and Political Rights ('ICCPR');
- UN International Covenant on Economic, Social and Cultural Rights ('ICESCR'); and
- Declaration on the Rights of Indigenous Peoples.

Article 1 of both the ICCPR and ICESCR states:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The States Parties to the present Covenant ... shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Self-determination was vested in 'peoples'. Thus, it was an exception to the individual-rights focus of the human rights framework since it was one of the few areas where a right vested in a group. Originally, it was linked to the decolonisation movement and the original intent was that it would apply only to 'peoples' within the territory of defeated European empires. However, other cultural and political groups, including Indigenous peoples, started to claim a right to self-determination and the principle was extended to other colonial situations.

This decolonisation process was not applied across the board. International law developed what became known as the 'blue water thesis'<sup>36</sup> that held that the decolonisation procedures applied to populations separated physically – by water – from their colonising powers. Therefore, according to international law, colonised populations that were a minority within the boundaries of independent colonial states were excluded from decolonisation procedures. By this definition, the Indigenous populations of Australia, Aotearoa New Zealand, Canada and the United States were excluded. While state sovereignty over distant or external colonial territories was eroding, it remained over the enclaves of indigenous groups within states and worked to keep them outside the realm of international law.

Indigenous peoples did not accept this attempted exclusion and continued to assert the right to self-determination. Acting on several fronts, Indigenous campaigners argued for a broadening of the definition and challenged the exclusion as being racially discriminatory. Largely because of their advocacy, international law later clarified that the principle of self-determination applies to *all* peoples including Indigenous peoples who live within the borders of nation states. The right as it relates to Indigenous peoples has been described by James Anaya, former Special Rapporteur on the rights of Indigenous peoples, as encompassing a range of collective human rights. These include non-discrimination; cultural integrity; control over land and resources; social welfare and development; and self-government.<sup>37</sup> Other elements include the right to freedom of speech, to peaceful assembly, to freedom of association, to vote and to take part in the conduct of public affairs directly or through chosen representatives.<sup>38</sup>

## **B. United Nations Declaration on the Rights of Indigenous Peoples**

The Declaration on the Rights of Indigenous Peoples (Declaration) was adopted by the United Nations General Assembly on 13 September 2007 and is the most comprehensive statement of the rights of Indigenous peoples in international law. It also provides guidance on the

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<sup>36</sup> The notion was adopted into General Assembly Resolution 1541 in Principles IV and V. See also Anaya, above n 31, 43; Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (Nellen Press, 1977) 119; Gordon Bennett, *Aboriginal Rights and International Law* (Royal Anthropological Institute of Great Britain and Ireland, 1978) 12-13.

<sup>37</sup> Anaya, above n 30, 129ff.

<sup>38</sup> *Ibid.*

responsibilities of countries (called states in international law) and the applicable standards that states should meet.

As we observed above, the human rights regime generally relates to individual rights. But in contrast, the Declaration is notable for outlining *collective* rights of Indigenous peoples, including self-determination. Some countries, including Australia, have continued to resist using the term self-determination to articulate Indigenous peoples' rights, arguing that it implies secession and challenges to territorial integrity, despite numerous attempts to dispel this misconception. This is reflected in Australia's initial opposition to the Declaration, which was based on concerns that Indigenous rights to self-determination would potentially impair the 'territorial and political integrity of a State with a system of democratic representative government.'<sup>39</sup> It was also concerned that the right to self-determination might be 'misconstrued', and that it potentially could adversely affect third parties' rights (including land rights)<sup>40</sup>. Australia subsequently gave qualified support to implementing the standards, emphasising that the Declaration is 'non-binding and does not affect existing Australian law' and that it 'cannot be used to impair Australia's territorial integrity or political unity'.<sup>41</sup>

### **Indigenous self-determination in the Declaration**

Articles 3, 4 and 5 of the Declaration relate to the right to self-determination:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

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<sup>39</sup> Robert Hill, Australian Ambassador to the United Nations cited in Sarah Joseph, 'The Howard Government's Record of Engagement with the International Human Rights System' (2008) 27 *Australian Yearbook of International Law* 45, 47-48.

<sup>40</sup> Commonwealth, *Parliamentary Debates*, Senate, 10 September 2007, 53-54 (Marise Payne).

<sup>41</sup> Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement, 3 April 2009) <<http://jennymacklin.fahcsia.gov.au/statements/2009/04>>.

These collective rights go beyond the individual, the family or the community organisation but are held by Indigenous peoples. The term 'Indigenous peoples' is not defined by the Declaration but scope of rights contained in the Declaration is directed at self-identified decision making entities which govern through their own institutions to achieve their political, economic, social, and cultural goals (articles 18 & 19). The Declaration also outlines the responsibilities of countries/states to engage with Indigenous peoples to ensure that Indigenous peoples can attain those rights.

The post-war decolonisation movement (that only applied to the whole people of a colony) that we described above led to concepts of *internal self-determination* and *external self-determination*:

- ***Internal self-determination*** is the right of a people to freely choose
- ***External self-determination*** is the right of a people to be free from external domination, which during the decolonisation era, also meant the right to declare independence.

It is apparent that the Declaration envisages the right to internal self-determination for Indigenous peoples who share territory with the nation state. Indigenous peoples are entitled to govern themselves and make decisions related to their internal affairs and the state is required to negotiate with Indigenous political, legal, social and cultural institutions (arts 18, 19). However, it is argued<sup>42</sup> that article 46 excludes the right to external self-determination:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The argument that the right to external self-determination as it emerged during the decolonisation era cannot be applied to Indigenous peoples within the boundaries of the nation state is self-evident. Secession or the right to declare independence are not the ambitions of most Indigenous peoples. Instead they seek internal autonomy and the right to enter into negotiations and agreements with local, state and federal governments as distinct, self-governing peoples. In this way, what may be sought is a colonial or settler external self-determination related to the place of autonomous Indigenous peoples within the nation state. This might also be described as

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<sup>42</sup> Dylan Lino, 'The politics of inclusion: The right of self-determination, statutory bills of rights and Indigenous peoples' (2010) 34 Melbourne University Law Review 839, 848. References excluded.

*relational self-determination* that conceives the Indigenous-state relationship as one of non-domination, where Indigenous peoples are not unilaterally controlled by the state.<sup>43</sup>

### Collective rights of Indigenous peoples included in the Declaration

Some of the particular collective rights of Indigenous peoples and of country (State) responsibilities associated with the right to self-determination are listed below:

<b>Rights of Indigenous peoples</b>	
Article 3	The right to self-determination, where Indigenous peoples have the right to determine their political status and pursue their economic, social and cultural development.
Article 4	The right to autonomy or self-government in matters relating to their internal and local affairs.
Article 5	The right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. The right to participate fully in the political, economic, social and economic life of the country.
Article 7	The right to live in freedom, peace and security as distinct peoples.
Article 8	The right to be free from forced assimilation and from destruction of culture.
Article 9	The right to be an Indigenous community or nation in accordance with the community's or nation's traditions and customs.
Article 10	The right to not be forcibly removed from their lands or territories. Relocation should only take place with free, prior and informed consent and after agreement on compensation and the possibility of return.
Article 11	The right to practise and revitalise their cultural traditions and customs. This includes the right to protect past, present and future manifestations.
Article 12	The right to practise, develop and teach their spiritual and religious traditions, customs and ceremonies; and the right to use and protect religious and cultural sites and ceremonial objects.
Article 13	The right to revitalise, use, develop and teach their histories, languages, oral traditions, philosophies, writing systems and literatures.
Article 14	The right to establish and control their own educational systems and to provide culturally appropriate education.
Article 18	The right to participate in decision-making relating to matters that affect their rights through representatives that they have chosen. The right to maintain and develop their own decision-making institutions.
Article 20	The right to maintain and develop their political, economic and social systems. The right to enjoy their traditional and other economic activities and means of subsistence and development.
Article 21	The right to improve their economic and social conditions, including in education, employment, vocational training, housing, sanitation, health and social security.
Article 22	The right to determine and develop priorities for exercising their right to development. The right to develop health, housing and other economic and social programs and administer them (as far as possible) through their own institutions.

<sup>43</sup> Ibid 854.



Article 23	The right to maintain and strengthen their distinctive spiritual relationship with their traditional Country, or lands that they occupy and use.
Articles 24, 28, 29 and 32	The right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, including the right to develop priorities and strategies for use of that land. The right to conserve and protect the environment and the productive capacity of their lands, territories and resources. The right to restitution for or compensation for such lands that have been taken, occupied, used or damaged without their free, prior and informed consent.
Article 30	The right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and their sciences, technologies and cultures. The right to maintain, control, protect and develop their intellectual property.
Article 33	The right to determine their own identity and membership according to their customs and traditions. The right to determine the structure of their institutions and membership according to their own procedures.
Article 35	The right to determine the responsibility of individuals to their communities.
Article 39	The right to access financial and technical assistance to enjoy the rights included within the Declaration.

<b>Responsibilities of countries (States) to support Indigenous peoples</b>	
Article 19	The responsibility to consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions so as to obtain their free, prior and informed consent before adopting legislative or administrative measures that affect them.
Article 32	The responsibility to consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions so as to obtain their free, prior and informed consent before approving any project that affects Indigenous lands, territories or resources.
Article 38	The responsibility to take appropriate measures, in consultation and cooperation with Indigenous peoples, to achieve the purposes of the Declaration.
Articles 8, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 32	The responsibility to protect specific rights included in the Declaration and provide redress or compensation where necessary. These include rights related to: <ul style="list-style-type: none"> <li>• Integrity as distinct peoples, cultural values and protection from assimilation or destruction of culture;</li> <li>• Indigenous peoples' cultural, intellectual, religious and spiritual property;</li> <li>• Repatriation of ceremonial objects and human remains;</li> <li>• Indigenous peoples' histories, languages, oral traditions, philosophies etc;</li> <li>• Culturally appropriate education, including in language, where possible;</li> <li>• Dignity and diversity of cultures, traditions, histories, and aspirations;</li> <li>• Culturally diverse media;</li> <li>• Protection from economic exploitation, especially for children;</li> <li>• Compensation for dispossession from Country;</li> <li>• Improved economic and social conditions, with emphasis on the needs of Indigenous elders, women, youth, children and persons with disabilities;</li> <li>• Protection against violence and discrimination;</li> <li>• Control lands, territories and resources;</li> <li>• Fair and just redress for adverse environmental, economic, social, cultural or spiritual impact on Indigenous lands, territories or resources.</li> </ul>



### C. Indigenous justice systems and international law

Aboriginal and Torres Strait Islander people frequently assert that before invasion their peoples were self-governing and exercised sovereignty over their lands and water; and that post invasion, they have not ceded their lands or sovereignty. As a consequence, their communities, like Indigenous peoples throughout the world, retain their 'distinctiveness as political communities', claim 'an inherent sovereignty that is independent of the settler state' and consider that a 'separate autonomous status [is] all-pervasive and [lies] beneath nearly all their claims.'<sup>44</sup>

However, while Indigenous peoples may know themselves to be distinct from the settler population, the extent to which, and the manner in which nation states acknowledge the status of Indigenous political collectives within their borders differs. For example, within the legal and political institutions of the United States, it is unambiguously accepted that Indigenous peoples (tribes or Native nations) are sovereign with the inherent right to self-government but, according to US law, are domestic dependent nations. By contrast, Australia never has acknowledged – either by treaty or through its Constitution, legislation or case law – the status of Indigenous peoples as 'peoples' as understood in international law.

Despite the different approaches of the domestic law of nation states, international law upholds the rights of Indigenous peoples to identify as distinct peoples with the right of self-determination, which is constituted by a number of collective rights. Crucially the right to collective self-determination necessarily implies laws, legal systems and mechanisms by which peoples may assert a separate, collective identity to that of the nation state; have processes to make and implement decisions and set future direction. In order to fulfil these roles, agreed values, norms and rules are needed to create the institutions and mechanisms through which a collective can act.

Therefore, pursuant to the principle of self-determination, the Declaration is explicit in acknowledging the rights of Indigenous peoples to identify and live according to their own law (arts 9, 11, 18, 33); to maintain and build their political systems to make law (arts 3, 5, 20); to maintain their legal institutions to administer law (art 5, 40); and to resolve disputes with the

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<sup>44</sup> P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, 2004) 62-63

nation state through institutions that accommodate the law and legal systems of the people(s) concerned (art 40). Specific species of law are also explicitly acknowledged in the Declaration such as Indigenous intellectual property (art 31).

The existence of law, its practice and institutions that can administer law for the Indigenous peoples concerned also is necessarily implied through the specific collective rights protected in the Declaration. For example, the right to live as distinct peoples (art 7); freely engage in all traditional and economic activities (art 20); own, use, develop and control the lands they owned, occupied or used (art 26); determine the responsibilities of individuals to their communities (art 35); and right to maintain connections with their members across borders (art 36) each require common understandings by the collective of what the rights entail. Even the obligation of nation states to ensure that they obtain the free, prior and informed consent of the Indigenous collective affected by any decision of the nation state (art 19) requires the existence of systems and laws according to which collective consent can be defined and granted.

Collective decision-making is emphasised throughout the Declaration, which relies upon the rules, norms, values, law – that is, the normative systems – that Crawford defines as *Aboriginal public law*.<sup>45</sup> Aboriginal public law consists of the ‘body of rules, traditions or understandings’ that define the Indigenous polity, and provide the authority to members of that community to act as a political collective. In other words, ‘public law is what defines collective action.’<sup>46</sup> He clarifies that it has its own legitimacy and its own (Australian) domain.’ ‘It is not delegated by the Constitution, still less is it a subdivision of the Public Service Acts of the Commonwealth or the States.’<sup>47</sup>

As the former Special Rapporteur on Indigenous Rights explains, any diminishment in the authority or altering of de facto or de jure indigenous institutions of autonomous governance should not occur unless pursuant to the wished of the affected group.<sup>48</sup> To the contrary, nation states have an obligation to uphold the existence and free development of indigenous institutions, including legal institutions. However, the Australian Government made it clear at the time of its

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<sup>45</sup> James Crawford, ‘The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal’ (1989) 63 *The Australian Law Journal* 392, 392.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Anaya, above n 30, 129ff.

announcement that it would abide by the Declaration that its interpretation of self-determination as it relates to political participation was for Indigenous people to be able to participate 'fully in Australia's democracy'.<sup>49</sup>

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<sup>49</sup> Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Statement, 3 April 2009) <<http://jennymacklin.fahcsia.gov.au/statements/2009/04>>.

### III Impact of Indigenous self-determination: The evidence

Self-determination is a right of peoples, including Indigenous peoples, which is acknowledged in international law. Further, countries, such as Australia have an obligation to facilitate that right to self-determination by engaging with Indigenous peoples through their own political and legal institutions. Not only is self-determination a right of Indigenous communities, but there is robust and consistent Australian and international evidence that **self-determination** and **self-governance** are critical to Indigenous communities achieving their economic, social and cultural goals.

