SENATE ESTIMATES COMMITTEE
FEDERAL MAGISTRATES SERVICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Provide broad detail of what migration matters are currently before the court.

I am advised that the answer to the honourable Senator's question is as follows:

Since 2 October 2001 the Federal Magistrates Court has had concurrent jurisdiction with the Federal Court pursuant to the amendments made to the *Migration Act 1958* by the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001* to review visa-related decisions under the Migration Act.

Between 2 October 2001 and 11 June 2002, the following are the statistics for migration matters in the Federal Magistrates Court -

Filings in Federal Magistrates Court	17
Transfers from the Federal Court	102
TOTAL	119

Of the 119 matters, 100 were filed (12) or transferred (88) since 1 April 2002.

SENATE ESTIMATES COMMITTEE
FEDERAL MAGISTRATES SERVICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Have you had any migration matters referred from the court that have later been withdrawn or dismissed by the FMS?

I am advised that the answer to the honourable Senator's question is as follows:

Of the 119 migration matters before the Federal Magistrates Court, a total of 27 have been finalised with the outcomes being as follows:

21 = application dismissed
1 = application withdrawn
2 = consent orders/terms of settlement
3 = discontinued

Of the 102 migration matters transferred to the Federal Magistrates Court from the Federal Court, a total of 23 have been finalised with the outcomes being as follows:

18 = application dismissed
1 = application withdrawn
2 = consent orders/ terms of settlement
2 = discontinued

SENATE ESTIMATES COMMITTEE
FEDERAL MAGISTRATES SERVICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Are you able to break down the 'reasons' given on remittal (in relation to migration matters)? Were they done on the application of the applicant or the respondent? Provide the numbers that have been withdrawn following remittal.

I am advised that the answer to the honourable Senator's question is as follows:

The governing legislation provides for discretionary transfer of proceedings to the Federal Magistrates Court either on application of a party or on the Court's own initiative. The legislation and Rules of Court set out factors that are relevant to decisions whether to transfer proceedings.

It is not possible to provide reasons for transfer as no reasons are generally given. Nor are statistics kept on whether the parties sought to have the matter transferred or the transfer was on the motion of the court. Statistics on those matters which have been transferred and subsequently withdrawn are set out in the answer to the previous question.

SENATE ESTIMATES COMMITTEE
AUSTRAC
QUESTIONS ON NOTICE

Senator Cooney asked the following question at the hearing of 27 May 2002:

How much material have you supplied to the Royal Commission into the building industry

I am advised that the answer to the honourable Senator's question is as follows:

AUSTRAC has signed a Memorandum of Understanding (MOU) with the Building and Construction Industry Royal Commission on access to and use of Financial Transaction Reports information (FTR information). This MOU provides for online access to FTR information by authorised access officers of the Royal Commission and also allows for off-line dissemination of FTR information by AUSTRAC to the Royal Commission.

The Royal Commission has 6 authorised access officers. To date the access officers have a total of 44 logons and have undertaken 377 searches of the AUSTRAC database.

In addition, AUSTRAC has disseminated 3 analytical reports, comprising 30, 18 and 62 financial transaction reports respectively; 1 suspect transaction report; and a series of significant cash transaction reports, for a particular geographic region, which were extracted from the database using AUSTRAC's Industry and Occupation macro analytical tools. These financial transaction reports relate to the building and construction industry.

SENATE ESTIMATES COMMITTEE
AUSTRAC
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002:

How long did it take for your organisation to respond to the inquiry in relation to the Shining Path music company

I am advised that the answer to the honourable Senator's question is as follows:

AUSTRAC received two reports of suspicious transactions relating to the Shining Path matter. Both reports were disseminated to the Australian Federal Police (AFP) within 4 working days.

AUSTRAC received the first suspect transaction report from the Commonwealth Bank of Australia (CBA) relating to the Shining Path on 27 December 2001. This date was an official holiday for AUSTRAC staff and the office was unattended. On 28 December 2001 an AUSTRAC staff member had a telephone conversation with the CBA officer who sent the report to AUSTRAC. As with other reports of suspicious transactions following September 11, it is understood that the CBA officer would have indicated that he had spoken to the AFP and notified them of the suspect transaction report prior to submitting the report to AUSTRAC. Neither AUSTRAC, nor the CBA, have a written record of the conversation. AUSTRAC then formally disseminated the report to the AFP on 3 January 2002 following the Christmas/New Year public and public service holidays.

The second suspect transaction report was received by AUSTRAC from the CBA on 5 February 2002 and was formally disseminated to the AFP on 8 February 2002.

SENATE ESTIMATES COMMITTEE
AUSTRAC
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002:

Did they (the Australian Federal Police) come back to you (after you passed the information on from the Commonwealth Bank)? Did they ask for any further information in relation to that transaction or any other transaction?

I am advised that the answer to the honourable Senator's question is as follows:

No, in response to both questions.

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SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Did the minister receive an advance draft copy of the *Social Justice Report 2001* prior to 23 December?

I am advised that the answer to the honourable Senator's question is as follows:

The Minister did not receive an advance draft copy of the *Social Justice Report 2001* prior to 23 December 2001.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

In the ministerial budget statement at page 25, there is an item regarding community affairs and HREOC, with an estimated actual for 2001-02 of $1,079,000, but budget estimates for 2002-03 show only $0.988 million. Does this item refer to a decrease? If it does, why is there a decrease and what implications does it have for the indigenous affairs work of HREOC and all of HREOC's work?

I am advised that the answer to the honourable Senator's question is as follows:

In March 2001 the Social Justice Commissioner on behalf of HREOC entered into a partnership with the Aboriginal and Torres Strait Islander Commission and Public Interest Advocacy Centre to convene a national conference on stolen generations issues and reparations, titled *Moving Forward - Achieving reparations for the stolen generations*.

HREOC entered into an agreement with ATSIC to undertake most aspects of the conference's organisation at cost. A payment of $91,000 was provided to HREOC for costs associated with the conference (such as venue hire, catering, travel arrangements for international and domestic speakers, publications, advertising, media and so forth). Therefore the estimated actual for 2001-021 includes the $91,000 payment made by ATSIC.

Accordingly, there has been no decrease in the budget for the indigenous affairs work of the Commission for the 2002-03 period and therefore there are no implications for the indigenous affairs work of HREOC and all of HREOC's work.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Has the commission received any indication from the government about whether or not it will respond, and if so when, to the documents handed to the government at Corroboree 2000 or the recommendations of the *Council for Aboriginal Reconciliation's final report of December 2000?*

I am advised that the answer to the honourable Senator's question is as follows:

The Social Justice Commissioner has not received any formal indication as to whether the government intends to respond to the documents of reconciliation presented at Corroborree 2000 or the final report of the Council for Aboriginal Reconciliation.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Provide the final program for the public hearings for the Children in Immigration Detention Inquiry

I am advised that the answer to the honourable Senator's question is as follows:

As at 7 June, the following changes to the public hearing program have been made. The public hearing in Adelaide, originally scheduled for 15 July, will now be held on 1-2 July. The public hearing in Sydney (for organizations and individuals) was originally going to be held on 24 and 25 June. In order to visit Woomera IRPC within the timeframe set by DIMIA (by end of June, or after July), the Commission has changed this hearing to 15-16 July.