#### A. North American and Australian evidence

Almost 30 years ago, the Harvard Project on American Indian Economic Development (Harvard Project) and later, the Native Nations Institute at the University of Arizona, commenced research exploring the factors impacting upon the prosperity, or lack of prosperity, of Indigenous communities in North America. A core finding of their research is that, in general, Indigenous communities progress towards their self-defined economic and community development goals when they exercise genuine decision-making control over their internal affairs and resources (described in Australia as exercising 'political jurisdiction');<sup>50</sup> have mechanisms of self-governance such that things get done predictably and reliably; are accountable to internal and external stakeholders; have governance structures and mechanisms that have cultural legitimacy within the community they serve; base their actions on long-term systemic strategies; and have community-spirited leadership.<sup>51</sup>

Despite different legal, political, constitutional and social histories and different contemporary challenges, researchers in Australia found the same factors to be relevant. For example, the Indigenous Community Governance Project (ICG Project)<sup>52</sup> concluded that 'when Indigenous

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<sup>50</sup> Michael Dodson and Diane Smith, 'Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities' (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003) 10.

<sup>51</sup> For an overview of the Harvard Project's research findings, see Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) especially chapter 1.

<sup>52</sup> The Indigenous Community Governance Project ('ICGP') was a partnership between the Centre for Aboriginal Economic Policy Research ('CAEPR') and Reconciliation Australia, which undertook research over five years on Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia. The ICGP was established to understand the effectiveness of different forms of governance and their consequences for Indigenous policy, service delivery, self-determination and socioeconomic development,

governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience'.<sup>53</sup>

The research findings demonstrate that *stable political governance* has a direct, positive impact on Indigenous communities and that the corollary, poor governance undermines the building of sustainable and workable Indigenous economies.<sup>54</sup> This was so in North America whether the tribes had large resources or a lack of resources. In fact, capable and culturally legitimate governance is a more crucial factor than availability of natural resources, market proximity or educational attainment of the community, although these factors are beneficial. Importantly, Indigenous self-determination is not only a necessary precursor for economic prosperity but contributes to effective service delivery in health, education, forestry, natural resource management etc.<sup>55</sup>

The North American and Australian research similarly identified that 'Indigenous skills, abilities, knowledge and leadership are mobilised and most effectively exercised when initiatives are

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and designed to 'explore the diverse conditions and attributes of Australian Indigenous community governance arrangements, elucidate culturally based foundations of Indigenous governance and extricate broad universal principles of what constitutes effective, legitimate Indigenous governance, identifying transferable lessons to contribute to policy formulation': Diane Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 29/2005, Centre for Aboriginal Economic Policy Research, Australian National University, 2005), 1-4. For the ICGP research findings, see Janet Hunt et al, *Contested Governance: Culture, power and institutions in Indigenous Australia*, (Research Monograph No 29, Centre for Aboriginal Economic Policy Research, Australian National University, 2008) (*Contested Governance*); Janet Hunt and Diane Smith, 'Indigenous Community Governance Project: Year Two Research Findings' (Working Paper No 36/2007, Centre for Aboriginal Economic Policy Research, Australian National University, 2007) ('ICGP: Year Two Findings'); Janet Hunt and Diane Smith, 'Building Indigenous community governance in Australia: Preliminary research findings' (Working Paper No 31/2006, Centre for Aboriginal Economic Policy Research, Australian National University, 2006) ('ICGP: Preliminary Findings'). See also Janet Hunt and Diane Smith, 'Understanding and Engaging with Indigenous Governance: – Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30.

<sup>53</sup> Hunt and Smith, 'Understanding and Engaging with Indigenous Governance', above n 52. See also Hunt and Smith, 'ICGP: Preliminary Findings' above n 52; Hunt and Smith, 'ICGP: Year Two Findings', above n 52; Hunt et al, *Contested Governance*, above, n 52.

<sup>54</sup> Stephen Cornell and Joseph P Kalt, 'Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations' in Stephen Cornell and Joseph P Kalt (eds), *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (American Indian Studies Centre, University of California, 1992).

<sup>55</sup> Alyce S Adams, Andrew J Lee and Michael Lipsky, 'Governmental Services and Programs: Meeting Citizens' Needs' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 223.

Indigenous-driven, towards Indigenous goals'.<sup>56</sup> Where Indigenous people are driving the agenda and making decisions about future direction, capacity can be productively released and mobilised,<sup>57</sup> and greater risk and accountability fosters improved decision making based on previous experience.<sup>58</sup>

In summary, Australian and North American evidence demonstrates that communities which 'succeed' according to their own definitions, commonly demonstrate five features:

1. **Real decision making authority:** The group making the decisions has the capacity to set the direction and priorities and to determine the goals about the issues that affect the community.
2. **Effective implementation bodies and mechanisms:** There are effective structures in place that are able to implement decisions and to make sure that things get done.
3. **Cultural match:** The approaches taken by the decision-making group and the decisions that are made align with the culture, norms and values of the community.
4. **Sustainable strategic planning:** The decision-making group is planning for the long-term.
5. **Community spirited leadership:** The decision-making group puts the community ahead of other interests.

## B. Self-determination and Indigenous justice systems

Many agencies and individuals are part of an Indigenous justice system: courts, law enforcement, and public safety offices, law offices, jails, and the associated personnel: judges, prosecutors, defence lawyers, peacemakers, mediators, Elders, clerks, police officers, probation officers, detention officers, and victim and witness advocates.<sup>59</sup> While all contribute to the capacity of a community to manage its own justice system, much of the research conducted by the Harvard Project and NNI in relation to justice systems has been to evaluate the impact of tribal court systems on communities.

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<sup>56</sup> Hunt and Smith, 'ICGP: Year Two Findings', above n 52, 34; Cornell and Kalt, Stephen Cornell and Joseph P Kalt, 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (The University of Arizona Press, 2007) 3, 19-22. (Two Approaches)

<sup>57</sup> Hunt and Smith, 'ICGP: Year Two Findings', above n 52, 29-30.

<sup>58</sup> Cornell and Kalt, Two Approaches, above n 56, 21.

<sup>59</sup> Joseph Thomas Flies-Away, Carrie Garrow and Miriam Jorgensen, 'Native Nation Courts: Key Players in Nation Rebuilding' in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007) 115, 116.

This research found that tribes that were able to establish effective tribal courts were able to more effectively assert and defend their sovereignty, support economic growth, enhance public safety, promote community development and uphold the community constitution.<sup>60</sup> In fact, the existence of effective dispute resolutions was found to ‘permeate and support all aspects of daily life, reinforcing community cohesion, community health and community lifeways.’<sup>61</sup> In part, this is hypothesised to be due to the nature of the systems of Indigenous justice that are focused on restorative and reparative justice, which have a healing effect in and of themselves.<sup>62</sup> But increased community health was also considered to be due to the community’s and individuals’ increase in self-determination and capacity to tackle other problems.<sup>63</sup>

### **C. Self-determination and its impact on criminal offending**

The evidence is clear that self-determination has a positive impact on community well-being and on the capacity of communities to achieve their aspirations. Perhaps the corollary is also true and there may be a connection between the lack of autonomy or self-determination and community distress. Research that we have conducted at Jumbunna IHL suggests (but does not prove at this stage; more research is required) that there is some correlation between self-determination and crime rates in Aboriginal communities.

In an ARC funded Jumbunna IHL study (Jumbunna study), research participants were forthright in linking external control to the circumstances of distress in their communities that they consider contributes to high crime rates. The study’s objective was to explore factors – positive and negative – that impact on crime rates on six towns in New South Wales. We hoped to better understand the broad social, cultural and economic factors that might affect rates of crime in six Aboriginal communities in NSW.<sup>64</sup>

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<sup>60</sup> Ibid 117-121.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 121.

<sup>64</sup> For an overview of the study, see Larissa Behrendt, Amanda Porter and Alison Vivian, ‘Factors Affecting High and Low Crime Rates in Aboriginal Communities’ in J. F. Donnermeyer (ed) *The International Handbook of Rural Criminology* (Routledge, 2015) 33.

Case studies were conducted in three pairs of communities with proportionately large Aboriginal populations with similar demographic conditions but with contrasting crime rates, namely Wilcannia and Menindee, Bourke and Lightning Ridge, and Kempsey and Gunnedah.<sup>65</sup> However, it is also important to note that, while the six towns are markedly different in character, they nonetheless share many similarities, especially in relation to the socioeconomic circumstances for the Aboriginal populations, where poverty and unemployment are rife. Unemployment in the six towns is well above the national average and populations and average household income, significantly lower. Educational attainment in each town is also lower than the national norm. Therefore, caution is needed in analysing the weight to be given to different factors.

Our methodology was designed to canvass the views of community members in conversations where they directed the discussion, rather than to lead research participants to particular topics about crime.<sup>66</sup> Conversations were wide-ranging and diverse. When asked about crime as a phenomenon in his or her local community, a variety of complex and interrelated social, cultural, economic issues were raised: extremely difficult socioeconomic circumstances of the towns experiencing rural decline and low income/poverty; dangerous levels of alcohol consumption; unemployment and lack of meaningful activity; compounding impact of the inability to pay fines; over-policing and underreporting of crime; limited sentencing options and limited access to alternative regimes; and poor quality housing and overcrowding.

In addition, research participants raised several issues that do not commonly appear in the academic literature about crime and criminal justice issues. They described their communities—positively and negatively—as intimately shaped by their local histories, impacting upon relationships within the local Aboriginal community, between the Aboriginal and non-Indigenous communities, and between the Aboriginal community and the criminal justice system and other service providers. Education and policing were highlighted. Interviewees spoke about racism,

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<sup>65</sup> The first two studies – Wilcannia/Menindee, and Bourke/Lightning Ridge were pilot studies funded by a UTS Partnership Grant and Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') Research Grant respectively. The continuation of the research in was supported by a 2008 Australian Research Council Linkage grant in partnership with the NSW Bureau of Crime Statistics and Research and the NSW Department of Attorney-General and Justice.

<sup>66</sup> For a brief overview of the methodology, see Alison Vivian, Amanda Porter and Larissa Behrendt, 'Reflections on the Rates of Crime Project', (2017) 5 *Ngiya: Talk the Law* 75.



segregation and inequality; inter-generational trauma, loss, grief and anger; leadership, decision-making authority and autonomy; family conflict and community divisions; stereotyping and expectation; hope and ambition; resilience and resourcefulness; relations with state entities and 'remote control' syndrome. For many interviewees, the links between such issues and crime were self-evident; potentially causal.

It should be remembered that interviewees were asked for their opinions and were not led to any particular themes, which led to some surprising results – not so much in terms of content but certainly in terms of emphasis. It should also be remembered that our central question was 'Why does your community have high/low crime rates?' Governance, autonomy, self-determination, and self-government were not issues immediately on the agenda. While it is not possible to state that there is a proven correlation between Aboriginal self-determination and the crime rates from the study, it would certainly be valid to conclude that the results were strongly indicative of such a correlation and a subject worthy of further research.

### **Jumbunna IHL's research findings about crime and self-determination**

Community organisation and communities' capacity to determine their own destiny may not immediately spring to mind as a factor contributing to the prevalence of crime rates, but it was a prominent theme in our discussions with residents of the six towns. In reflecting on why their communities had relatively low or high crime rates, we were struck by the extent to which research participants stressed local decision-making, self-determination and autonomy as positively or negatively shaping the nature of 'crime'. They may not have explicitly used the terminology of self-determination, but people describing whether their community had the capacity to respond to their local problems was a striking and common story.

Research participants in towns with low crime rates frequently spoke of 'community control' or community self-reliance as a positive contributor to 'success' or relative harmony, both as preventing crime and as enabling the community to respond to crime and other community issues as they arise. By contrast, the prevalence of external control, undermining of community decision-making and indifference to community-based solutions were frequently highlighted as destructive

and contributing to malaise and distress in the towns with high crime rates. Research participants vividly described a sense of paternalism and helplessness that was palpable.

Research participants described the impact of community decision-making, both positively and negatively, on (1) community capacity and resourcefulness on the one hand, and (2) the undermining of community-led, locally based responses to community problems on the other. Similarly, research participants also commented on the impact of effective community decision-making, or its lack, on 'good' leadership.

Viewing these conversations through the lens of the Australian and North American Indigenous nation building/self-determination research, the research participants' observations are not surprising. While on the one hand the Indigenous nation (re)building approach described above is the approach of Indigenous communities that are building institutional capacity to exercise rights of self-determination successfully and strategically.<sup>67</sup> The nation building approach can be contrasted with the *standard approach* to Indigenous governance, which has tended to prevail in the Australia and elsewhere.

The antithesis of the nation-building approach, the standard approach is characterised by, among other things, governments or organisations other than the Indigenous communities setting the community development agenda,<sup>68</sup> which was a common complaint from research participants. In short, the result of the standard approach is disillusionment and dependence where community leaders and administrators spend their valuable time in the 'urgent search for more federal and other resources',<sup>69</sup> leaving little time for strategic planning based on community aspirations and goals. These observations parallel the disenchantment expressed by research participants with overpowering external control, particularly in the towns with high crime rates; described as

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<sup>67</sup> Cornell and Kalt, Two Approaches, above n 56, 19.

<sup>68</sup> Ibid 8.

<sup>69</sup> Ibid 9.

communities run by ‘remote control’.<sup>70</sup> Indeed, the description by residents of life in these towns suggests that there is less a ‘development agenda’, than reactive response to crisis.

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<sup>70</sup> The expression ‘remote control communities’ is a colloquialism in rural New South Wales. In policy discourse the first use of the term can be traced to Drewery, L. (2009) *Remote Control Communities: Final Report*, Central Darling Shire, March 2009, 9.



## IV Indigenous self-determination and government policy

Numerous government reports and studies have emphasised the need for an urgent new approach to Indigenous policy development.<sup>71</sup> The unambiguous messages from the research described above are that self-determination is a critical prerequisite for Indigenous socioeconomic and community wellbeing, and that Indigenous governance is the fundamental driver of self-determination. Therefore, Indigenous nation building to may be the urgent solution that is sought, and may provide a mechanism to achieve the 'bottom up' solutions devised with Indigenous people and Indigenous communities that are repeatedly stressed in reports and studies as necessary for socioeconomic and community well-being. The evidence suggests that, in order to fully participate in developing locally relevant policy and programs, Indigenous peoples need to be able to organise so as to determine collective policy positions and strategy on various issues.

Indigenous communities' efforts to develop effective and culturally legitimate community governance does not occur in isolation and government policy, programs and practices have the capacity to either facilitate or undermine effective Indigenous governance and the achievement of community or nation aspirations. In fact, ANU's Indigenous Community Governance Project claimed that at least half the so-called 'Indigenous governance problem' results from governments' own political and bureaucratic incapacity and in particular in governments' inability to formulate and implement enabling policy and integrated financial frameworks.<sup>72</sup> Hunt and Smith argue that the 'entrenched failure of the governance of governments ... constitutes the major impediment to Indigenous people developing and sustaining effective governance arrangements.'<sup>73</sup>

Rapidly changing national policy and funding environments and poor coordination and collaboration between government departments within and across jurisdictions place a potentially unsustainable burden on Indigenous organisations.<sup>74</sup> One specific area in which governments undermine Indigenous governance is through current funding models and reporting requirements.

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<sup>71</sup> Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2016* (Commonwealth of Australia, 2016); Australian Government. 2010. *Strategic Review of Indigenous Expenditure: Report to the Australian Government*. Cth of Australia; Altman, Jon, Nicholas Biddle and Boyd Hunter. 2008. 'The Challenge of 'Closing the Gaps' in Indigenous Socioeconomic Outcomes.' CAEPR Topical Issue No 8/2008, College of Arts & Social Sciences. Canberra: Australian National University.

<sup>72</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 48; Hunt and Smith, ICGP Year Two Findings, above n 52, 29.

<sup>73</sup> Smith and Hunt 'Understanding and engaging with Indigenous governance', above n 52, 31.

<sup>74</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 48.

The need for pooled, streamlined funding to Indigenous communities has been recommended in countless government reviews and inquiries but drip feed funding on a program-by-program basis continues.<sup>75</sup> Uncoordinated and overly stringent compliance requirements disable better governance when organisations spend significant amounts of limited staff time on financial accountability and reporting requirements, which detract from their other governance work.<sup>76</sup> Indigenous organisations need considerable management and financial skill to consolidate funds from disparate programs that have changing guidelines and uncertain implementation procedures,<sup>77</sup> balancing funded core functions and unfunded constituency expectations, further complicated by cost shifting practices of governments.<sup>78</sup>

Day-to-day compliance issues can dominate leaving important strategic governance and functional responsibilities neglected. Yet the evidence demonstrates that it is those organisations that ignore or are unable to give attention to governance development which experience ‘greater internal conflict, dominating leadership, poor outcomes, difficulty in delivering services, and problems with internal and external accountability.’<sup>79</sup> This, in turn, undermines an organisation’s internal legitimacy and accountability, adversely impacting on its overall effectiveness and creates a negative feedback loop operating between these internal and external dimensions of effectiveness.<sup>80</sup>

The clear message is that effective Indigenous community governance requires effective government governance.<sup>81</sup>

Government policy is relevant in two regards:

1. Government policy, programs and practices to facilitate Indigenous community input into social services policy; and
2. Government policy, programs and practices to facilitate Indigenous community governance.

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<sup>75</sup> Cornell and Kalt, Two Approaches, above n 56, 14-15.

<sup>76</sup> Ibid.

<sup>77</sup> Hunt and Smith, ICGP Year Two Findings, above n 52, 42.

<sup>78</sup> Ibid 6.

<sup>79</sup> Ibid 17.

<sup>80</sup> Ibid 61.

<sup>81</sup> Janet Hunt, ‘Between a rock and a hard place: self-determination, mainstreaming and Indigenous community governance’ in Janet Hunt et al (eds) *Contested Governance: Culture, power and institutions in Indigenous Australia* (ANU Press, 2008) 27, 41-42.

## **A. Self-determination and policy development: Transparency and accountability**

There is strong evidence linking Indigenous self-determination to improved outcomes for Indigenous communities. There are clear reasons why Indigenous involvement in policy-making, program design and service delivery provide improved outcomes:

- Indigenous people understand the issues of concern and priority in their local areas and regions;
- Involvement of Indigenous people in policy, services and programs ensures ‘buy-in’ from the local community and ensures culturally appropriate solutions;
- Inclusion of Indigenous people in policy development, service delivery and programs builds community capacity and social capital;
- Involvement of Indigenous people is more likely to create culturally sensitive spaces and improve the cultural competency of non-Indigenous staff improving Indigenous engagement;
- Indigenous people are able to use their networks informally to engage people in programs and services who may not otherwise participate; and
- Indigenous people can use their community networks to work across agencies in communities.

## **B. Government policy directed at facilitating Indigenous self-determination**

Given Indigenous communities’ and organisations’ continuing dependence on at least some level of federal funding, mainstream governments have a role in Indigenous nation building, especially in transitioning from decision-maker to advisor and facilitator.<sup>82</sup> A key hurdle for government policy makers is that the relevant issues are complicated and conceptually challenging, and do not lend themselves to straightforward or immediate solutions. A ‘one size fits all’ policy approach has been repeatedly demonstrated to be unworkable and unsustainable and likely to produce sub-optimal outcomes.<sup>83</sup> By contrast, the evidence demonstrates that strengthening Indigenous governance capacity relies on governments devolving power and authority,<sup>84</sup> and facilitating

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<sup>82</sup> Cornell and Kalt, Two Approaches, above n 56, 27.

<sup>83</sup> Hunt and Smith, ICGP Year Two Findings, above n 52, 43.

<sup>84</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 55.

Indigenous decision-making and control over their core institutions, goals and identity.<sup>85</sup> Flexibility is fundamental to developing culturally legitimate processes and institutions.

The research findings suggest a critical need for top-level support from government and provision of integrated funding mechanisms, backed by bureaucratic leadership and collaboration to generate a positive enabling environment.<sup>86</sup> Cornell and Kalt prescribe the following roles for mainstream governments – instituting a programmatic focus on institutional capacity building, shifting from programs and project funding to block grants, developing new program evaluation criteria, recognising that sovereignty involves the freedom to make mistakes, to be accountable and to learn.<sup>87</sup>

Recommendations emerging from the Australian and North American research in relation to the role of non-Indigenous governments in fostering effective Indigenous governance include that:<sup>88</sup>

- Policy frameworks and capacity development strategies for building Indigenous governance should foster structures and decision-making processes that reflect Indigenous views of contemporary relationships and culturally legitimate forms of authority, *combined with* a practical management and service capacity to deliver outcomes. Governments should avoid the temptation to focus on mainstream valued capabilities alone;<sup>89</sup>
- Governments should facilitate and provide the time for Indigenous nations, communities and organisations to undertake their own processes of developing governing institutions of their own design, and avoid the temptation to take over the process.<sup>90</sup> Indigenous governance capacity is greatly enhanced when Indigenous people create their own rules, policies, guidelines, procedures, codes, and design the local mechanisms to enforce those rules and hold their own leaders accountable;<sup>91</sup>
- It can be misguided for governments to start by imposing community governance structures or mechanisms that may diverge from locally preferred models, which are frequently rejected by Indigenous community members. Previous external intervention has been demonstrated to diminish the legitimacy of organisations and leaders, and reduce their effectiveness and undermine objectives;<sup>92</sup>

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<sup>85</sup> Ibid

<sup>86</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 52.

<sup>87</sup> Cornell and Kalt, Two Approaches, above n 56, 28.

<sup>88</sup> See in particular, Cornell and Kalt, Two Approaches, above, n 56; Hunt and Smith, 'Understanding and engaging with Indigenous governance', above, n 52; Hunt et al, *Contested Governance*, above n 52; Hunt and Smith, ICGP Year Two Findings, above n 2, 7, 13, 23, 28, 34-35, 42-43.

<sup>89</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 52.

<sup>90</sup> Ibid.

<sup>91</sup> Hunt and Smith, ICGP Year Two Findings, above, n 52, 34.

<sup>92</sup> Hunt and Smith, ICGP Preliminary Findings, above n 52, 18.

- Building capable governance is a developmental process where change is incremental and requires a long-term commitment.<sup>93</sup> Indigenous people need time to assess how well their governance initiatives are working, and the power to adapt or completely change arrangements when they are found to be insufficient to the task at hand<sup>94</sup>;
- Contemporary Indigenous governance arrangements need support to evolve to meet internal and external changing conditions and challenges;<sup>95</sup> and
- Stable and long term policy and funding environments, and good coordination and collaboration between government departments support the effectiveness of Indigenous governing systems.<sup>96</sup>

## C. Transparency, accountability and oversight case studies

### 1. Aboriginal and Torres Strait Islander Commission

In 1990, the Hawke Government established a policy of ‘self-determination’. A key aspect of this was the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC), a national representative structure that was attached to a government bureaucracy.

ATSIC was given several wide-ranging legislative functions. Set out in section 7 of the *Aboriginal and Torres Strait Islander Act 1989* (Cth) these included:

- (1) The Commission has the following functions:
  - (a) to formulate and implement programs for Aboriginal persons and Torres Strait Islanders;
  - (b) to monitor the effectiveness of programs for Aboriginal persons and Torres Strait Islanders, including programs conducted by bodies other than the Commission;

Although these powers were underutilized,<sup>97</sup> they set up a framework whereby ATSIC had the ability to set the policy agenda and priorities and then monitor their implementation.

The Howard Government abolished the agency in 2005. As a result of its abolition, a specious argument developed in the discourse around Indigenous disadvantage that asserted that ‘self-determination has failed’. This claim emerged in the wake of the disestablishment of the national representative structure in the Aboriginal and Torres Strait Islander Commission (ATSIC). The

<sup>93</sup> Ibid 52.

<sup>94</sup> Ibid 21.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid 48.

<sup>97</sup> This was a conclusion in the Report of the Review of the Aboriginal and Torres Strait Islander Commission, *In the Hands of the Regions: A new ATSIC*, November 2003. [http://old.antarqld.org.au/pdf/ATSIC\\_review\\_report.pdf](http://old.antarqld.org.au/pdf/ATSIC_review_report.pdf)



political rhetoric implied that there was a government policy called ‘self- determination’ and one of its key initiatives had been the establishment of ATSIC, and since ATSIC was a failure, self- determination was a failure.

However, it is not clear that ATSIC was ‘a failure’ and had several policy successes. In the area of program delivery, ATSIC established the Community Development Employment Program (CDEP) – the only employment program to have successfully addressed developing community capacity in areas where there are no jobs.<sup>98</sup>

Similarly, the Community Housing Infrastructure Program (CHIP) was assessed by the Australian National Audit Office as effective in delivering major housing and infrastructure projects to Indigenous Communities.<sup>99</sup> These policy successes within ATSIC would highlight the positive outcomes when Indigenous people are engaged with the design of policies going into their communities.

The problem with the assertion that ‘self-determination failed because ATSIC failed’ is that it assumes that the establishment of a government bureaucracy, albeit with an elected arm, to assist with government policy and the administration of government money, is an embodiment of self- determination. Many would argue that this is not a form of self- determination but rather the integration of a representative body into the bureaucracy. In many instances, the concept was equated with ‘self-management’ rather than ‘self- determination’.

However, the rhetoric that ‘self-determination had failed’ became popular and was adopted by both sides of the political spectrum. Alongside this mantra emerged the symbiotic proposition that Indigenous Australians are not capable of looking after their own affairs and require intervention and policies aimed at behavioural change. This is not only a contentious proposition, it also runs counter to the large amount of evidence that shows that Indigenous involvement in Indigenous

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<sup>98</sup> For a summary of the success of CDEP see Jon Altman, ‘Neo-Paternalism and the Destruction of CDEP’ (Topical Issue No 14/2007, CAEPR, ANU, 2007) <<http://caepr.anu.edu.au/Publications/topical/2007TI14.php>>. He notes that CDEP has employed 36,000 Indigenous people and had over 200 Indigenous organisations as participants.

<sup>99</sup> Australian National Audit Office, *National Aboriginal Health Strategy—Delivery of Housing and Infrastructure to Aboriginal and Torres Strait Islander Communities* (1999). <[https://www.anao.gov.au/sites/g/files/net616/f/anao\\_report\\_1998-99\\_39.pdf](https://www.anao.gov.au/sites/g/files/net616/f/anao_report_1998-99_39.pdf)>.

policy making, design of programs and service delivery is the most effective way to achieve positive outcomes and to improve socio-economic indicators.

## 2. Victorian Charter of Human Rights

The *Charter of Human Rights and Responsibilities Act 2006* protects basic rights and freedoms of all people in Victorian. These include the rights to: recognition and equality before the law, life, protection from torture and cruel, inhuman or degrading treatment, freedom from forced work, freedom of movement, privacy and reputation, freedom of thought, conscience, religion and belief, freedom of expression, peaceful assembly and freedom of association, protection of families and children, taking part in public life, property rights, liberty and security of person, humane treatment when deprived of liberty, a fair hearing, not to be tried and punished more than once.

Some consideration was given to the inclusion of a right to self-determination but in deciding that it would not be included in the Charter when it was enacted in 2006. However, it was reconsidered as part of the first major review of the Charter in 2010 through a consultation process with the Victorian Indigenous community.<sup>100</sup> It has not, however, been included in the Charter protections to date. Those community consultations highlighted that *'the right to self-determination was considered relevant and important as it is a fundamental principle that provides the opportunity for the further acknowledgment of the status of Indigenous people and the unique rights and status they hold.'* They also concluded that *'any definition of self-determination for Indigenous people in Victoria must allow for individual perspectives in its application.'* The consultation generally supported the inclusion of the right to self-determination in the Charter.<sup>101</sup>

While the Charter does not specifically include the right to self-determination, it does contain protections of some rights that are inherent components of self-determination. For example, the

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<sup>100</sup> Larissa Behrendt and Alison Vivian, *Indigenous self-determination and the Charter of Human Rights and Responsibilities: A framework for discussion - Mar 2010*. Victorian Equal Opportunity and Human Rights Commission. <http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/charter-reports/item/170-indigenous-self-determination-and-the-charter-of-human-rights-and-responsibilities-a-framework-for-discussion-mar-2010>. <http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/charter-reports/item/159-talking-rights-consulting-with-victorias-indigenous-community-about-self-determination-and-the-charter-mar-2011>

<sup>101</sup> <http://www.humanrightscommission.vic.gov.au/our-resources-and-publications/charter-reports/item/159-talking-rights-consulting-with-victorias-indigenous-community-about-self-determination-and-the-charter-mar-2011>

Charter protects cultural rights at section 19, which is the only recognition of distinct rights of Aboriginal people:

People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practice their religion and use their languages. Aboriginal persons hold distinct cultural rights.

### **Policy making under the Charter**

The Victorian Government, public servants, local councils and other public authorities must act consistently with the Charter and observe human rights in their day-to-day operations. Human rights must be taken into account when making laws, setting policies and providing services. Public authorities must consider human rights when they deliver services, make decisions, develop policies and create laws. Section 38 of the Charter requires public authorities to act compatibly with human rights by providing that it is unlawful to:

- act in a way that is incompatible with a human right
- to fail to give proper consideration to a relevant human right when making a decision.

The Charter affects the operation of the legislature, the executive (including public authorities), and the courts:

- A statement of compatibility with the Charter must be tabled with all Bills on their introduction to parliament that tells parliament whether they meet the standards set by the Charter.
- All legislation (including subordinate legislation) must be assessed for compatibility with human rights by the Scrutiny of Acts and Regulations Committee.
- Public authorities must act in accordance with human rights and give proper consideration to human rights in decision making.
- Courts and tribunals must interpret and apply legislation consistently with human rights and may have regard to international, regional and comparative domestic human rights law.
- The Supreme Court has the power to declare that a law is inconsistent with human rights but does not have the power to strike it down.