The full schedule for Public hearings and IDC visits is reproduced below:

Public Hearing Dates

MELBOURNE

30 - 31 May
Australian Institute for Management,
181 Fitzroy St, St Kilda

PERTH

10 June
Terrace B, Parmelia Hilton
14 Mill St, Perth

ADELAIDE

1 - 2 July
Meeting Room B, Hilton
233 Victoria Sq, Adelaide

SYDNEY

15- 16 July
Avillion Hotel
Corner Pitt & Liverpool Street, Sydney

BRISBANE

5 August
Parliament House - Level 5 Conference Room
Parliamentary Annex
Alice Street, Brisbane

SYDNEY

15 - 16 August
Hearings for DIMIA
Parliament House
Macquarie Street, Sydney

Witnesses chosen from ACT, NT and Tasmania will be invited to attend hearings in the most appropriate of the above locations.

Immigration Detention Facility Visits:

Tuesday 28 - Wednesday 29 May - Maribyrnong IDC

Tuesday 11 June - Perth IDC

Wednesday 12 June - Thursday 13 June - Port Hedland IRPC

Monday 17 June - Wednesday 19 June - Curtin IRPC

Thursday 27 June - Saturday 29 June - Woomera IRPC

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SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

It is indicated on the web site that you have in fact got some pictures from the children that you have already accepted as submissions to the inquiry. Provide the actual specifics of other media used.

I am advised that the answer to the honourable Senator's question is as follows:

In the document 'Frequently Asked Questions' on the National Inquiry website, people are advised that submissions may be made in many forms, including pictures. The Inquiry has received the following:

- Submission No.53, United Nations Association of Australia report 'Desert Camps', which includes several drawings by children in detention centres; and

- Submissions Nos 228 and 229 (received 28th and 31st May 2002 respectively), which include drawings and comments provided by former child detainees.

As at 7 June 2002 no tapes had been received. It is expected that a child's hand-made book, which may contain pictures, will be forwarded at a later date.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

How many of the submissions (to the inquiry into children in immigration detention) have been received so far on a confidential basis. Do you have an indication or perhaps a percentile figure.

I am advised that the answer to the honourable Senator's question is as follows:

As at 7 June 2002, there were 18 confidential submissions to the Inquiry. The total number of submissions (including supplementary submissions) at that date was 240.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Provide the number of days when both assistant commissioners would be employed on the Children in Immigration Detention inquiry by the commission.

I am advised that the answer to the honourable Senator's question is as follows:

As at 6 June 2002, it is expected that Dr Sullivan will be directly involved in hearings or inspections on 22 days, and Professor Thomas will be directly involved for 15 days. The difference results mostly from Dr Sullivan's expected participation in inspections at the remote centres in Western Australia.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002:

a) Does the public consultative process include all capital cities or regional centres
b) What program is in place
c) If there is a program, please provide

I am advised that the answer to the honourable Senator's question is as follows:

The consultation process includes visits to all capital cities and a regional centre. The program is as follows.

Brisbane	23-24 May 2002
Melbourne	30-31 May 2002
Darwin	5 & 7 June 2002
Katherine	6 June 2002
Sydney	12 June 2002
Adelaide	13-14 June 2002, 1 July 2002
Canberra	17 June 2002, 24 June 2002
Perth	20-21 June 2002
Hobart	26 - 27 June 2002

It is likely that at least one other regional centre will be included before the end of the consultation period. Some further consultations may also be scheduled.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002:

Regarding the McBain case, provide a breakdown of representative counsel's costs and the overall solicitor costs and other incidentals.

I am advised that the answer to the honourable Senator's question is as follows:

The total amount of external costs incurred by the Commission in relation to the McBain case was $8068.15. This figure is made up by the following amounts:

Senior Counsel – acted for the Commission on a pro bono basis apart from incidentals

Junior Counsel - $5212.73

Incidentals (for example, airfares, accommodation) - $2855.42

The honourable Senator also requested a breakdown of the overall solicitor's costs in relation to this matter. As explained to the honourable Senator, much of the Commission's intervention work is carried out in-house and the Commission's legal section staff act as instructing solicitors in nearly all matters. In this matter there were no external solicitor costs incurred by the Commission.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002:

Could you detail those 12 matters and the breakdown of what the costs were for each of those 12 matters? Where you have got a matter that you have briefed counsel for but you have also then sent along a junior out of your staff, then can you put an asterix?

I am advised that the answer to the honourable Senator's question is as follows:

In 2000-01 the Commission intervened in four intervention matters and one amicus curiae matter. The total external costs incurred were:

intervention matters - $34,408
amicus curiae matters - $ 5,237

In the current financial year, the Commission has intervened in eleven matters and two amicus curiae matters. The total external costs incurred were:

intervention matters - $84,432
amicus curiae matter - $18,789

Details of the individual matters and a breakdown of external costs incurred by the Commission are given below. An asterix has been used to indicate those matters in which the Commission legal staff have acted as junior counsel.

2000-01

1. The State of Western Australia v Ben Ward & Ors on behalf of the Miriuwung & Gajerrong People & Ors -High Court (Nos P59, P62, P63 and P67 of 2000) -Intervention

Item	**Cost $**
Senior Counsel	Pro-bono
Junior Counsel	22,063
Incidentals	7,548
Total	**29,611**

2. ACTU – Parental Leave for Casuals Test Case Australian Industrial Relations Commission (C Nos. 39482-39486 of 2000) -Intervention

Item	**Cost $**
Senior Counsel	2,619
Junior Counsel	600
Incidentals	750
Total	**3,969**

3. Ming Dung Luu and The Honourable Phillip Ruddock, Minister for Immigration and Multicultural Affairs Federal Court (No V288 of 2001) - Intervention

Item	**Cost $**
Incidentals	829
Total	**829**

4. AMWU Casuals and Part Time Application Australian Industrial Relations Commission (C No.22704 of 1999) - Intervention

A written submission was prepared by Commission staff. No external costs were incurred.

5. Harrison v Santos Ltd Federal Court (No S91 of 2000) - Amicus Curiae

Item	**Cost $**
Junior Counsel	*
External solicitors	5,171
Incidentals	66
Total	**5,238**

2001-02

1 . Ming Dung Luu and The Honourable Phillip Ruddock, Minister for Immigration and Multicultural Affairs Federal Court (No V288 of 2001), Full Federal Court No.V995 of 2001) -Intervention

Item	**Cost $**
Junior Counsel	25,444
Incidentals	1,974
Total	**27,418**

2. An application for writs of mandamus, certiorari and prohibition against: Hon Justice Ross Alan Sundberg, Justice of the Federal Court of Australia John McBain v Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church (No C22 of 2000) High Court – Intervention

Item	**Cost $**
Senior Counsel	Pro bono
Junior Counsel	5,213
Incidentals	2,855
Total	**8,068**

3. The Victorian Council for Civil Liberties Inc and Eric Vadarlis v Hon. Phillip Ruddock, Minister for Immigration and Multicultural Affairs and Hon. Daryl Williams, Attorney-General and Hon. Peter Reith, Minister for Defence and the Commonwealth of Australia Federal Court (No V899 and V900 of 2001), Full Federal Court (No V1007 and V1008 of 2001) and High Court special leave application – Intervention

Item	**Cost $**
Senior Counsel	8,545
Junior Counsel	4,626
Incidentals	4,620
Total	**17,791**

4. Rainsford -v- State of Victoria Full Federal Court (No V1243 of 2001) Intervention

Item	**Cost $**
Senior Counsel	4,364
Junior Counsel	*
Incidentals	117
Total	**4,481**

5. A matter before the Refugee Review Tribunal (name withheld) No V 01/13391 – Intervention

A written submission was prepared by Commission staff. No external costs were incurred.

6. The Attorney-General for the Commonwealth v Kevin And Jennifer Full Family Court (No EA 97/01) – Intervention

Item	**Cost $**
Senior Counsel	11,592
Junior Counsel	*
Incidentals	Nil
Total	**11,592**

7. Simon Odhiambo and Peter Martizi v Minister For Immigration and Multicultural Affairs (W373 of 2001 and W378 of 2001) Full Federal Court – Intervention

Item	**Cost $**
Senior Counsel	10,673
Junior Counsel	*
Incidentals	536
Total	**11,209**

8. Gunn and Taylor (Aust) Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (PR918573) Australian Industrial Relations Commission - Intervention

Item	Cost $
Junior Counsel	2,970
Incidentals	668
Total	**3,638**

9. Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors (M19 Of 2001) High Court – Intervention

Item	Cost $
Senior Counsel	Pro bono
Junior Counsel	Account not yet received
Incidentals	Accounts not yet received

10. Ainsworth Game Technology v Cathy Song Full Federal Court – Intervention

Item	Cost $
Junior Counsel	No fees incurred to date
Incidentals	No costs incurred to date

11. NAAV v Minister for Immigration and Multicultural Affairs and NABE v Minister for Immigration and Multicultural Affairs Full Federal Court (No 265/2002 and 282/2002) - Intervention

Item	Cost $
Junior Counsel	Account not yet received
Incidentals	235
TOTAL	**235**

12. Harrison v Santos Ltd Federal Court (No S91 of 2000) – Amicus Curiae

Item	Cost $
Senior Counsel	10,691
Junior Counsel	*
External solicitors	1,227
Incidentals	Nil
Total	**11,918**

13. Ferneley v Boxing Authority of NSW & State of NSW Federal Court (No N1261 of 2000) – Amicus Curiae

Item	Cost $
Junior Counsel	6,871
Incidentals	Nil
Total	**6,871**

Attachment A to QoN 77

Diversionary programs in Western Australia and their impact on Indigenous youth

Prepared on behalf of the Human Rights and Equal Opportunity Commission

Harry Blagg
University of Western Australia

Introduction

Western Australia locks up Indigenous youth at a higher rate than any other state or territory in Australia. On any day between 60% and 65% of young people in detention (male and female) are Aboriginal. Like many other states, and following an international trend, Western Australia began to develop a number of diversionary mechanisms in the early 1990s. They have failed to make an impact on the overall situation in regards to the over-representation of Indigenous youth.

This paper discusses the diversionary systems in Western Australia as they impact on Indigenous youth.

It concludes that:

- the processes is failing to impact on rates of over-representation of Indigenous youth and requires fundamental reform;
- the diversionary system is bifurcated on racial grounds;
- non-Indigenous youths are the main beneficiaries of diversion: Indigenous youth remain stranded in the justice system;
- despite a number of worthwhile initiatives, the process suffers from a lack of support from Indigenous people;
- serious attention needs to be given to legislative and policy changes that:
  a) reduce police discretion where decisions regarding cautioning and referrals to juvenile justice teams are concerned; and,

b) introduce new "secondary" screening mechanisms;

- the practice of citing previous cautions and justice team referrals in court, as though they form part of a prior record, must cease;
- children and young people need to have access to legal representation before agreeing to involvement in diversionary conferences and should have the benefit of legal council during conferences;
- the family conferencing process needs to be given back to Indigenous people and their organisations for discussion about their form, organisation, management and coordination in the future.

Diversion in Western Australia

Currently there are 2 tiers to the diversionary system in operation in Western Australia: *police cautioning* and referral to a *juvenile justice team.* These options were formally established under the *Young Offenders Act 1994* and constitute the primary mechanisms for ensuring that the full powers of the judicial process are not deployed unnecessarily in cases where a less intrusive option would suffice.[1]

"Front end" diversionary mechanisms (that is, diversion from the system based at the point of first contract between offenders and the criminal justice process, usually the police), exist in some form in most societies based upon the common law tradition. This tradition, gives considerable scope for discretionary decision-making at the lower level of the system – principally by the police. There are strengths and weaknesses in this. One strength is that cases can be dealt with relatively speedily without recourse to formal processes. A weakness is that police practice is notoriously opaque and difficult to scrutinise: this lack of transparency has attracted concerns that police discretion is not always used appropriately with some groups of young people.

The police's "gate-keeping" role is of pivotal importance in framing how the justice system as a whole deals with individual cases. For this reason, Blagg and Wilkie (1995, 1997) maintain, the policing process needs "be at least as rigorously constrained with a framework of rights as the court or trial process" (1997, 144).

Decisions the police make can have serious consequences down the track. The police have discretion in determining, for example, whether to deal formally or informally with cases and, if they decide to proceed formally, they will select the kinds of charges offenders will face. In turn, this may influence the form any ensuing judicial proceedings will take, as, "the choice of charge, determines the mode of trial" (Ashworth, 1994, 7).

Restorative justice

Interest in diversion has been given added significance due its links with the emerging "restorative justice" movement. There are now 2 (sometimes contradictory) ways of seeing diversion. The first is relatively minimalist: diversion is about giving first or minor offenders "a second chance". The second is more radical and ambitious. Diversion, becomes not just as a mechanism for re-routing individual cases away from contact with the existing criminal justice system but a vehicle for directing cases into *an alternative process of community based justice*. Restorative justice shifts the focus of attention away from infractions of the criminal law towards the repair of the harms caused to individuals and groups by a criminal event – including the victims. The definition established by Marshall (1996, 37) describes the aims:

> Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

Since the early 1990s, the possibility of employing diversionary mechanism as a pathway into these processes described by Marshall has been the subject of intense deliberation. *Family conferencing,* a practice begun in New Zealand, has offered a particular rich source of ideas about how restorative justice could be given practical expression with young people. According to Van Ness, Morris and Maxwell (2001: 7) conferencing "involves":

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[1] The recent creation of a *Drug Court* in WA has prompted debate about the possibility of extending the cautioning scheme to include minor drug offences such as the possession of cannabis.

> ….not only the primary victim and offender, but also secondary victims (such as family members or friends of the victim) as well as supporters of the offender (such as family members or friends). These people are involved because they have also been affected in some way by the offence, and because they care about one of the primary participants. They may also be involved in carrying out the final agreement.

The conference provides a forum for restorative solutions to emerge. Proponents stress that conferencing is not a soft option. It directly confronts young people with the human consequences of their behaviour and provides avenues for direct reparation and restitution for victims. The agreements reached by conferences can me tailored to meet the direct wishes of participants and often involve the offender in community work, a direct apology to the victim and some kind of – often symbolic - restitution. Families of offenders may leave the conference empowered by the process, having re-claimed control over their children.