### **Oversight under the Charter**

Rights protected under the Charter are not absolute and can be overridden by legislation but the intention to do so must be clearly stated and a statement of compatibility with the Charter must accompany all bills presented to the Victorian Parliament.

The Charter does not provide new avenues for legal action for a breach of the Charter. Instead, the Charter primarily establishes mechanisms to scrutinise laws for their compatibility with human rights at the planning and policy stage. It is important to understand that laws that are not compatible with human rights are nonetheless valid and must be complied with – laws cannot be struck down because they do not comply with human rights. However, where people have an existing case before a court or tribunal, they can raise human rights arguments.<sup>102</sup>

If parliament has made laws that are compatible with human rights, then public authorities must make decisions and must act in a way that complies with human rights. If public authorities do not comply with human rights, then their actions may be unlawful and an affected person could bring an action in court to stop the unlawful behaviour.<sup>103</sup>

### **3. Waitangi Tribunal**

Te Tiriti o Waitangi (the Treaty of Waitangi) is the starting point for examining relations between Māori and Pakeha in Aotearoa New Zealand. It was signed by representatives of the British Crown and Māori chiefs in 1840 but interpretation of the treaty has always been highly contested because the Māori and English texts cannot be reconciled. The Māori did not and do not accept that they ceded absolute sovereignty to the British. Instead, they interpret the Treaty as providing for ‘parallel paths of power under a single nation state’ and continued to exercise their own laws after signing.

The legal status of the Treaty is also contested and courts have held that it only has legal force to the extent that it is incorporated into law. However, the principles of the Treaty that are applied by the Tribunal to government action, and that are increasingly incorporated into legislation, provide some measure of accountability and impact on government policy and practice.

Almost from the beginning, Māori complained about Treaty breaches but it was not until 1975 that the Waitangi Tribunal was established. The Tribunal inquires into claims by Māori that the Crown’s legislation or actions are or were inconsistent with the Treaty’s principles. The Tribunal

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<sup>102</sup> Behrendt and Vivian, above, n 100, 7.

<sup>103</sup> Ibid.

inquires into and makes recommendations on claims submitted to the Tribunal; and examines and reports on proposed legislation referred to it by the House of Representatives or a minister.

The Waitangi Tribunal is a permanent commission of inquiry established in 1975 by the *Treaty of Waitangi Act* 1975. The Tribunal's mandate is to inquire into and report on claims by Māori that the Crown's legislation or actions are or were inconsistent with the principles of the Treaty of Waitangi.<sup>104</sup> Generally, the Tribunal has authority only to make recommendations which do not bind the Crown, the claimants, or any others participating in its inquiries and cannot decide points of law.<sup>105</sup> However, for the purposes of the Act, the Tribunal has exclusive authority to determine the meaning and effect of the Treaty as it is embodied in both the Māori and the English texts.<sup>106</sup>

The Tribunal comprises up to 16 members, who are appointed by the Governor-General on the recommendation of the Minister of Māori Affairs, for their range of skills and expertise in the matters likely to come before them.<sup>107</sup> Approximately half the members are Māori and half are Pakeha. Members, mostly part time, constitute a pool, from which between three and seven are drawn for any one inquiry.<sup>108</sup> It has flexible panel selection to adapt to claims circumstances. For instance, depending on the nature of the claim, a community member with traditional knowledge or a historical researcher may form part of the panel but the majority of members have law backgrounds.<sup>109</sup> The chairperson is either a judge or a retired judge of the High Court or the chief judge of the Māori Land Court, and the deputy chairperson is a judge of the Māori Land Court. Judges of the Māori Land Court, even if not members of the Tribunal, and members of the Tribunal who are barristers and solicitors of the High Court with seven years standing, may preside at an inquiry.<sup>110</sup>

The Tribunal is bound by rules of natural justice and subject to High Court review but, being inquisitorial, is not limited to the evidence and the arguments of the parties. The Tribunal may

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<sup>104</sup> Morris Te Whiti Love, 'The Waitangi Tribunal's Role in the Dispute Resolution of Indigenous (Māori) Treaty Claims' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada: UBC Press, 2004) 128, 131.

<sup>105</sup> <http://www.waitangi-tribunal.govt.nz/about/established.asp>

<sup>106</sup> <http://www.waitangi-tribunal.govt.nz/about/established.asp>

<sup>107</sup> Te Whiti Love, above n 104, 135

<sup>108</sup> *Ibid.*

<sup>109</sup> [http://www.ainc-inac.gc.ca/wige/trd/nezeal\\_e.html](http://www.ainc-inac.gc.ca/wige/trd/nezeal_e.html)

<sup>110</sup> Te Whiti Love, above n 104, 135

receive material that would be inadmissible in courts and can conduct its own research.<sup>111</sup> It can commission further evidence, make further inquiries or commission an opinion on the evidence.<sup>112</sup> Cross examination is permitted but not encouraged for elders giving traditional evidence.<sup>113</sup> The Tribunal determines its own special procedure and may adopt Māori protocols and hearings are generally heard on marae.

The claim process commences with extensive historical research undertaken by the Tribunal itself, the Crown and the claimants. Once the issues are researched, the claim is ready for hearing. Submissions from the Crown and claimants, and other interested parties are given and researchers speak to the main themes of their reports.<sup>114</sup> The Tribunal has a limited power to summons witnesses, require the production of documents, and maintain order at its hearings.<sup>115</sup> At the completion of the hearing, the Tribunal may issue an interim report and recommend that the parties reach agreement by negotiation. The Tribunal can also assist negotiations by conducting further hearings on recommendations. The Tribunal may make a final report including detailed recommendations on remedies.<sup>116</sup>

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<sup>111</sup> <http://www.waitangi-tribunal.govt.nz/about/established.asp>

<sup>112</sup> Te Whiti Love, above n 104, 140

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> <http://www.waitangi-tribunal.govt.nz/about/established.asp>

<sup>116</sup> Morris Te Whiti Love, 'The Waitangi Tribunal's Role in the Dispute Resolution of Indigenous (Māori) Treaty Claims' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada, UBC Press: 2004) 128, 140

## V Self-determination and Indigenous justice mechanisms

Contemporary Australia is a legally pluralistic nation, with multiple legal systems and overlapping jurisdictions. Aboriginal Australia is made up of over 250 nations, each with its unique culture, language, history, laws and customs. Aboriginal legal systems continue to operate in many locations across Australia, co-existing simultaneously with the Australian mainstream legal system.<sup>117</sup> Aboriginal law and legal systems are often described as customary law, or lore to distinguish that lore from Australian mainstream law.

The Australian Law Reform Commission found that ‘Aboriginal customary law governs all aspects of Aboriginal life, establishing a person’s rights and responsibilities to others as well as to the land and natural resources’.<sup>118</sup> While in some cases knowledge of local laws and customs has been weakened or lost due to forced removal from country and family, the operation of local legal systems is an integral part of everyday life in Indigenous.<sup>119</sup> Indigenous peoples’ collective right to self-determination and self-government has its genesis in the unextinguished Indigenous sovereignty to Aboriginal nations or ‘Country’. In the Western Australian Law Reform Commission report *Aboriginal Customary Laws*, a research participant offers a vivid description of this reality:

Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can’t see it, but the table is still there.<sup>120</sup>

Australia is a region of jurisdictional multiplicity—not only in terms of the overlapping jurisdictions within the Australian legal system (including local, state, territorial, federal and international jurisdiction), but also as between the Australian and Aboriginal legal systems. Notwithstanding this multiplicity, the Australian mainstream and Aboriginal legal systems operate with little or no recognition of one another. Aboriginal people describe deciding on a daily basis about which laws to apply in different contexts. At times, this involves careful evaluation of which systems’ laws have the greatest relevance to the situation at hand.

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<sup>117</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law* (1986, Australian Government Publishing Service); Australian Law Reform Commission, *Final Report: Multi-culturalism and the law* (1991, No. 57, Australian Government Publishing Service); Western Australian Law Reform Commission, *Aboriginal Customary Laws* (2005, WALRC).

<sup>118</sup> Western Australian Law Reform Commission, above n 114, [6].

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

...it has us operating within a system where we operate one way at work but behave in a totally different way when we got home. So the choice always became for us to operate according to a western model under a Westminster legal system that locks you into that or do I behave culturally? ... We always have had to make that choice. No one else in the country has to make that choice but us. Aboriginal people have to do that every day.

Former CEO, Wilcannia Land Council

I know all about your lifestyle, I know everything about your world. ... Over here now – in our world, you still don't know at all, and that's - not that we want you to know it all, you need to understand that and that's what's not happening at the moment. But there's that invisible line that we move across - you know, we cross.

Former Aboriginal Cultural Heritage Officer,  
NSW Department of Environment, Climate Change and Water

There has been limited formal recognition of Indigenous sovereignty by Australian governments. An example of limited recognition is native title legislation, whereby the Australian government recognises, in certain instances where a claim is successfully proved, certain proprietary rights (namely, rights to 'native title') which includes the right to fish, hunt and practice customary laws.

## **A. Conceptions of Indigenous justice: Restorative and reparative justice**

Humans are social creatures and we develop rules, ways of doing things and systems in order to achieve things together in a group that we cannot achieve individually. As groups we are highly interdependent. Cornell, Curtis and Jorgensen explain:<sup>121</sup>

We suffer and fail in isolation; we thrive in groups. It is only in networks of relationships—from small families to large societies—that human beings are able to survive for very long. We meet our needs by developing relationships of trade, cooperation, association, intimacy, and so forth. Through such relationships, we provide ourselves with the necessities of life and manage to do the things we wish to do.

For millennia before invasion, Indigenous collectives (nations, communities, peoples, societies, or clans; however the group chooses to describe itself)<sup>122</sup> across the world developed governing and

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<sup>121</sup> Stephen Cornell, Catherine Curtis, Miriam Jorgensen, 'The Concept of Governance and its Implications for First Nations' (Joint Occasional Papers on Native Affairs No. 2004-02, Harvard Project on American Indian Economic Development, 2004) 2.

<sup>122</sup> Because international law uses the term 'peoples' to describe the collectives that have the right to self-determination, we will use the term people in this literature review. However, we are aware that different groups will have a preference to describe themselves in different ways.



justice systems to guide interactions between individuals, families, groups within their community and with other peoples to ensure the well-being of the collective. Despite the very large number of Indigenous peoples across the globe and the vast distances between them, there are remarkable similarities in the principles that underpin many Indigenous peoples' 'justice systems' or dispute resolution mechanisms or systems for problem solving.<sup>123</sup> For example, Indigenous people in Australia, Aotearoa New Zealand, Canada and the United States describe in similar terms the purpose of their justice systems to restore harmony and re-establish balance for all individuals affected by the 'crime' (victim *and* perpetrator) and for the community.<sup>124</sup>

While the individual is expected to accept responsibility for the wrongdoing, unlike western concepts of justice, wrongdoing cannot be isolated to that individual. Hand et al describe an Indigenous worldview where the centrality of relationships – a community of relatedness – is self-evident.<sup>125</sup> Therefore, within an Indigenous justice paradigm, the underlying philosophy is that 'crime' or wrongdoing harms the community itself and it must also be healed. Some justice systems also see the cause of the wrongdoing as being a community responsibility.<sup>126</sup> Rather than place emphasis on the specific events of the wrong, the restorative process instead identifies how the harmony of the group is disrupted and how it might be restored.<sup>127</sup> For example, the Navajo peacemaker court and Tsuu T'ina First Nations Court do not attach blame to the person focus on mending the act.<sup>128</sup>

The term 'peacemaker court' is appropriate for these restorative processes of mending personal and communal relationships.<sup>129</sup> It is a holistic process that engages the physical, emotional, mental, and spiritual aspects of self and investigates what must occur to restore the victim to well-being

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<sup>123</sup> The following description is in general terms. We realise that we cannot capture the sophistication and intricacies of these systems and simply attempt to capture common features.

<sup>124</sup> Carol A Hand, Judith Hankes and Toni House, 'Restorative justice: the indigenous justice system' (2012) 15(4) *Contemporary Justice Review* 449, 452.

<sup>125</sup> *Ibid* 453.

<sup>126</sup> Meagan Berlin, 'Restorative justice practices for Aboriginal offenders: Developing an expectation-led definition for reform' (2016) 21 *Appeal* 3, 5-6.

<sup>127</sup> Hand, Hankes and House, above n 124, 452.

<sup>128</sup> Marianne O Nielsen, 'Navajo Nation Courts, Peacemaking and Restorative Justice Issues' (1999) 44 *Journal of Legal Pluralism* 105, 111; Norma Large, 'Healing Justice' *Social Issue* (May/June 2001) 21, 21-23.

<<http://www.albertaviews.ab.ca/issues/2001/mayjun01/mayjun01social1.pdf>>

<sup>129</sup> Ada Pecos Melton, 'Indigenous Justice Systems and Tribal Society' (1995) 79(3) *Judicature: Journal of the American Judicature Society* <<http://www.tribal-institute.org/articles/melton1.htm>>.

but also how the offender might make amends to restore their dignity and the trust of the community.<sup>130</sup> For example, the Navajo believe that reintegrating the offender into the community is more important than punishment.<sup>131</sup> An important goal is for the offender to develop greater self-understanding so that they will not repeat the wrongdoing.<sup>132</sup>

To achieve healing, Indigenous justice systems bring together all the people who have an interest in the matter who will be needed to restore balance and harmony. The 'circle' is often used to describe peacemaking as both metaphor or practice where interested parties sit and face each other. The circle is appropriate for these restorative processes because it can be understood as describing the relationships and between the parties and groups who are affected, and also describes a community. According to Melton, the centre represents the underlying issues that need to be resolved for peace and harmony.<sup>133</sup>

Given the centrality of restoration, repair, healing, balance and harmony to Indigenous concepts of justice, it is not surprising that many of our examples of Indigenous self-determination within the justice system are examples of peacemaker or restorative processes. Of the four CANZUS nation states, it is only in the United States where Indigenous peoples have the legal capacity to create and operate their own justice systems. By contrast, in Australia, Canada and Aotearoa New Zealand criminal jurisdiction is exercised by the nation state and self-determination (to the extent that it can be achieved) is achieved through modification to the justice systems of the state.

## **B. Case studies: Indigenous Justice Mechanisms**

### **1. Prevention and early intervention**

#### ***Case study 1: The Men's Shed, Mount Druitt, Sydney NSW***

The Men's Shed is a drop-in centre and 'wrap-around-service' based in Bankstown, NSW, with a focus on Aboriginal and Torres Strait Islander men who have been in prison and on men's suicide prevention. Situated at the Holy Family Catholic Church and headed by local resident Rick Welsh,

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<sup>130</sup> Ibid.

<sup>131</sup> Hand, Hankes and House, above n 124, 453.

<sup>132</sup> Ibid.

<sup>133</sup> Pecos Melton, above, n 129.

the Men's Shed provides a 'one stop shop': a culturally safe space for Aboriginal and Torres Strait Islander men who are at risk of serious stress, suicide or homelessness and who, for a number of complex reasons, fall through the cracks of the mainstream service providers, including health, counselling, legal and social services.

The Shed has become an essential link between at-risk men and the services they could access but don't know how to, or are not comfortable attempting to access. A fundamental tenet of their approach is that they provide a place where Aboriginal men talk to Aboriginal men. The Men's Shed provides link up services such as: in-house assistance in completing Centrelink forms, in-house access to lawyers, Centrelink Officers, parole officers and health care. In addition to enabling access to services, the Men's Shed also provides a safe space for mentoring, care-taking and building relationships. Some men attend the Men's Shed because they are homeless and want a meal, but others might drop in because they need a chat and they trust the men at the Shed. The Shed is open five days a week and provides a free weekly lunch on Wednesdays.

In broad terms, the Men's Shed provides support to men and their families and is a place of encouragement and hope for many who are trying to improve their life situations. In the words of Rick Welsh:

Our main thing, what we are looking at, is a suicide prevention point to address the stuff that comes along. You might have someone with a legal problem but when you sit down and talk to them they'll generally tell you other stuff – 'Oh well, I've been drinking', 'I've been depressed' – it's generally all those things that's wrapped around them... It's about people getting to a state of despair where they feel no value, maybe not in their children's lives, they're homeless, there's nowhere for them to really go so they get to a state of despair.

*Why the Men's Shed works:*

Although the Men's Shed has not been subject to any formal evaluation, the Men's Shed is very popular and well known/established institution, with up to 500 visiting over a typical year. When asked what made the initiative 'work', the steering committee emphasised the following **principles** underlying the Men's Shed approach:

- **participation:** The Men's Shed did not start with a list of 'programs', any programs or initiatives have grown organically out of the needs of men frequenting the Men's Shed. For example, mainstream tobacco cessation programs might please the Department of Health,

but in the words of a staff member: ‘unless they are led by men who have actually given up smoking, [they] tend to be a wast of time.’

- **suicide prevention:** The Men’s Shed approach is based on an understanding of the stigmatising effects of mental health care. The Shed workers ‘walk with’ men and their families through serious challenges, which can lead on downward spirally paths of despair and even suicide.
- **integrated approach:** A general criticism of service providers is the ‘silo approach to their work. In contrast, the Men’s Shed seeks to provide a ‘one stop shop’ and is based on an interconnected understanding of the social and cultural determinants of health and wellbeing.
- **welcoming approach:** the Men’s Shed adopts an approach that is inclusive and welcoming of all men and families. While the majority of the men coming through the service have been from the Mount Druitt Aboriginal community, all are welcome and have been welcomed.
- **cultural and spiritual leadership:** the Men’s Shed adopt the World Health Organisation’s broad definition of health as being ‘Not just the absence of disease, but the total physical, emotional and spiritual wellbeing of individuals and communities’.
- **belonging:** Belonging is an important social determinant of Aboriginal men’s health. The Men’s Shed approach is based on an understanding that what keeps Aboriginal men safe includes, ‘a sense of being part of a web of relationships, of kinship, of being part of a “mob”’. An understanding of ‘belonging’ is sometimes lacking from mainstream approaches to mental health, but is part of what makes the Men’s Shed unique, popular and valued by its regulars.
- **gender:** Aboriginal women speak of the ‘rightness’ of the Men Shed as offering a place for “men’s business”. This view in no way condones violence against women but is an approach that sees solutions as involving men.
- **humility, resilience and continuous adaptation/learning:** The staff at the Men’s Shed admit that although the work they do is not “rocket science”, they emphasised that “we are still learning”. In November 2016 the Men’s Shed lost some of its funding but through a social media campaign and public events, managed to reinstate some of the funding.

#### *Governance:*

The service, which has been operated since 2004, is governed by a steering committee consisting of Elders, prominent Aboriginal and community members, invited guests and Shed regulars and partners with 28 organisations.

The Men’s Shed receives funding from the Commonwealth Department of Health and Ageing via the National Strategy for Prevention of Suicide Initiative and in-kind assistance from the University of Western Sydney. The Men’s Shed operates with the assistance of volunteers as well as in-kind assistance from the University of Western Sydney and the Holy Family Church.

### ***Case study 2: Gamarada Men's Healing, Redfern***

Gamarada Healing is a grass-roots Aboriginal wellbeing program in Redfern NSW that supports clients to deal with healing in the broad sense of the term; dealing with violent behaviour (personal or familial, institutional and structural), identity and culture, substance abuse issues, and strengthening relationships with partners and children.

Gamarada Healing commenced in an ad hoc way from 2007 onwards, originally involving local Aboriginal leaders working in a voluntary capacity. The program developed in response to increased recognition of the need for healing and life skills programs for Aboriginal men and the links between poor mental health and interaction with the criminal justice system including disproportionately high levels of incarceration. It is based on a peer support and self-healing and life skills development model with a strong underpinning of cultural renewal and spiritual growth. In its early development the program had become well recognised for its positive impacts on Aboriginal male participants.

Gamarada Healing is currently led by Ken Zulmovski, a descendant of the Kabi Kabi nation with training in psychology. He describes the program as essentially being about: 'respect for self, promoting culture and taking responsibilities for our actions.' The 10 week structured program consists of participation in community events, leadership and intensive mentoring. The program currently places an emphasis on time management and personal organisation skills

Gamarada teaches participants practical skills such as stress management, relaxation, breathing and visualisation exercises. The concept of awareness is explored in detail in connection to Indigenous spiritual concepts such as 'dadirri' (deep listening and quiet stillness). Anger management and emotional control are addressed using 'non-reaction' techniques. The program encourages participants to apply these skills in order to gain greater control and harmony within their lives and relationships.

Participants are given responsibility for the smooth running of the program, for example starting and finishing on time, managing the breaks, arriving early to assist in setting up the room, preparing resources, looking after the elders, and managing administration. This includes completing attendance and consent forms; preparing for guest speakers; and seeking permission

from other participants to delegate necessary tasks required for the session. These core elements along with a set of group rules developed during week one and reinforced at each session create a foundation of safety and respect for healing and the emergence of leadership.

**Case study 3: Maranguka Justice Reinvestment, Bourke NSW**

Maranguka is a whole of community strategy currently being trialled in Bourke, on the western plains in NSW. 'Maranguka' means 'caring for others and offering help' in the local Ngemba language. Maranguka is a community-led collective impact approach to justice reinvestment—which involves taking money out of corrections and incarceration strategies and reinvesting it in community development strategies. It is a co-ordinated strategy to support vulnerable families and young people through community-led teams working in partnership with existing service providers, in order to 'together ... build a new accountability framework which wouldn't let our kids slip through'. The overarching goal of the project is to decrease the rate of contact of Aboriginal young people with the criminal justice system, adult incarceration and youth detention in Bourke.

The project is currently in the second stage of a three-phase justice reinvestment strategy. The first stage focused on building trust between the Aboriginal community and service providers, identifying community priorities, and identifying circuit breakers. Regular meetings have been held with Bourke community members, local service providers and government representatives. The community has identified and are currently in the process of implementing—in partnership with local service providers—a number of cross-sector initiatives or 'circuit breakers' to achieve the goal of reducing offending and making the community safer. The community has currently identified three 'circuit breakers'—strategies or focus areas identified by community members as priority areas which will in turn enable positive cycles of change in behaviour patterns and opportunities—around the issues of breaches of bail, outstanding warrants and the need for a learner driver program.

The second stage involves data collection on local crime, including: offending, diversion, bail, sentencing, punishment and re-offending rates. Data will also be collected on broader socio-economic factors on local community outcomes, including: early life, education, employment,

housing, healthcare, child safety and health outcomes including mental health and drugs and alcohol. The data has been handed over to the community members via the Bourke Tribal Council for the third and final stage of the strategy.

The final implementation stage will involve using economic modelling to demonstrate the savings associated with the strategies to be identified by the community and local service providers to reduce offending among children and young people.

## 2. Policing

### **Case study 4: Tribal Warrior's Clean Slate Without Prejudice, Redfern**

Tribal Warrior is a not-for-profit community organisation that operates a range of initiatives including mentoring programs, training programs and other cultural activities in Redfern, Sydney.<sup>134</sup> One of its initiatives is Shane Phillips's 'Clean Slate Without Prejudice' ('CSWP') which started in 2009 as a partnership between NSW Police and the Tribal Warrior Association. Clean Slate Without Prejudice is centred around a boxing program based at the National Centre for Indigenous Excellence which aims to provide an opportunity for Indigenous young people and local police officers to exercise and socialise in an informal setting. CWSP works with the both young men and women, and was commented upon as being a positive partnership involving Aboriginal and Torres Strait Islander people in Redfern and police.

The program is a 'grassroots community, holistic exercise, assistance and referral program' focused on young people. Participants undertake boxing training three mornings per week and are offered assistance with accommodation, employment and training.<sup>135</sup> Police officers and Aboriginal leaders train with the young people. Young people are referred by schools, social services, courts or the police. Participation in the program can form part of a suspended sentence and young people sentenced to prison can now participate. While not able to be verified as attributable to the program, it has been reported that between 2008 and 2014 robberies in the area dropped by 73 per cent, assaults on police dropped by 57 per cent and break-and-enters nearly halved.<sup>136</sup> Initially, the Clean Slate program was only offered to boys, however female Aboriginal mentors have now been employed, to encourage greater participation by young women.

### **Case study 5: Night patrols**

Night patrols are locally run initiatives with formal agendas that focus on keeping young people safe and on preventing contact between Aboriginal young people and the state police. Patrols

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<sup>134</sup> Shane Phillips, *Tribal Warrior* (2016): <https://tribalwarrior.org/>

<sup>135</sup> Ibid.

<sup>136</sup> Dan Box, 'Clean Slate Without Prejudice a Bold Boxing Experiment' (2016) *The Australian*: <http://www.theaustralian.com.au/life/weekend-australian-magazine/clean-slate-without-prejudice-tribal-warrior-redfern-and-a-bold-boxing-experiment/news-story/28d94564e0924918ebb5efcaa6188ee2>



operate in a diverse range of urban, rural, and remote settings across some Australian jurisdictions.<sup>137</sup> Blagg estimated that approximately 130 such patrols operate in Australia; with around two-thirds of these being located in rural and remote parts of WA and NT. The core features of patrol work include independence from state police, a consensual basis for operations, and a connection to the local Indigenous community.<sup>138</sup> Indigenous night patrols are distinctive from formal reform efforts that seek to alter the state police, in that a key part of their agenda is to minimise Aboriginal people's contact with the criminal justice system. Importantly, patrols function independently of the state police and, at least in theory, are connected in some way to the local Aboriginal community within which they operate. In practice, they operate with varying levels of community input or involvement from the Aboriginal community. As this implies, patrols do not fall neatly in either the governmental or autonomous reform efforts, and occupy what scholars have termed third or hybrid spaces.<sup>139</sup>

Despite variation and diversity among initiatives, broad unity can be seen at the level of key functions, which in NSW includes providing transport, maximising safety, the mentoring of Indigenous young people, preventing harmful behaviour, and maximising the safety of young people who 'fall through the cracks' of the system.<sup>140</sup> Research suggests that the everyday activities of patrols extend beyond Western concepts of policing, crime prevention, and social work; and that they provide an encompassing cultural service for Indigenous youth.<sup>141</sup> It is perhaps for this reason that—with few exceptions<sup>142</sup>—the contribution of Indigenous patrols has largely escaped the attention of criminologists.

### **Case study 6: Cross-cultural training, education and competency**

Cross-cultural advisory units exist in every police force in Australia, overseeing the education and training of police officers in cross-cultural issues including communication.<sup>143</sup> The rationale

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<sup>137</sup> Harry Blagg, *An Overview of Night Patrol Services in Australia*. Canberra: Department of Justice and Attorney General, (2003, Aboriginal and Torres Strait Islander Commission & National Crime Prevention)

<sup>138</sup> Amanda Porter, 'Indigenous Patrols, Counter-Policing and Safety' *Theoretical Criminology* (2014).

<sup>139</sup> Chris Cunneen, *Conflict, Politics and Crime* (2001, Allen and Unwin); Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2008, Hawkin's Press).

<sup>140</sup> Amanda Porter, above n 138.

<sup>141</sup> Ibid.

<sup>142</sup> Chris Cunneen, above n 139; Harry Blagg, above n 137; Harry Blagg, above n 139.

<sup>143</sup> Janet Chan, *Changing Police Culture: Policing in a Multicultural Society* (1997, Cambridge University Press).

is that educating police officers about Aboriginal culture and cultural competency would effectively redress the ignorance underlying racist attitudes and discriminatory practices.

Limitations of cultural competency have been three-fold. Psychological research emphasises the deeply embedded and persistent nature of racial prejudices, race-crime associations, and unconscious bias.<sup>144</sup> At an interpersonal level, despite the best intentions of training and education programs, eradicating racial stereotypes is an arduous task.<sup>145</sup> At a systemic level, cross-cultural training assumes that ignorance lies at the heart of the problem and is unlikely to touch biases that arise at both the operational and institutional levels of the state police. For example, an emphasis on training ignores policies (eg, zero tolerance policing towards certain behaviours) and specific criminal laws (eg, paperless arrest laws in the NT) that police officers enforce.

#### **Case study 7: Bourke Community Assistance Patrol**

The Bourke Community Assistance Patrol (known locally as ‘the CAP’) was an Aboriginal initiative which monitored the presence of young people on the streets at night, sometimes returning them to their homes, at other times helping young people work out alternative safe places to go. Patrol operations typically consisted of one driver, one person in the passenger seat, and two others patrolling on foot. All patrol workers were of Aboriginal descent. Communication occurred between the bus and on-foot patrollers via a 2-way radio. Patrol workers wore a uniform of a poloshirt with the CAP logo (an echidna, an animal of cultural significance for Ngemba people), which was designed by one of the patrol workers. The workload was seasonally adjusted, with patrol operations finishing earlier in winter months.

The CAP was operated by Aboriginal members of the community. The patrol complemented the duties and activities of New South Wales Police, seeking to reduce the extent to which people may become exposed to or involved in anti-social or criminal activities and transporting people potentially at risk to a safe environment, as well as reducing the likelihood of negative contacts between members of the Indigenous community and police.

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<sup>144</sup> Jennifer Eberhardt et al., ‘Seeing Black: Race, crime and visual processing’ *Journal of Personality and Social Psychology* (2004) 87(6): 876–893.

<sup>145</sup> R Wortley and R Homel, ‘Police Prejudice as a Function of Training and Outgroup Contact: A longitudinal investigation’ *Law and Human Behaviour* (2000) 19.