The conference remains at the centre of diversionary systems operating in Australia, most of which would claim to be philosophically aligned with the principles of restorative justice (Daley, 2001; Strang, 2000). Some critics have questioned the degree to which the processes are genuinely restorative – particularly given the degree of control exerted by the existing systems "gate-keepers" (the police) over the process in many states (White 1994.Blagg and Wilkie 1995; Cunneen and White 1997). The police are the key players and primary decision makers in youth focused diversionary programs. For many marginal groups of young people, in particular, the police represent a coercive presence in every-day life and the authoritarian face of the criminal justice system (Blagg and Wilkie, 1995). It is difficult to envisage how schemes controlled by them could develop legitimacy with many groups of young people – such as Indigenous youth.

The "Seen and Heard" inquiry heard evidence of the "discriminatory impact" of the legal process on Indigenous youth, and were particularly concerned about lack of controls over police use of discretionary powers (Law Reform Commission and the Human Rights and Equal Opportunity Commission, 1997 p485-487). The inquiry commented that diversionary programs in Australia failed to take adequate account of

the particular needs of Indigenous youth and argued that, "the level of police involvement in most conferencing models is particularly problematic for Indigenous youth" (Law Reform Commission and the Human Rights and Equal Opportunity Commission, 1997 p485).

Similar observations were made in the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Human Rights and Equal Opportunity Commission, 1997) - the historical role played by the police in the removal of children and the implementation of discriminatory government policies against Indigenous people, still had consequences in terms of poor Aboriginal/police relations. In regard to police involvement in conferencing, the report argues that, "the conferencing process has particular significance for Indigenous communities given the history of removals and prior police intervention" (Human Rights and Equal Opportunity Commission, 1997. p525). Police involvement also, "increases the reluctance of Indigenous people to attend meetings and contributes to a non-communicative atmosphere for those Aboriginal youth who attend" (Human Rights and Equal Opportunity Commission, 1997. p525).

Restorative justice and Indigenous peoples

The restorative justice movement has tended to "claim lineage" (Blagg, 2001) with the forms of face-to-face dispute resolution practices existing – or which existed – in Indigenous society. Moreover, in the wake of the RCIADIC, restorative justice seemed to offer a way out of the impasse created by Indigenous people's lack of faith in the existing system and the alien nature of white law. However, while there is a relatively clear link between Maori justice practices and the conferencing system in New Zealand, linkages between conferencing (as currently practiced) and traditional Australian Aboriginal dispute resolution practices are more difficult to demonstrate clearly (Daley, 2001).

Also a number of critics have expressed concern at what they see as a tendency amongst some proponents of restorative justice to "appropriate" Indigenous decision making, thereby, maintaining colonial relationships. This time, though, it is Indigenous culture, rather than their land, that is the object of "colonial desire". The

image of the *indigene* enjoys wide circulation within the discourse of restorative justice. Restorative justice texts are liberally spiced with references to Navajo peace-making and Native Indian forms of dispute resolution. The cruel irony is that in Australia today it is largely non-Indigenous people who are the beneficiaries of diversionary conferencing and other forms of restorative justice and, in exchange, Indigenous people are being given the latest western justice ideas – mandatory sentencing and zero tolerance policing!

As we shall see, there are serious problems with diversion and diversionary conferencing in Western Australia, where Indigenous people are concerned.

Diversionary options for young offenders in Western Australia

The emergence of diversionary practices in Western Australia can be traced back to the immediate aftermath of the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) in the late 1980s and early 1990s. The Commissioners had been especially critical of policing attitudes and practices in Western Australia in regards to Indigenous people, which, they maintained, were perhaps the worst in Australia at that time. In 1991 the, then, Lawrence Government established a high level inter-governmental & judicial commission (The State Government Advisory Committee on Young Offenders - SGACYO) to deal with what may have been two incompatible demands: resolving the problem of Indigenous youth over-representation while, simultaneously, satisfying community demands for a tougher approach to juvenile crime. A fundamental contradiction that has had an ongoing impact on the practice of diversion and diversionary conferencing.

As part of the committee's deliberations on the issue attention was focussed on the high numbers of young people being arrested and placed before the courts: effectively "swamping" the judicial process with minor cases that could be dealt with more effectively at the "front end" of the system – meaning, at the point of contact with the police. There were no formal diversionary mechanisms in existence in Western Australia apart from a "Children's Panel" for minor offenders, run by, and at the discretion of, the police, It was widely accepted that the panel did not fulfil a diversionary function – dealing with trivial matters & offences that may have

warranted no more than a warning or "no action" in other police jurisdictions. At its peak in the early 1980s it diverted about 30% of cases from the system, this fell to around 20% in 1991(Daley, 2001) – as "get tough" policing became common practice in the wake of moral panics about youth – particularly Indigenous youth – crime.

The Panel was abolished in 1991 as police cautioning came on stream. At this time the police were being encouraged, based on lessons from over-seas, to develop alternative "pathways" out of the system (Kucera, 1992) in to community bases networks of care and control. Begun on a trial basis, cautioning was formalised in legislation under the *1994 Young Offenders Act*[2]. The legislation gave wide scope for the exercise of police discretion: the only limitations were placed on what they *could not* divert, as opposed to what they *should* or *must* divert from the system – hence, a high degree of legislative conservatism was inscribed into the Act from the outset.[3]

As we move through the legislation - and ensuing practices around diversion - it should borne in mind that prefacing the legislation, at s.7, were a number of *"General principles of juvenile justice"* that articulated the over-arching "spirit" of the legislation. Key among these principles are those acknowledging that:

- the system should only be used "as a last resort"[4];
- that young people required "special provision"[5];
- that "punishment" should be of a kind that would encourage "social responsibility"[6];

[2] *Young Offenders Act 1994,*s. 22A empowers police to "administer a caution to the young person instead of starting a proceeding for the offence." Under s. 22B the police are invited to "consider whether in all the circumstances it would be more appropriate – (a) to take no action; or (b) administer a caution to the young person".

[3] *Young Offenders Act 1994, Schedules 1 & 2.* These schedules identify certain offences for which a caution cannot be given & for which a juvenile cannot be referred to juvenile justice team & "for which a conviction will normally be recorded". There are 70 such exceptions, they include obvious offences such as sexual offences, murder & infanticide under the *Criminal Code,* through to victimless offences under the *Misuse of Drugs Act1981* (that take in possession of small amounts of cannabis) & the *Road Traffic Act 1974*. Other offences include assaults occasioning bodily harm, & criminal damage.

[4] S.7(h) "detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary".

[5] S.7(a) "there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences".

- that young people's "sense of time" be appreciated;[7]
- that the child's age, maturity and "cultural background" be considered.[8]

The principles also give weight to the centrality of family and the "family group"; in terms of the family's right to be involved in the process and as a necessary element in the reintegration of young people.[9]

These principles reflect a number of extant justice principles, found in Human Rights conventions to which Australia is a signatory (see preceding discussion). As such they should have an influence on the ways the legislation is interpreted. It has been suggested by youth lawyers, professionals in the justice system and a number of judicial officers, however, that they are frequently ignored in the practical operation of the Act.

The *juvenile justice teams*[10] were another diversionary innovation given legislative force in the Act. Like police cautioning, the juvenile justice teams had been operating on a trial basis for a few years, a number of "pilots" having been established in Metropolitan Perth in 1992. They had been recommended by the State Government Advisory Committee on Young Offenders, following a review of similar strategies elsewhere, and were strongly influenced by the practices developed in New Zealand designed to empower Maori to make decisions about their own young people (State Government Advisory Committee on Young Offenders, 1991). Family group

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[6] S.7(j) "punishment of a young person …should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways".

[7] S.7(k) "a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time"

[8] S. 7(l) "in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered…."

[9] S.7(m) " a young person who commits an offence is to be dealt with in a way that –
(i) strengthens the family and family group of the young person;
(ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and
(iii) recognises the right of the young person to belong to a family.

[10] Division 2 of the Act establishes the teams & sets out the criteria to be employed when assessing whether a case is suitable for this form of diversion.
Diversion to the teams was limited by the same schedules that limited police use of cautioning.

conferencing, as set out in legislation,[11] offered a mechanism for increasing the scope of Indigenous involvement in the justice process – an outcome desired by Indigenous groups in Western Australia. However, it was recognised by the committee that the New Zealand scheme had been successful because the legislators had absorbed the lessons of previous failures – as far as diverting Maori youth was concerned. The legislation set down strict criteria to control police discretion to approach, question, detain and charge young people. The discretionary powers of the police were curtailed and they were only empowered to refer matters to a Youth Justice Coordinator, who must (under the Act) convene a family group conference – involving all parties affected by a particular offence. Courts only have limited powers to hear a case without a conference being convened.[12] The police were encouraged to use cautioning wherever feasible and were deterred from employing arrest by the new "gate-keeping" strategies contained in the Act. [13] Also, while the police played a role in the conference, the process was led and directed by the youth justice coordinator.

The police as "judge and jury"?

This practice essentially distributes power and authority across a range of participants. Commentators were critical, however, of the development of "police led conferences", in Australia. A scheme developed by police in Wagga Wagga (New South Wales) employing a conferencing format, that the police were now becoming the "judge an jury" over cases they themselves have brought (Blagg and Wilkie, 1995, Sandor, 1994). Ashworth (2001) maintained that giving police power over conferences, such as in the Wagga Wagga program, concentrated too much power in the hand of one particular group. This argument has particular resonance in relation to Australia, where the police also prosecute cases in court (in Britain this practice

[11] *Children, Young Persons and their Families Act 1989* (New Zealand).

[12] Maxwell and Morris (2001) estimate that "roughly three quarters of cases involving young people are diverted from the court by police actions (cautioning), a further 12% are by direct referral to a family group conference, and about 12% are dealt with by the Youth Court, usually along the lines recommended by the family group conference" (Mawell and Morris, 2001, 243n).

[13] Various Australian jurisdictions had begun incorporating elements of the New Zealand approach in the early 1990s. Generally speaking, the Australian variants tended to focus on the "front end" of the juvenile justice system– those parts relating to police decision-making. The majority of states and territories have some kind of diversionary processes in place involving family conferencing – the majority under legislation. For a review see Daley (2001) and Strang (2000).

ceased in the 1980s when responsibility for bringing prosecutions was transferred to the Crown Prosecution Service) - raising concerns that their powers already extend too far into the judicial system. These concerns about unrestrained police power were given added weight during debates about restorative conferencing in Australia following the popularisation of John Braithwaite's theory of "reintegrative shaming" (1989). This thesis, that "shaming" could be a positive process if handled with sensitivity by communities of care, was picked up by advocates of the police-led *Wagga Wagga* scheme. A heated debate ensued, between those advocating police leadership in conferencing and those concerned that (aligned with the power to "shame") this would have a negative impact on vulnerable and marginal groups of young people (such as Indigenous youth) and potentially threaten their human rights (Bargen, 1996; Blagg, 1997; Cunneen, 1996).

The legislation in Western Australia was far more restricted in scope than the New Zealand Act. Indeed, *the 1994 Act essentially increased rather than curtailed the discretionary powers of the police.* The diversionary processes were simply grafted onto existing police powers and no attempt was made to introduce any mechanisms of secondary gate-keeping, to vet police decisions or prevent unnecessary prosecutions being made. Decisions about cautioning and referrals to juvenile justice teams are left to individual arresting officers.

The Act was ostensibly introduced to screen out minor offences from the criminal justice system and provide what the then Attorney General called a "series of gateways" out of the system (Cant and Downey, 1998).

The juvenile justice teams

The juvenile justice teams are inter-agency based and are coordinated by the Department of Justice. There are 5 full time teams operating in metropolitan Perth (Perth, Thornlie, Victoria Park, Wangara, Fremantle) and another 2 in outer metropolitan areas (Midland and Rockingham). In addition most country towns have *ad hoc* arrangements to convene teams when necessary (country based teams are discussed separately, below). The teams are established under the 1994 Act (s24 to s40). The Act empowers the Department of Justice to appoint an officer of the

department to coordinate a juvenile justice team (at s36) and (at s37) for the Commissioner of Police to appoint a member of the police force. Also, "if its is practicable" (s37(2)) there should also be a representative from education and a "member of an ethnic or other minority group" (s37(2)(a) & (b)).[14] Teams are housed on Department of Justice premises.

A matter can be referred to a Team if a young person accepts responsibility for the offence and choses to have the matter dealt with by the Team, otherwise the matter will be heard in court. The child must agree to participate and agree to any outcome (s32(1). Also, a "responsible adult" must agree with the referral and be willing to participate[15]. The teams have regular intake meetings where they vet cases. Some are returned to police, where a caution would be more appropriate (this limited quality control hardly constitutes a secondary screening process). Decisions need to be unanimous. Teams can accept referrals from the police, prosecutors and the children's court. The fact that the process is convened and coordinated by the department of Justice means that the system is not entirely police led – as in the Wagga Wagga model. However, the police still control the major pathways in and out of the system, making them the major players in decision making terms.

Interpreters

There is no equivalent to the Anunga Rules formally operating in Western Australia. Indigenous youth, it is claimed by lawyers and justice workers, are interviewed by police often without an "interview friend" (a breach of recommendations 243 and 243 of the RCIADIC).[16] The rules also stipulate that an interpreter be present during

[14] In practice education representatives have tended not be employed on teams. Currently there is only one education worker covering all the metro teams, while it is only recently that the DOJ has paid more than lip service to involving a member of an ethnic minority on Teams (discussed below).

[15] See S8. Role of responsible adult. S8(c)"a responsible adult should be notified as soon as practicable after a young person is taken into custody or otherwise dealt with under this Act".
S30(1) states that "Before it deals with an offence, a juvenile justice team is to give a responsible adult notice that it proposes to deal with the young person for the offence, and it can only proceed if a responsible adult is present and has indicated agreement with the proposal and a willingness to participate in the proceedings as the team sees fit".

For situations where a responsible adult can not be located see ss3-5.

[16] The Anunga Rules were developed in the Northern Territory to ensure the use of interpreters and allow accused persons to have an "interview friend" in attandance during police interviews. They were

interviews. There is no statutory obligation in Western Australia for interpreters to be used in the criminal justice system – at any stage. There is also no provision similar to Queensland and South Australia ensuring that police must communicate in a manner understandable to a child.[17] We found no evidence to suggest that interpreters were used during cautioning or during juvenile justice team meetings in a formal sense. Country workers suggested that Indigenous people might be brought in on an informal basis to interpreter: an Indigenous person on the team – an Aboriginal Police Liaison Officer or Aboriginal Juvenile Justice worker – may play this role, however, questions of independence arise here. The Department of Justice is in the process of training 30 Indigenous interpreters (from various language groups in Western Australia) under a Federal initiative managed by the Attorney General's Department. These would be used in the court and there are no equivalent plans to have interpreters at the investigation stage and during conferences.