The genesis of the Bourke CAP lay over several meetings of the Bourke Aboriginal Community Working Party ('BACWP'), an unincorporated community organisation. After a series of meetings where the BACWP discussed the form this initiative should take, the first formal meeting of the Community Assistance Patrol was held on 16 December 2003 to discuss specific logistics of the patrols operation, in particular the roster, uniforms, the van, first aid kits, tea/amenities and so on. The initial objectives were twofold: to look out for young people on the streets late at night, and to provide meaningful employment opportunities for local Indigenous people. As recorded in one of the minutes, 'the program aims to give the trainees an opportunity to gain further opportunities, including drivers' licenses for car and bus and security licensing'. The CAP commenced operations in December 2002 with eleven participants who had passed the relevant checks and initially worked in a volunteer capacity. Meeting minutes from this period indicate there was considerable ambiguity as to the role and responsibilities of the patrol.

During the initial phase of operations the patrol vehicle was stored at the police office and workers were escorted by police officers to their homes at the end of each shift. This was partly to secure the vehicle and partly as a relationship building exercise between the local police and the patrol workers (the latter often lived out of town and had no vehicles of their own). Interviews and archival documents indicate the relationship between the police and the state police had mixed success. For example, one conflict arose when a police officer asked a patrol worker to get into the rear of the police vehicle (the paddy wagon). Other examples include a police vehicle being hailed with stones on return from dropping one of the drivers off at Alice Edwards Village. In 2004, the patrol vehicle ceased to be parked at the police office, and began to be parked at the CDEP complex near the new office. Such instances of conflict reflected the nature of relations between the police and the Aboriginal community in Bourke more generally.

In March 2004 employment for workers shifted from a purely voluntary basis to receiving a wage component as part of the Community Development Employment Program ('CDEP'). In addition some individuals continued to offer their support in a volunteer capacity. During this time the patrol functioned from 6pm–midnight Tuesdays and Wednesdays and from 5pm–midnight Thursday to Saturday nights. At this time there were seven patrollers employed on the programme and eight volunteers. All volunteers and workers required police checks and first aid

qualifications. Required training consisted of a short course offered at the local TAFE comprising first aid training, Roads and Traffic Authority training, workshops dealing with domestic violence situations, and general law and justice issues.

In total, the CAP patrol ran intermittently from December 2003 until some time in 2007. The CAP temporarily ceased in the months of (May 2004, June 2005, October 2005) due to disruptions in funding and management issues. Reports from this time refer to a lack of enthusiasm from participants due to the uncertainty of the patrol service. The CDEP initiative was abolished in 2007 under the Howard government, which severely impacted the patrol's work force.

#### *Why the CAP worked:*

There is substantial evidence that the CAP was widely perceived as having a beneficial impact in the local community. This is evidenced through archival documentation (such as minutes, letters of support, statistics) and was borne out in interviews with Bourke residents. For example, at a community meeting held in 2004, Sergeant Williams is recorded as commenting that the program 'has to be independent of police, as the program does something totally different to policing roles' and that the CAP 'enhances the relationship between the police and the Indigenous community through their co-operative roles'. Similarly in minutes from a meeting of the BACWP, (then) Chairperson Phillip Sullivan stated that:

Patrollers have become great role models and out of this process a youth forum has been established. Patrollers have a heightened profile in the community and are displaying leadership qualities. Bourke CAP is an example of the whole of Bourke community working together. If the issues with Bourke CAP are not resolved it has failed to the COAG process and the Bourke community. (Phillip Sullivan, Bourke resident)

This is similarly reflected in the letters of support collected over the years from the Local Area Command, Bourke Shire Council, the Bourke Chamber of Commerce. The Darling River Local Area Commander, R.T. Mason, reported that since the inception of the CAP 'nearly all the categories of crime have been reduced within the Bourke area'.

#### *Governance:*

In the early years workers were volunteers and funding (for petrol and other expenses) was through the Bourke Shire and Murdi Paaki Regional Enterprise Corporation Ltd. The governance arrangements of the patrol were formalised when in 2005 the Bourke Aboriginal Community

Working Party ('ACWP') signed two Shared Responsibility Agreements with the Commonwealth and New South Wales Governments. At this point, funding from the Commonwealth Government allowed for the funding of a Community Co-ordinator who acted as a liaison between community-wide meetings and the CAP management staff.

The activities of CAP workers and volunteers were overseen by the CAP Co-ordinator who organised a roster and compiled statistics, bi-annual reports and wrote applications for funding. There was also a Steering Committee, which oversaw more general managerial and governance issues. This consisted of representatives of the local police, TAFE, the Department of Community Services, the Aboriginal and Torres Strait Islander Commission, Department of Justice and Attorney-General and members of the Bourke Shire Council.

The Commonwealth Government provided a total of \$47,000 in funding (consisting of \$20,000 from the Commonwealth Attorney-General's Department and \$27,000 from the Department of Families, Communities Services and Indigenous Affairs) to staff CDEP workers at award wages. The New South Wales Government provided accredited training for Patrol staff (via the local TAFE) and provided \$20,000 funding (via the NSW Department of Justice and Attorney-General). The Bourke Shire Council contributed to the operating costs.

### **3. Indigenous court systems**

#### ***Case study 8: Tsuu T'ina First Nation Court***

The federal government has exclusive jurisdiction over the Aboriginal peoples of Canada and provincial law only applies to Aboriginal people with laws of general application.<sup>146</sup> The *Indian Act* administers whether First Nations (also called Indian bands) people have 'status' as Indian; the form and jurisdiction of local First Nations governments; and the management of reserve land and communal monies but does not apply to the Métis or Inuit.

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<sup>146</sup> Under s91(4) of the *British North America Act 1867 (Constitution Act 1867)* the Parliament of Canada has exclusive authority to legislate for "all matters" pertaining to "Indians and Lands reserved for the Indians". s88 of the *Indian Act* provides that only provincial laws of general application apply to Aboriginal people in Canada.

First Nations are generally governed by band councils that are chaired by an elected chief (called Chief and Council). Some First Nations also have hereditary chiefs and there can be difficult relationships between elected and hereditary chiefs. In addition, several bands may join together to form a Tribal Council. The *Indian Act* gives little jurisdiction to First Nations governments mainly in the area of municipal or local government responsibilities. Band councils may make by-laws and appoint justices of the peace to enforce them. Aboriginal people in Canada are subject to the *Criminal Code* and *Youth Criminal Justice Act*.

The Tsuu T'ina First Nation Court (TTFNC) was the first Aboriginal court in Canada, commencing in 2000.<sup>147</sup> It was an initiative of the Chief and Council of the Tsuu T'ina Nation with support from the Alberta provincial court to address over representation of First Nations people in the criminal justice system and corrections systems. The Tsuu T'ina Nation considered the option but decided not to create a separate court in recognition that the Tsuu T'ina live in both cultures.<sup>148</sup> The TTFNC has the jurisdiction of a provincial court, limited to offences committed on the Tsuu T'ina reserve.<sup>149</sup> All adult and youth provincial offences (except homicide and sexual assault), and breaches of First Nation by-laws are eligible. It incorporates both Canadian law and Tsuu T'ina law by introducing traditional peacemaking methods alongside normal provincial court processes.

Until he was appointed to the Federal Court of Canada, the TTFNC's first judge was Provincial Court Judge, Justice Tony Mandamin<sup>150</sup> who is Anishnabe from the Wikwemikong First Nation of Manitoulin Island. He was required to live on the reserve, so that he would have the necessary cultural awareness of the Tsuu T'ina. While there is a strong preference that the judge, prosecutor, court clerks, probation officer and peacemaker coordinator be Aboriginal people, the appointment of the judge is a provincial responsibility and that discretion cannot be fettered.<sup>151</sup> Similarly, while

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<sup>147</sup> Shelly Johnson, 'Developing First Nations Courts in Canada: Elders as foundational to Indigenous therapeutic jurisprudence' (2014) 3(2) *Journal of Indigenous Social Development* 1, 6.

<sup>148</sup> Catherine Bell, 'Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada, UBC Press: 2004) 241, 251

<sup>149</sup> Dale Dewhurst, 'Parallel Justice Systems' in Catherine Bell & David Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (Canada, UBC Press: 2004) 213, 216

<sup>150</sup> For Justice Mandamin's account of the Tsuu T'ina FNC see Judge L. S. Mandamin with Ellery Starlight and Monica One-Spot, 'Peacemaking and the Tsuu T'ina Court' in Wanda D. McCaslin (ed) *Justice as Healing: Indigenous Ways* (Living Justice Press, 2005) 349.

<sup>151</sup> Dewhurst, above n 148, 216. Note that the first judge to preside over the court, Justice Mandamin presided over two First Nation courts and in the Calgary criminal division.

the prosecutor takes Aboriginal values into consideration in evaluating what charges to lay, what charges to proceed with and whether to drop charges at the end of a successful peacemaker process, they are at all times under the authority of the chief Crown prosecutor of Alberta.<sup>152</sup>

Not all cases are referred for peacemaking. The prosecutor and peacemaker coordinator review cases to determine those that may be suitable. It is optional and the offender or victim may choose to have the matter heard in the adversarial system.<sup>153</sup> If the offender takes responsibility for their actions, and the victim is prepared to participate, the case can be referred.<sup>154</sup> Where there is dispute as to suitability, the judge's decision is final.<sup>155</sup> Where a matter is not referred to peacemaking, the provincial court's adversarial process is followed.

The court day starts with a traditional smudging ceremony and the physical structure of the court room differs markedly from conventional courts; instead parties sit in a circle and no-one is elevated.<sup>156</sup> Those cases selected for peacemaking are adjourned and a peacemaker is appointed who is considered 'fair' by both sides. Peacemakers are highly regarded in the community as knowledgeable in traditional ways and customs and receive training in the facilitation of conventional participatory dispute resolution processes.<sup>157</sup> Over time, as the importance of participation to the entire community has become clearer, many have volunteered their time and active recruitment has not been needed.<sup>158</sup>

Peacemaking can take two hours or two days through circles including Elder peacemakers, the offender, victim/s, family members and sometimes additional personnel (counsellors, addiction specialists etc).<sup>159</sup> Peacemakers use a range of techniques that may involve traditional circles, sweat lodges and spiritual healing techniques.<sup>160</sup> If resolution is reached and the offender commits to complete the agreed actions, the matter returns to court. If the prosecutor is satisfied with the

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<sup>152</sup> Ibid, 216-217

<sup>153</sup> Large, above, n 128, 21-23.

<sup>154</sup> Lynette Parker, 'Tsuu T'ina Peacemaking Justice in Canada' (2004) *Restorative Justice Online*, Article No 4733.

<sup>155</sup> Large, above, n 128, 21-23.

<sup>156</sup> Ibid.

<sup>157</sup> Bell, above, n 147, 256

<sup>158</sup> Large, above, n 128, 21-23.

<sup>159</sup> Parker, above n 153

<sup>160</sup> Dewhurst, above n 148, 217.

agreement, she or he withdraws the charges.<sup>161</sup> If not satisfied, the agreement is used as an element in sentencing by the judge.<sup>162</sup> Once the offender completes the agreement, they return to court for a celebration. If the offender does not complete the agreement, they return to the adversarial court without prejudice.<sup>163</sup>

#### *Why does the program work?*

The strength of the Tsuu T'ina First Nations Court is that perpetrators of offences are held accountable to their victims, their families and the community and are required to take responsibility for their actions before their community. Members of their community, who are knowledgeable in the ways and values of the community, facilitate the process. In contrast to the adversarial element of the Tsuu T'ina FNC as a provincial court, Aboriginal values provide the very foundation for the peacemaker process. The peacemaker's focus is not on punishment but on healing and mending breaches by working with elders, the accused, victims, the community and all others considered to be connected to the problem behaviour.<sup>164</sup> 'Restoring healthy relationships grounded in spirituality is of paramount importance'.<sup>165</sup> The quest is, not only to resolve problems, but also to 'investigate and discover the root causes of behaviour which have translated into criminal activity or disharmony in the community or among families.'<sup>166</sup>

Peacemakers are not neutral mediators but are actively involved in promoting and teaching Aboriginal values.<sup>167</sup> They provide traditional and non-traditional dispute resolution and make recommendations for sentencing that can be highly creative.<sup>168</sup> The peacemaker does not attach blame and concentrates on the action and its consequences with the primary goal of restoring the health of the community and re-establishing spiritual harmony.<sup>169</sup>

The role of the peacemakers is broader than that of the Tsuu T'ina FNC. The Office of the Peacemaker is located on the Tsuu T'ina reservation and people can be referred through the

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<sup>161</sup> Parker, above n 153.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Dewhurst, above n 148, 217.

<sup>165</sup> Ibid.

<sup>166</sup> Bell, above, n 147, 255-256

<sup>167</sup> Dewhurst, above n 148, 217.

<sup>168</sup> Ibid.

<sup>169</sup> Large, above, n 128, 21-23.



police before a charge is laid, by the prosecutors' office after a charge is laid by the Crown, or after conviction through a sentencing circle.

### *Governance*

As noted above, the Tsuu T'ina FNC appears to be a genuine hybrid of Canadian law and certain aspects of Tsuu T'ina law. It is a provincial court that operates under the rules and legislation of the Canadian provincial system but incorporates a traditional approach to dealing with crime that expunges the charges in the Canadian system. As noted above, the judge appointed by province but is an Aboriginal person, as is the prosecutor who is employed by the Crown prosecutor's office. The court workers, probation officer and peacemaker coordinator are provided by the Tsuu T'ina/Stoney Corrections Society.<sup>170</sup> The TTS Corrections Society is a joint effort by the Tsuu T'ina First Nation and the Stoney First Nation to provide counselling and rehabilitation services to offenders within their communities. The TTS Corrections Society provides referral programs for victims of crime and tragedy, volunteer training, community based programs for offenders and programs offering support to communities for crime prevention activities. The Office of the Peacemaker is maintained on the reservation by the TTS Chief and Council.

### ***Case study 9: Tulalip Healing to Wellness Court***

Native American tribes in the United States hold a unique position in regards to their relationship with the State. From the outset, the relationship was one of nation to nation, where tribes entered into treaties with the British colonisers, first in relation to trade and military allegiance, and later in relation to cession of certain lands with guaranteed rights in return. Although these treaties are enforceable legal documents (unlike the Treaty of Waitangi for instance), they were largely ignored and the rights contained within them whittled away. Nonetheless, the continued sovereignty of tribal governments was first recognised by the courts in the mid-1800s, although in a modified form. Tribes have retained powers of law making and self-government as "domestic dependent nations" and continue to be ruled by their own laws while being subject to federal government jurisdiction. Civil and criminal jurisdiction of tribes is complex and jurisdiction varies according to where the matter arose or offence occurred, whether the parties are members of the

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<sup>170</sup> Johnson, above n 146, 6.

tribe, are Indian or non-Indian and, if a criminal matter, whether the crime is considered to be a serious crime. If serious, the federal government has jurisdiction.