The team will convene a meeting that should include the offender and responsible adult, the victim (if possible) and support person. The meetings are chaired by the coordinator (a member of the Department of Justice); the police officer reads out the charges and may suggest the kind of dispositions the case might have received had it gone to court. Meetings tend to be quite "scripted". In that the coordinator and police officer retain tight control over the meeting agenda, asking each participant to speak in turn and present their point of view. At the end of the meeting (assuming their is agreement) the offender and family sign a contract to fulfil certain conditions (such as a verbal and/or written apology, restitution/reparation, community work). Assuming the conditions are fulfilled, the child will receive a formal caution.

Teams in country areas

Juvenile justice workers act as coordinators in country areas on top of other work, there are no full time coordinators. The police member of the team is selected from staff at the local station. Cant and Downey (1998) found that when there was a

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set up by the Supreme Court in 1976 (*R v Anunga;Rr v Wheeler* (1976) 11 ALR 412) to specifically allow for language differences and the tendency for Aboriginese to defer to authority (to their detriment). The rules are general guidelines for police conduct, departure from which, according to Justice Forster (1976, 413-4) would "probably lead to evidence of the interrogation…being rejected" (cited in Blagg & Wilkie, 1995).

"nominated" officer who fulfilled the function regularly, there tended to be smooth relationships within the team (Cant and Downey, 1998, 39). Otherwise there were often disagreements and uncertainty about the purpose of the process, leading to "problems with both arranging and conducting meetings". They drew the conclusion that, in general, police understanding of the teams was "variable" (p39) and this had a detrimental affect on the work of the Teams.

Our understanding is that workers from within the Justice Department are also uncertain about the purpose of Teams and the kinds of cases that cane be referred. The procedural rules tend to be less clearly understood, meetings might more easily than in metro areas, become "inquisitorial" sessions where further evidence is gained by the police and other offenders inculpated. Team meeting in the country (according to members of the Aboriginal Justice Council) are thought by Indigenous people to be about "shame and punishment", take more trivial matters and are not considered genuinely "diversionary" by some lawyers working with young people in country areas.

There is a general dearth of community-based programs in country areas for Indigenous youth (Aboriginal justice Council, 1999). Teams might try to refer a child to a program in an Indigenous organisation. However, it is widely accepted that these are very poorly funded and that the regions are generally disadvantaged in comparison with the metropolitan area across a range of services (Aboriginal Justice Council, 1999, 8). There are few programs in country areas specifically around problems associated with drugs, petrol and alcohol abuse for young people. There are, clearly, few initiatives into which children and young people can be diverted.

Police powers

Western Australia remains one of the few states where police obligations and powers are not codified in legislation and remain in police operational orders (see Blagg and Wilkie, 1995) – part of a generally anachronistic architecture of controls typified by the still functioning *Police 1892*. Police Operational Order 24 governs police

[17] Juvenile Justice Act 1992 (Qld), s15(1). Young Offenders Act 1993 (SA), s 2.5.1.

behavior with juvenile offenders, including cautions and referrals to teams. In relation to diversion the Order reads:

> "The Western Australia Police Service adopts as policy, the concept of diversion as an appropriate option for dealing with the majority of juvenile offenders".

And goes on to describe available diversionary options as:

- informal warnings issued on the street, at a station or as part of the patrol function;
- formal cautions in writing;
- Juvenile Justice Team referral.

The Operational Orders suggests:

> "The use of any of these options will depend on the circumstances surrounding the particular offence and the decision to proceed with any option will be left to the discretion of the member concerned"[18]

The Order goes on to say that, "cautions should be not used to punish a juvenile, but to correct and direct behaviour".

In relation to second and subsequent cautions, it suggests:

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18 The police are also to give consideration to:

¨ the time and circumstances of the offence;
¨ the age of the offender and degree of his or her involvement in the offence;
¨ the type of offence and the extent of public interest in ensuring that juvenile offenders are adequately dealt with by the justice system;
the degree of remorse shown by the offender and the likelihood of re-offending;
whether or not the offence is a trivial one or a technical breach only; and
whether the offence is contained in Schedule 1 or Schedule 2 of the Young Offenders Act.

The police are also asked to be aware of Section 26 of the Young Offenders Act 1994, which calls on police to seedily release young people once a decision has been made to refer to a juvenile justice team (s.26(1) & ensure that young people are not detained solely to make a referral decision (s.26(2).

> "Members may prefer second and subsequent cautions where there is a lapse of time between offences, the current or previous offence is minor or different, or the record of the child is not serious. A previous court or Juvenile Justice Team referral is not a bar to a formal caution".

Juvenile justice teams

In regards juvenile justice teams, Operational Orders 24 suggest that "Members may refer offending children to a Juvenile Justice Team where:

- the issue of a formal caution is inappropriate;
- the child admits guilt;
- the parents agree; and
- the offence does not appear within Schedule 1 and Schedule 2 of the Young Offenders Act 1994."

Operational Order 24 goes on to permit police to refer young people on more than one occasion:

> "Previous referral not a bar to future referral. If appropriate, the Juvenile Justice Team may deal with an offending child on more than one occasion. The Juvenile Justice Team may deal with an offending child who has committed more than one offence".

Police Powers and legislation

The main problem with the policies is that they tend to be seen as "guidelines" rather than rules by the police. The emphasis is on "may" rather then "must" when recommending the use of diversion. The Police Operational orders do not prohibit police from cautioning or referring to teams a number of times (no upper ceiling is stipulated). Some young people are being cautioned 5 or 6 times – according to

workers in the juvenile justice teams. These are rare occurrences, the "informal tariff" appears to be a 2 caution maximum and 1 referral to a justice team.

Cant and Downey's review of police perceptions of the 1994 legislation found that police did not feel they needed to adhere strictly to police regulations – including those ensuring fundamental safeguards for young people rights (such as having a responsible adult present when an interview is conducted) (Cant and Downey 1998, 4). Jurisdictions concerned with ensuring that police fully respect the rights of young people, racial minorities and other vulnerable groups have taken steps to enshrine these rights in legislation. Section 215-217 of the 1989 *Children, Young Persons and Their Families Act (New Zealand)* set down clear rules governing police behaviour when approaching, stopping, questioning and charging young people. Similar controls exist in England and Wales under the codes of practice connected to the *Police and Criminal Evidence Act.* These rules ensure that ethical conduct by police and respect for human rights is encouraged, breach of the rules ensures both that any evidence obtained would be deemed inadmissible and disciplinary action against police officers. On the other hand, most commentators agree that a wide degree of discretion is inevitable, whatever the legislative regime controlling the police (Waddington, 1999).

Furthermore, the family conferencing process was introduced at a time when the police were still coming to terms with the cautioning system. New Zealand's family conferencing scheme was introduced on the back of considerable police experience in cautioning young offenders – the rate of cautioning was already around 50% of all cases dealt with by the police before 1989. In contrast, Western Australia's scheme was introduced when the police were diverting very few cases. Another key difference was that, in New Zealand, the cautioning process in the police is handled by a skilled core of specialists in the Youth Aid section of the police, while the West Australian police rely on the judgement of general duties officers to make decisions about whether a child should be cautioned or prosecuted.

Training

It is open to doubt whether current police training is adequate to deal with this kind of decision-making. Cant and Downey surveyed police officers to identify their degree of knowledge of the 1994 Act as it related to questions such as cautioning and JJT referral and concluded that training was inadequate:

> Survey responses show that 37% of respondents were either unsure or did not believe their level of understanding enabled them to meet the requirements (under the Act). This presents a clear training requirement that the Police Service must address (Cant and Downey, 1998, 11).

The same survey also found that police in non-metropolitan areas were more reluctant to become engaged in the juvenile justice team process (Cant and Downey, 1998, 12) and did not see the process as "police work". Police recruits receive a half day training on juvenile diversion issues at the Police Academy presented by a police officer from a juvenile justice team and a representative of the Department of Justice and the Education Ministry. On the job training is responsibility of Perth based Community Services Branch, although this function is about to be devolved to district training officers. The Community service Branch have developed a training package for the regions and a representative of the Branch said that police were actually quite aware of their discretionary powers and had a grasp of the juvenile justice team process. According to this source, and other police contacted in Perth, many police simply did not want to exercise their discretion in this fashion and preferred to prosecute in many instances. They maintained that a "generational shift" was required to change the culture of the police in favour of diversion. One police source said that the many country regions had particularly conservative sergeants who tended to determine policy in the area. Some of these were opposed to diversion.

Indigenous justice issues

The New Zealand system was not established simply to bolster police cautioning, and provide another "option" for the police to consider when dealing with first and/or minor offenders but represented a genuine paradigm shift in the way justice was delivered. It has to be set within a framework of expanding Maori self-determination rather than as simply a new juvenile justice reform. This is why the there were few

restrictions placed on the kinds of cases that could be conferenced in New Zealand. In sharp contrast, Western Australia's system is highly restrictive. We have mentioned the restrictions imposed under Schedules 1 and 2. Referrals to juvenile justice teams are restricted to young people whose offence *"is not part of a well-established pattern of offending"*.

The focus is clearly on the juvenile justice teams as an early intervention option within the framework of the juvenile justice system, rather than as part of an overall shift in orientation. The reforms have brought "restorative elements" in to the system without making the system as a whole "restorative". The legislation did provide one important check on the police referral powers, however, by allowing the courts to refer cases to a juvenile justice team. [19] This "back-stop" role was intended to be used minimally, as police themselves perform the main gate-keeping and diversionary function. As we shall see, in relation to Indigenous youth, the courts are having to compensate for the unwillingness of police to divert Indigenous youth into the juvenile justice teams.

What affects, then, have police cautioning and diversionary conferencing had on the position of Indigenous youth in the juvenile justice system? Have they achieved a reduction in the rate of over-representation? We will now turn to an examination of the impact of the schemes since their inception.

Aboriginal youth and juvenile justice

There are few grounds for optimism as far as Indigenous justice issues are concerned in Western Australia. The 10 years since the introduction of the pilot diversionary schemes has not seen significant improvement. Successive reports by the Western Australian Aboriginal Justice Council (Aboriginal Justice Council, 1997, 1999) have been critical of the lack of progress by government in implementing key recommendations of the *Royal Commission into Aboriginal Deaths in Custody,*

[19] *Young Offender Act* s.28 states, "Instead of itself dealing with a young person who has been charged with an offence, the court may, whether or not the person has pleaded to the charge and whether or not the person has been found guilty of an offence, refer the matter for consideration by a juvenile justice team".

particularly in relation to police contact with Indigenous youth, imprisonment as a last resort and for the introduction of appropriate diversionary options.

Reviews of the system by the Aboriginal Justice Council reveal that little has changed and that reforms to date have either been incorrectly targeted to achieve desired changes, or have been cancelled out by "get tough" policing strategies and new sentencing practices. It has to be borne in mind that diversion has run parallel with tough law and order policies, such as:

- three strikes sentencing;
- stricter parole laws;
- restrictions on eligibility for bail (requiring juveniles only to be released to a responsible adult);
- zero tolerance policing.

Mandatory sentencing has been particularly negative for Indigenous youth. It is estimated that upwards of 80% of young people caught up in the legislation have been Aboriginal. It has particular problems in states such as Western Australia where (as we have noted) police discretion is comparatively unrestrained by legislation in crucial areas. Mandatory sentencing essentially "redistributes" discretion from the court to the police – expanding an already wide net police discretionary powers (Morgan, 2000).

In relation to the key *RCIADIC* recommendations urging *"arrest as an option of last resort"* for juveniles the council reported that the *"picture continues to be bleak"* (The Aboriginal Justice Council, 1999, 54). The Council expressed considerable disappointment that the family conferencing system was not being used sufficiently for Indigenous youth and their families. The council identified problems with the police's attitude to Indigenous youth as well criticising an administrative system unsuited to Indigenous people. [20]

[20] This situation is not confined to Western Australia. Indigenous people across Australia are frustrated by the juvenile justice system. A consultative inquiry in Queensland reported continuous "failure" by the system: "the term justice (in juvenile justice) was...a misnomer in light of the escalating numbers of young people in the juvenile justice system" it argued (The Aboriginal and Torres Strait Islander Women's Task Force on Violence, 2000, p.237).

Ironically, some reforms to the system (such as cautioning and the juvenile justice teams) have tended to *intensify* differences between Indigenous and non-Indigenous rates of involvement in the system. This can be demonstrated statistically.

Indigenous youth over-representation

Indigenous youth are still dramatically over-represented at all levels of the justice system and they have proportionately more contact with the police, courts and juvenile detention. Cautioning has been "successful" in terms of reducing the numbers of young people being placed before the courts. Rates of court appearances and numbers of charges dealt with by the Children's Court have halved. However it has failed to make real in-roads into the rates of involvement of Indigenous people. Police lock-ups, courts, detention centers still warehouse Indigenous youth in large numbers. They remain their main clientele. It needs to be constantly borne in mind that Indigenous youths constitute less than 4% of the youth population of Western Australia.

Arrests

A report by the Justice Council (Aboriginal Justice Council, 1999) found that, while there was a slight decline in the number of Indigenous people arrested between 1991 and 1995 from 142 per 1,000 to 137 per 1,000, the rate of the decline was significantly less than for non- Aboriginal people, whose rate fell from 21 per 1,000 to 16 per 1,000. *This in fact meant that the differential risk had in fact increased.* From being 6.9 times more likely to be arrested, Indigenous people were now 8.3 times more likely (Aboriginal Justice Council, 1999, 28). The main source of the decline was in the area of juvenile arrests. However, even with a slight decline in the arrest rate, Aboriginal youth between the ages of 10-14 were still *25 times more likely to be arrested than a non-Aboriginal youths of the same age,* between 15-17 they were 9.3 times more likely. The picture generally has not improved. The rate of over-representation has increased – a recent survey finding that Aboriginal people generally are now 10 times more likely to be arrested by the police Ferrante, Fernandez and Loh, 2000). Arrests rates since 1995 have plateaued out (discussed below).

A worrying trend noted in their study is the 100% increase in the arrests of Indigenous women (mostly for good order and driving related offences). Indigenous women often provide the only source of stability in many Indigenous families and communities, loosing them to the justice system will further disadvantage Indigenous people and, particularly, children

Cautions

Indigenous youth accounted for just under 20% of all cautions in WA in 1997. This rate increased slightly to just over 22% in 1999 – accounting for just over 2,000 of the 10,609 officially recorded cautions of that year (Ferrante, Fernnadez and Loh, 2000).