The Tulalip Tribes is a confederation of six Coast Salish Tribes and associated bands that were co-signatories to the 1855 Treaty of Point Elliott. Their traditional Country covered a large area of western Washington State but today the Tulalip community is located on a 22,000 acre reservation north of Seattle. The Tribe has about 4,300 enrolled members with approximately half living on the reservation, where the majority of residents are non-Indian.

Washington is a PL-280 State which means that tribes can request that the state assumes criminal jurisdiction for the tribe. From 1958 Washington exercised criminal jurisdiction on the reservation but did not provide sufficient resourcing and law enforcement.<sup>171</sup> Criminal justice was at best inadequate and, at worst, non-existent. It was a difficult place to live with harsh conditions and where 'serious crimes such as murder, rape and aggravated assaults often went uninvestigated and perpetrators were not prosecuted or punished.'<sup>172</sup>

In 1996, the tribe decided that it was time to build its own criminal justice system because the federal government had failed to fulfil its responsibility and state criminal responsibility was ineffective. The tribe sought to have state authority removed and took on control of law enforcement for Indigenous and non-Indigenous people on the reservation and later established its court, through the Northwest Intertribal Court system.<sup>173</sup> Initially the court was modelled on mainstream American courts and did not seem to be achieving the community's aims. As Tulalip prosecutor, Brian Kilgore explains, 'When all you have is a hammer, everything is a nail.'<sup>174</sup>

Instead the tribes wanted to create a justice system that contributed to the health and wellbeing of the community. Integral to this aim is the Healing-to-Wellness (Drug) Court that was created in

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<sup>171</sup> Evidence to the United States Senate Committee on Indian Affairs Oversight Hearing on Tribal Courts & the Administration of Justice in Indian Country, 24 July 2008 (The Hon Theresa M. Pouley, Tulalip Tribal Court Judge; President, Northwest Tribal Court Judges Association)  
<<https://static1.squarespace.com/static/572d09c54c2f85ddda868946/t/57ac89ce15d5db281ea95a84/1470925262424/Tribal+Courts+%26+the+Administration+of+Justice+in+Indian+Country.pdf> >

<sup>172</sup> Pouley, above n 170.

<sup>173</sup> Ibid.

<sup>174</sup> Niki Cleary, 'Restorative justice returning to Tulalip courthouse' *Tulalip News* (online)  
<<http://www.tulalipnews.com/wp/2016/03/30/restorative-justice-returning-to-tulalip-courthouse/>>.

response to drug-related crimes and provides an alternative to sentencing. Program participants typically have been charged with possessing or purchasing drugs; are non-violent offenders; do not have a history of drug-trafficking arrest or more than two previous non-felony convictions. Participants may be on GPS monitoring with ankle bracelets, have regular drug tests, return to court regularly (initially weekly) to review their progress, receive counselling, attend educational and/or vocational courses and job search programs.<sup>175</sup> They may be asked to attend Elders meetings, secure their driver's licence and attend classes on life skills, healthy living, parenting, anger and stress management, or family violence perpetrator courses.<sup>176</sup>

Tulalip prosecutor, Brian Kilgore, described programs that do not take a holistic approach as feeling 'like a game of whack-a-mole.'<sup>177</sup> He explained:

We fix one thing then another pops up. If all you offer an addict is housing, then in a couple of years, you have drug houses. If you only offer counselling, then individuals with addictions to meth move onto opiates to treat pain because they have raw exposed nerves in their teeth from tooth decay. You have to address all the issues at the same time if you want people to change.

Conversations are held with the participant with a large circle of interested people: judge, participant, prosecutor, defence lawyer, compliance officer, service providers, Elders, family member, peers. Members of the Tribes' Board of Directors will attend a session as will law enforcement officers, a representative from the gaming commission etc.<sup>178</sup> As originally established, the program was largely run on a volunteer basis that heaped additional responsibilities on people who were already overburdened and ultimately proved to be structurally unsound.<sup>179</sup> When there was staff turnover, or when volunteers were burned out or had other commitments, much needed support would come to an end. A new version commenced in January 2017 that is properly funded and is staffed by paid workers.<sup>180</sup>

### ***Why does it work***

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<sup>175</sup> Pouley, above n 170.

<sup>176</sup> Harvard Project on American Indian Economic Development, *Honoring Nations. 2006 Honoree: Tulalip Alternative Sentencing Program*

<<http://www.hpaied.org/sites/default/files/publications/Tulalip%20Alternative%20Sentencing%20Program.pdf>>

<sup>177</sup> Cleary, above, n 173.

<sup>178</sup> HPAIED, above n 175.

<sup>179</sup> Cleary, above, n 173.

<sup>180</sup> Ibid.

The focus of the program is on correcting behaviour and not penalising crime. The Tribes claim that they have tried the experiment of punishing crime but that does not work. doesn't work. You only need to see the number of repeat offenders in jails and prisons across the country.<sup>181</sup>

### **Case study 10: Ngā Kooti Rangatahi / Rangatahi Youth Courts**

The concept of Ngā Kooti Rangatahi<sup>182</sup> (Rangatahi Courts) emerged from a community meeting hosted by the Gisborne Youth Court in January 2008, where youth justice professionals expressed their dissatisfaction with the current system.<sup>183</sup> They were deeply concerned about successive generations of Māori youth making their way from Youth Court to District Court to prison.<sup>184</sup> They decided to try an entirely new approach.

Informed by the experience of Koori Courts,<sup>185</sup> Rangatahi Courts are Youth Courts with the same jurisdiction as other Youth Courts but are held on a marae (traditional Māori meeting place) and incorporate te reo Māori (Māori language), tikanga Māori (Māori protocol) and marae kawa (ceremonial rituals) as part of the ceremony and processes of the court.<sup>186</sup> Rangatahi Courts monitor Family Group Conference (FGC) plans, which are the cornerstone of the Aotearoa New Zealand youth justice process. FGC plans are developed at family group conferences where the offender (who must have admitted the offence) and their family meets with the 'victim' and their family along with members of the enforcement agency to decide upon an appropriate penalty.<sup>187</sup>

Judge Heemi Taumaunu, who was the presiding judge for the first Rangatahi Court, explains that because so many rangatahi (young people) who appear before the court have lost touch with their sense of identity as Māori, the court emphasises the young person understanding 'who you are

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<sup>181</sup> Ibid.

<sup>182</sup> The literal meaning of 'rangatahi' is youth but it also means 'new net' in the sense of a Māori proverb that the old worn out net is cast aside and the new net goes fishing. The name was chosen to reflect the expectation that young people will cast aside old worn out behaviours and replace them with new behaviours. See NZ District Court, Ngā Kōti Rangatahi O Aotearoa. News, stories and events from the Rangatahi Courts and Pasifika Courts, Issue 9, Hakihea (December) 2016. <<http://www.districtcourts.govt.nz/assets/Uploads/Nga-Koti-Rangatahi-o-Aotearoa-Dec-2016.pdf>>

<sup>183</sup> Judge Heemi Taumaunu, 'Rangatahi Courts of Aotearoa New Zealand – An update' (November 2014) *Māori Law Review* <<http://maorilawreview.co.nz/2014/11/rangatahi-courts-of-aotearoa-new-zealand-an-update/>>.

<sup>184</sup> Ibid.

<sup>185</sup> NZ Ministry of Justice, Evaluation of the Early Outcomes of Ngā Kooti Rangatahi, (17 December 2012) 8. <<https://www.justice.govt.nz/assets/Documents/Publications/Evaluation-of-Nga-Kooti-Rangatahi-FINAL-report-17-December-1.pdf>>.

<sup>186</sup> Taumaunu, above n 182.

<sup>187</sup> Youth Court of New Zealand, 'Youth Justice: Youth justice principles & processes' (updated 7 September 2016) <<https://www.youthcourt.govt.nz/youth-justice/youth-justice-principles-and-processes/>>.

and where you are from', drawing on traditional Māori beliefs about whakapapa (genealogy) and whakawhanaungatanga (making connections and relationships).<sup>188</sup> Therefore, court processes involve a powhiri (ritual ceremony of welcome), exchange of karanga (traditional calls of welcome and reply), a karakia (blessing), whaikōrero (formal speeches of welcome and reply), waiata (songs), hongī (formal pressing of noses) to signify that the visitors are people of the marae aof the time being and a whakawhanaungatanga (round of introductions to establish relationships) whereby the tangata whenua (people of the marae) and visitors introduce themselves.<sup>189</sup> Morning tea is shared to break tapu (a state of spiritual restriction created by the powhiri) and then the court proceedings can begin.<sup>190</sup>

Each young person is individually called to the wharenuī (meeting house) of the marae where they are greeted by kaumātua and kuia (male and female respected elders of the marae).<sup>191</sup> The kaumātua and kuia do not have a legal role but remain for each hearing and speak to the young people, often with words of encouragement and advice.<sup>192</sup> The young person will deliver his or her pepeha (traditional tribal saying) or mihi (greeting in Māori language), which for many will be the first time that they speak Māori and the court proceeding may be the first occasion that they have encountered Māori protocol or been to a marae.<sup>193</sup> They are assisted by a lay advocate who is appointed by the court, who will assist them to prepare their mihi, research their family background, represent their whanau (extended family), hapu (sub tribe) or iwi (tribe), and will ensure that the Court is informed about any relevant cultural matters involving that young person.<sup>194</sup> The lay advocate will support the young person throughout the entire process and will endeavour to connect that young person with their cultural heritage.<sup>195</sup>

Overrepresentation of Māori young people in the criminal justice system is a cause for serious concern. As at November 2014, Māori young people comprise 22% of the general population aged 14-16 inclusive but make up 51% of apprehensions of 14-16 year olds, approximately 53% of Youth

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<sup>188</sup> Taumaunu, above n 182.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

Court appearances, 60 % of supervision with residence orders and 53% of conviction and transfer orders made by the Youth Court.<sup>196</sup> Approximately 6% of Māori young people who are within the appropriate age range, appear in Youth Court.<sup>197</sup>

### ***Why is the Rangatahi Court system so successful?***

While noting that Rangatahi Courts were in the early stages of development, a 2012 evaluation of Rangatahi Courts commissioned by the Ministry of Justice found that the young people, their families, the marae community, youth justice professionals and the judiciary reported positive outcomes in terms of their engagement.<sup>198</sup>

According to the evaluators, the cultural relevance of the marae venue and the inherent cultural processes were critical success factors because they increased the legitimacy of the court for the young people and their families and engendered respect.<sup>199</sup> In this environment, it was easier for young people to engage in the difficult discussions about accountability for offending, the FGC plan requirements, and compliance.<sup>200</sup>

The roles of the Elders and lay advocates were also highlighted for their contribution. Elders were seemingly able to draw out respect and positive behaviour from the young people and were able to inspire a positive pathway.<sup>201</sup> In addition, justice professionals noted that lay advocates were able often to develop more trusting and respectful relationships with families than social workers can achieve.<sup>202</sup> The judges also valued the resulting depth and quality of the information that lay advocates were able to provide to the court.<sup>203</sup> The final factor identified in the evaluation was the commitment of the youth justice professionals and the marae community to the process.<sup>204</sup>

However, while the evaluation was positive, Judge Taumaunu advises caution in relying on Rangatahi Courts for systemic change. The reasons for the overrepresentation of Māori young

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<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Evaluation of Ngā Kooti Rangatahi (2012), above n 184, 9-11.

<sup>199</sup> Ibid 11.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid 12.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

people in the criminal justice system are complex and interrelated, ranging from ‘poverty, lack of educational achievement, unemployment and boredom, alcohol and drug use, and dysfunctional family dynamics.’<sup>205</sup> Other underlying causes include lack of self-esteem, self-identity confusion, and strong resentment that can lead to anger.<sup>206</sup> Therefore, while the success of the Rangatahi Court system should be acknowledged, Judge Taumaunu’s concern is that these culturally appropriate and positive resources are directed at the wrong end of the spectrum. Given the complexity of the factors contributing to offending, a wide-ranging community and government strategy is required if there is to be change in overrepresentation. Judge Taumaunu claims that the community cannot rely on the court system for the needed shift.<sup>207</sup>

### ***Case study 11 Navajo Nation court system***

The judicial branch of the Navajo Nation offers both adversarial and peacemaking models of justice to resolve disputes and deal with wrongdoing. The peacemaking system reflects traditional Navajo values about and perceptions of justice, while the adversarial system, which has now evolved to apply Navajo Common Law exists to deal with those matters that the Navajo peacemaking division cannot resolve. The Nation operates five courts – District, Family, Small Claims, Peacemaking and Supreme – that deal with up to 50,000 matters annually.

#### *The modern adversarial system*

The modern adversarial system was originally patterned on the Anglo-American court system and adopted in response to Arizona’s attempt to extend its power over the Navajo reservation under PL 280.<sup>208</sup> As part of a two-pronged approach designed to demonstrate to government officials that it had the capacity to govern and could ‘be trusted’ to govern, the Navajo Tribal Council decided to take control of police and court functions.<sup>209</sup> It replaced the Navajo Courts of Indian Offences that had been established in 1892 to apply the Bureau of Indian Affairs regulations but which had been used by judges to incorporate customary laws and methods into the system.<sup>210</sup> The Council created a ‘carbon copy of a state justice court’ and replaced the Court of Indian

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<sup>205</sup> Taumaunu, above n 182.

<sup>206</sup> Ibid

<sup>207</sup> Ibid.

<sup>208</sup> Raymond D Austin, *Navajo Courts and Navajo Common Law: A tradition of tribal self-governance* (University of Minnesota Press, 2009) 27.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid 19-25.

Offences' Law and Order Code with a Navajo Law and Order Code that was almost a word for word copy.<sup>211</sup> Many of these laws remain as statutory law in the Navajo Nation Code.<sup>212</sup>

The court system adopted the principles of judicial independence, checks and balances and separation of powers and went a step further and embraced the anti-corruption principle, which is the bedrock of Navajo fundamental laws.<sup>213</sup> In 1978, the Nation Council established a Supreme Judicial Council (composed of council delegates and judges) to hear appeals from the Navajo Nation Court of Appeals but it had a short duration.<sup>214</sup> As Austin states, its creation was an ill-conceived idea and it politicised the court system and threatened judicial independence.<sup>215</sup> It was abolished in 1985, along with the Navajo Nation Court of Appeals, after only hearing three cases, when the Nation Council created the Navajo Nation Supreme Court and streamlined court operations.<sup>216</sup> To prevent a further attempt to politicise the court, the Supreme Court is the court of final resort within the Nation.<sup>217</sup>

At the same time that unease was being expressed about inappropriate intervention in court jurisdiction, dissatisfaction with the law itself came to the foreground. There was a strong view among Navajo judges, Council members and many citizens that an alternative to the Navajo Court's adversarial approach was required. Modelling it on Anglo-American concepts of justice had served a purpose but it was not compatible with Navajo concepts of justice. Complaints can be summarised into four areas: (1) certain kinds of problems arising in Navajo communities could not be resolved; (2) Western forms of adjudication are expensive and time consuming; (3) Navajo litigants found western litigation to be confusing and frustrating; and (4) it contravened Navajo standards of justice.<sup>218</sup> Two major developments resulted: (1) Judges began to apply Navajo Common Law in their decisions; and (2) The Navajo Peacemaker Court (now Navajo Peacemaking Division) was created.

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<sup>211</sup> Robert Yazzie, 'History of the Courts of the Navajo Nation. Prepared for the orientation of the Judiciary Committee of the Navajo Nation February 11 2003' <<http://www.navajocourts.org/history.htm>>.

<sup>212</sup> Austin, above n 207, 30.

<sup>213</sup> Robert Yazzie, 'History of the Courts of the Navajo Nation. Prepared for the orientation of the Judiciary Committee of the Navajo Nation February 11 2003' <<http://www.navajocourts.org/history.htm>>.

<sup>214</sup> Ibid.

<sup>215</sup> Austin, above n 207, 30.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid 31.

<sup>218</sup> Ibid 39.



Ten geographical regions make up the judicial districts where the trial courts (district and family courts) are based.<sup>219</sup> Each judicial district also contains a peacemaking division and a small claims division.<sup>220</sup> Navajo district courts have original jurisdiction over (1) all crimes in the Navajo Nation Criminal Code when committed on the reservation, or committed off the reservation between Navajos; (2) all civil actions where the defendant lives on the reservation or caused an action to occur within Navajo territorial jurisdiction; and (3) all matters under Navajo statutory law, Navajo common law and Navajo treaties.<sup>221</sup> The Window Rock District Court also has jurisdiction to appoint a special prosecutor to investigate and prosecute ethics and corruption cases against Navajo Nation government officials.<sup>222</sup>

The Navajo Supreme Court can hear appeals from the final decisions of Navajo trial courts (district and family courts) and from decisions of certain administrative bodies including the Navajo tax commission, Navajo electoral commission and Navajo labour commission.<sup>223</sup> It can answer certified questions from Navajo trial courts and administrative bodies, and from state and federal courts; has authority over practising law in Navajo courts; has authority to approve the court rules for all Navajo courts; and general rules including rules of evidence, rules for civil and criminal proceedings, probate procedure, small claims rules etc.<sup>224</sup>

Judges are appointed by the President of the Navajo Nation from a shortlist prepared by the Navajo Judiciary Committee and are confirmed by the Navajo Nation Council.<sup>225</sup> We include a large amount of detail about the Navajo court system as an interesting example of a court system that would be familiar to western lawyers from the English common law countries such as Australia, the United States, Canada, and Aotearoa New Zealand. However, the courts apply both Navajo common law and Navajo statutory law that results in some procedures and practices that would be foreign to the English common law lawyer.

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<sup>219</sup> Ibid 32.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid 33-34.

<sup>222</sup> Ibid 32.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid 32-33.

The Navajo court system has retained the same structure since 1985 and is highly regarded as being a fair and impartial, which has given Navajo and non-Navajo litigants and defendants confidence in the system. However, in addition to the crucial role that it plays in adjudicating disputes and administering the justice system that ensures confidence in the governance and operation of the Nation, by its very existence, it also expresses tribal sovereignty.

### *Navajo Peacemaker Courts*

The Navajo Peacemaking Division (at first the Navajo Peacemaker Court) was created in 1982 and is now a major aspect of the Navajo justice system. It is derived from traditional dispute resolution concepts and has been demonstrated to be most effective when it uses traditional procedures and applies Navajo common law.<sup>226</sup>

Interrelationship and interdependence are the lynchpins of Navajo community and traditional concepts of Navajo justice invoke balance and harmony. Austin describes three principles that underpin Navajo fundamental law as *hózhó* – ‘a state where everything is properly situated and existing and functioning in harmonious relationship with everything else’; *k’é* – a person’s positive relationship with everything’; and *k’éí* – a person’s positive relations with relatives.<sup>227</sup> Law – *bee haz’áanii* – can be translated as ‘by it (norms, customs and traditions) which a certain state (*hózhó*, *k’é* or *k’éí*) exists’.<sup>228</sup> In 2002, traditional Navajo norms and values were added to the Navajo Nation Code in four sections as the ‘Diné (Navajo) fundamental laws’: (1) Traditional law – laws of the Great Spirit; (2) Customary law – laws of the Holy Beings; (3) Natural law – laws of Mother Earth and Father Heaven; and (4) Common law – Laws of the Diné (Navajo).<sup>229</sup>

Wrongdoing might be described as ‘disruption’; doing what ‘should not be done’.<sup>230</sup> Unlike western law, the focus is on the behaviour, not the intent, and the translation of ‘wrongdoer’ is roughly, ‘he took the chance’.<sup>231</sup> Disharmony is ‘bad’ because it ‘invites ‘retaliation, ridicule, ostracism against the disrupters, and ... it disturbs the community’.<sup>232</sup> Resolving disruption

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<sup>226</sup> Ibid 39.

<sup>227</sup> Ibid 40-41.

<sup>228</sup> Ibid 41.

<sup>229</sup> Ibid 42.

<sup>230</sup> Nielsen, above n 128, 106.

<sup>231</sup> Nielsen, above n 128, 107. References omitted.

<sup>232</sup> Ibid.

involved the wrongdoer, the ‘victim’, family/clan, and community members.<sup>233</sup> The traditional justice institution was the clan or kinship structure, and family and kin would work with the wrongdoer to change their behaviour but would also assume obligations such as making reparations and would endeavour to ensure there were no future disruptions.<sup>234</sup> Yazzie and Zion emphasise that the ‘moral force of the group’ was leveraged to put the wellbeing of the community above that of the individual.<sup>235</sup> This leads to the pejorative Navajo saying that ‘he acts as if he had no relations’.<sup>236</sup>

Navajo justice was, and through the peacemaking system is, more concerned with the ‘wholeness of the person, a peaceful community and adjusting relationships than it is with punishing people.’<sup>237</sup> Traditionally, a respected community leader would facilitate a meeting who used prayer, clarification of values, stories and teachings from traditional narratives and consensus to ‘arbitrate disputes, mediate quarrels, resolve family problems and try to correct wrongdoers.’<sup>238</sup> The goal was/is to restore solidarity and to prevent recurrence so that the ideal is for all parties to leave the meeting feeling that a solution had been reached, including the wrongdoer who should now understand him or herself better.<sup>239</sup>

Today, the peacemaking system is a parallel system to the court system described above. Peacemakers are not neutral mediators but are respected men and women who are chosen by the community for their ‘demonstrated character, wisdom, and the ability to make good plans for community action’.<sup>240</sup> Their ‘training’ is in Navajo fundamental law, values, principles and philosophy that lead to *hozho* – harmony, balance, peace, completeness, happiness etc.<sup>241</sup> They are guides and teachers who assist the parties to state the problem, say how they feel about it and

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<sup>233</sup> Ibid 107.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid. References omitted

<sup>236</sup> Ibid

<sup>237</sup> Ibid 108. References omitted.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid 108.

<sup>240</sup> Ibid 110. References omitted

<sup>241</sup> Austin, above n 207, 91.

to arrive at a solution.<sup>242</sup> They will express their views on the appropriateness of the solution and give guidance by sharing stories, prayers and direction on the fundamental laws.<sup>243</sup>

The process begins with a prayer and ends with a meal and includes the parties, friends, family and community members who are entitled to share their views, including the peacemaker.<sup>244</sup>

Peacemaking applies the traditional notion of ‘talking things out’ and consensus decision-making to solve community problems among all parties with an interest.<sup>245</sup> Blame is not part of the process and the involvement of all interested parties tends to act as a reality check on what is said by the parties about the events that led to the dispute.<sup>246</sup> If the wrongdoer does not fulfil the agreed actions, then the dispute is referred to the adversarial court system.

#### 4. Sentencing

##### ***Case study 12: Indigenous Circle Sentencing***

Indigenous sentencing courts involve the participation of Indigenous community members in the sentencing of Indigenous offenders and other efforts aimed at improving the cultural appropriateness of sentencing. Some Indigenous sentencing courts operate informally while others are governed through legislative frameworks, such as the *Magistrates’ Court (Koori Court) Act 2002* (VIC) which added section 4D to the *Magistrates’ Court Act 1989* (VIC) to establish the Koori Court Division, and the *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2003* (SA) which led to amendments to the *Criminal Law (Sentencing) Act 1988* (SA) and, later, the creation of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). At present, Indigenous sentencing courts exist in various locations within several Australian jurisdictions: SA, NSW, VIC, QLD, and WA.<sup>247</sup>

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<sup>242</sup> Nielsen, above n 128, 110.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid 111.

<sup>245</sup> Austin, above n 207, 90.

<sup>246</sup> Nielsen, above n 128, 111.

<sup>247</sup> Auty notes that while there is uniformity surrounding these initiatives, they are nonetheless ‘insistently individual.’ Kate Auty, ‘We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts’ (2006) Vol 1 – Special Series, *eLaw Journal* 101, 104 ; [https://elaw.murdoch.edu.au/issues/special/we\\_teach.pdf](https://elaw.murdoch.edu.au/issues/special/we_teach.pdf) (accessed 4 July 2008)

By way of example, the Nowra Circle Court is made up of four Elders from the local community. They oversee the sentencing of Indigenous young people who have elected to take part in the program. Established in February 2002, sessions of the Nowra Circle Court are held in the South Coast Aboriginal Cultural Centre and are presided over by a magistrate, who travels there as part of a circuit. Generally speaking, Indigenous sentencing courts have been evaluated in positive terms.<sup>248</sup> Research suggests that offenders find Indigenous courts more challenging and confronting than mainstream courts.<sup>249</sup> Similarly, sentencing courts play a role in improving communication and understanding between judicial officials, offenders and the Indigenous community.<sup>250</sup> Other benefits include improving a sense of inclusiveness; transparency and accountability in sentencing outcomes for Indigenous offenders; and providing the opportunity for community input over the sentencing process. Shortcomings of Indigenous courts include their limited reach both in terms of jurisdiction and eligibility; the relatively small proportion of Indigenous offenders sentenced before such courts; and, more generally, questions regarding the meaningfulness of Indigenous agency and oversight over court sentencing processes.<sup>251</sup>

## 5. Prison and Post-release

### ***Case study 13: In Search of Your Warrior program***

The *In Search of Your Warrior* (ISOYW) program is an Aboriginal specific program for male offenders who have a history of violent behaviour. Based on its success from 1995 at the Stan Daniels Healing Centre in Alberta, Canada, the Correctional Services of Canada (CSC) expanded the program in 1999 to include Aboriginal men in federal corrections institutions, and created two new programs, *Spirit of a Warrior* in 2002 for women in federal corrections institutions, and the TAPWE Youth Warrior Program in 2009 for young offenders. The ISOYW program has been offered in minimum and medium security institutions, healing lodges (which focus on healing and cultural

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<sup>248</sup> Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia'. *Trends and Issues in Crime and Criminal Justice* (2004) 277:2-6; Elena Marchetti, 'An Australian Indigenous-Focused Justice Response to Intimate Partner Violence: Offenders' Perceptions of the Sentencing Process' (2015) *British Journal of Criminology* 55(1)88-106. doi: 10.1093/bjc/azu089

<sup>249</sup> Elena Marchetti (2015), above n 247.

<sup>250</sup> Elena Marchetti and Kathleen Daly (2004), above n 247.

<sup>251</sup> Cunneen and Tauri, above n 8.

(re)connection while inmates serve their sentences) and at bush camps.<sup>252</sup> The setting, length, intensity level and variety of ceremonies varies from place to place but the fundamental principles are constant. This is in part achieved because all facilitators are trained by the NCSA.<sup>253</sup>

The ISOYW program is a high intensity violence prevention program created by the Native Counselling Services of Alberta (NCSA). It is offered to Aboriginal men with a history of violent offending and a high risk to reoffend.<sup>254</sup> A 2005 evaluation found that program participants tended to have certain common characteristics. These included that large proportions had not completed high school and were unemployed; that the majority had extensive criminal histories: almost two thirds (61%) had previous youth convictions and nearly all (91%) had previous adult court convictions; 71% had failed on previous community-based sanctions and 49% had failed on a prior conditional release.<sup>255</sup>

Program participants experience a holistic healing approach based on the Medicine Wheel that encompasses all aspects of self (physical, emotional, spiritual, psychological). They undertake 75 sessions over a six to thirteen week period (depending on the institution) to gain insight into how violence evolves and is transmitted from one generation to the next<sup>256</sup> and to help residents understand the impact on personal and historical trauma on their behaviour.<sup>257</sup> Participants undertake group therapy around eight components: anger awareness, violence awareness, family of origin awareness, self awareness, skill development, group skill development, cultural awareness and cognitive learning.<sup>258</sup>

Aboriginal Elders are employed to deliver the cultural teachings and undertake ceremony, upon which the program is based.<sup>259</sup> Their role is to spiritually engage with the participants and guide

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<sup>252</sup> Shelley Trevethan, John-Patrick Moore and Nicole Allegri, 'The "In Search of Your Warrior" Program for Aboriginal Offenders: A Preliminary Evaluation' (Research Paper N<sup>o</sup> R-172, November 2005) < <http://www.csc-scc.gc.ca/research/r172-eng.shtml> >.

2005 evaluation

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Stan Daniels Healing Centre, <<http://ncsa.ca/programs/corrections/stan-daniels-healing-centre/>>

<sup>258</sup> Trevethan, Moore and Allegri, above, n 251.

<sup>259</sup> Ibid.

the healing process that engages all parts of the self.<sup>260</sup> It is believed that the cultural teachings lead offenders back to a non-violent way of life.<sup>261</sup> The concept of ‘warrior’ is appropriate for men and women and captures qualities such as ‘self-possession, spiritual and psychic awareness/alertness/attentiveness, goodness and caring, endurance, patience, resilience and the capacity to fight for what must be defended and preserved’.<sup>262</sup>

### ***Why the program succeeds***

The 2005 evaluation found that all those associated with the program – participants, Elders, facilitators and CSC personnel – demonstrated a high level of satisfaction with the program. Participants were less likely to require services targeting personal distress, family issues, substance abuse, community functioning, employment, social interactions and pro-criminal attitudes and were also assessed as having greater potential for reintegration.<sup>263</sup> Interestingly, however, re-admission rates were found to be similar to the comparison group who had not attended the program.<sup>264</sup> While at first, this may appear to be a cause for alarm, evaluation of the reoffenders showed that they were much less likely to have committed a violent offence (7%) compared to the comparison group (57%).<sup>265</sup>

Those who are engaged in the program observed that the ceremonies and spiritual content were crucial to the success of the program.<sup>266</sup> Also the holistic nature of the program, which addresses social, educational, emotional, physical and spiritual needs of the participant, was a key factor.

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<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.