How should this data be analysed? On the one hand the rate of diversion seems high in terms of Indigenous representation in the general youth population of WA (at less than 4%) but low in relation to their over-representation in the prison population and the criminal justice system as a whole.

Net-widening

Worryingly, the existing rate of cautioning for Indigenous youth has been achieved at the cost of significant net-widening. Although praising the "remarkable" achievements of the cautioning system in diverting some 600 young people from the court in 1996, Cant and Downey's (1998) also found evidence of net-widening, with the police now "formalising" through a written caution contacts that may previously have led to a verbal warning:

> Twenty-one percent more young people had some formal contact with the juvenile justice system in 1996 than in 1994. This was due to a greater increase in the number being diverted from the court system. Some young people who would previously been dealt with informally by the police are now been given a formal caution (Cant and Downey 1998; 1)

As we shall see, this formalisation of contact can have consequences in a system based on the *incremental accumulation of relatively minor forms of contact between the police and offenders*. Formal cautions (as we shall see) build up and can eventually result in a court appearance.

Analysis of long term trends in cautioning practices in Western Australia reveals significant net-widening. Levels of contact between youth and the police increased substantially increased after the introduction of cautioning.

> The increase being most notable after 1995, following formalisation of the cautioning scheme….it appears that, while cautioning may have diverted many young offenders from the arrest process, the scheme also appears to have widened its net, "capturing" a significant number of additional offenders within its domain (Aboriginal Justice Council, 1999, 29).

This increase in police-youth contact was experienced by both Aboriginal and non-Aboriginal youth. For non-Aboriginal youth arrests declined from 2,578 in 1992 to 1,410 in 1997. In contrast the numbers of Aboriginal youth declined from 1,143 to 695. In the case of non-Aboriginal youths, the numbers cautioned only rose from 3,024 to 6,664 with a further number arrested and cautioned (in the same year, not at the same time) rising from 351 to 647 – meaning that the number of non-Aboriginal youth-police contacts went up from 5,953 to 8,721. In the case of Aboriginal youth, the cautions went from 382 to 1,167, with a further number arrested and cautioned rising from 166 to 397 – meaning that Aboriginal youth-police contacts went from 1,691 in 1992 to 2,259 in 1997 (Aboriginal Justice Council, 1999, p29).

The scheme has net-widened for both groups. While cautioning has reduced levels of contact between youths and the courts this has been at the expense of formalising a range of contacts which may have remained informal previously: and/or the police may be now intervening around behaviour that previously they may not have responded to at all.

The situation may be worse in terms of outcomes for Indigenous youth. Net-widening has come on top of already existing predisposition by the system to intervene with

them. Also, recent analysis of arrest and cautioning data by Ferrante (2001) suggests that there is significantly more net-widening occurring in relation to Indigenous youth than for non-Indigenous youth. Her data suggests that, while arrest rates for Aboriginal youths have remained stable (in fact, shows a marginal increase of about 3% since 1995) the rate of contact with the police has risen about 30% over that period. *This demonstrates quite significant levels of net-widening, as the increase in cautioning has not been matched by a similar decline in arrests.* The extent of net-widening for non-Indigenous youth is not quite as dramatic: arrests *decreased* by around 3% and rates of contact increased by 18% (Ferrante, 2001. P5).

Decisions about whether to caution, warn or charge a young person are not always made on the basis of the seriousness of the offence. A range of "extra-judicial factors" may influence the decision making process, these include:

- if the child's "attitude", appearance and demeanour are wrong - some youths "fail the attitude test" (Blagg and Wilkie, 1995);
- if the young person is homeless;
- if the young person is "street present";
- if the young person is part of some out-group or deviant sub-culture;
- if there is a "moral panic" or social anxieties associated with youth in a particular place and time;
- if the young person is from a non-mainstream background.

Consultations found concerns by professionals who have contact with Aboriginal youths in Perth that decisions to approach, question, name check, search, detain, warn, caution and arrest young Indigenous people were often based upon these extra-judicial criteria. Taking a train to Perth from the suburbs, hanging out around and near Perth train station and walking in Northbridge makes them a target. We have been told by workers in the justice system that Aboriginal youth "exhaust" the number of cautions they are allowed by the age of 11 – thereafter they are perceived by the police as "repeat offenders" an not eligible for diversion.

We have seen that Indigenous youth have not benefited to the same extent as non-Indigenous youth from the decline in arrest rates. Moreover, as we shall see, there is a tendency for cautioning decisions not to be genuinely diversionary – they can "re-appear" as part of a criminal record should the child ever appear in court.

Systemic bias

It is now believed that the "offender profiles" of many Indigenous youth are largely built on a string of relatively minor offences, often uncovered though the deliberate targeting of Indigenous youth in public space (Cunneen, 2001). While Findlay, Odgers and Yeo (1994; 274) maintain that courts may essentially "collude" with racially discriminatory practices when they accept at face value "prior records" of Aboriginal youth that have clearly been assembled as a result of "over-policing": suggesting that, *"justices are legitimating the police practices of targeting, arresting and charging Aborigines"*.

Other critics have also pointed to a distinct, *underlying systemic bias* against Indigenous offenders at work within the criminal justice system (Cunneen 2001; Blagg and Ferrante 1996). Luke and Cunneen (1995), refer to it as a "*small but compounding bias,* incremental and accumulative, over time. It begins with the first point of contact with the "front end" of the system (the police) and builds up steadily at successive stages. Cunnen (2001) argues that:

> In relation to Indigenous juveniles, police make "negative" decisions concerning Indigenous young people which, independent of the reasons for apprehension, have the effect of harsher decisions being made at points where discretion is available (Cunneen 2001, 31).

Discretion, Cunneen suggests, is employed "negatively" – Indigenous youth tend to be cautioned rather than warned, arrested rather than summonsed, and to face "bulk"

charges. Fagan (1994), commenting on racial bias in the American system, argues, similarly, that "small" biases in the system accumulate and are amplified over time:

> "even small racial effects at the earliest decision points are amplified to larger significant differences at later stages, where the consequences are more serious and potentially harsher (Fagan, 1994, 104).

The offender profiles of Indigenous youth may be constructed on the basis of over-intervention around trivial incidents early in adolescents. The process can become self-fulfilling. Indigenous youth may be become enmeshed and find it difficult to break out of the cycle.

A previous report by the *Aboriginal and Torres Strait islander Social Justice Commission* (1995) also suggested that Indigenous youth are victims of "indirect, systemic racism" (Aboriginal and Torres Strait islander Social Justice Commissioner 1995, 17*)*:

> ….the systemic effect is to incarcerate our kids in a disproportionate and discriminatory fashion. The subtle processes of fractionally negative treatment, from the likelihood of police contact on the street, to refusal of bail, to custodial sentences, rather than non-custodial options, operate cumulatively to result in a gross denial of the basic right to *"equality before the law"* " (Aboriginal and Torres Strait islander Social Justice Commissioner 1995, 18: emphasis in the original).

Our analysis reveals that little has changed since this report. Indeed, a number of Indigenous people and organisations consulted for this report held a pessimistic view that, if anything, things had become worse. Cant and Downey's sombre appraisal of the system in relation to Indigenous youth was that there was still *"serious concern"* about the continued over-representation of Indigenous youth. Their interpretation of Ferrante et al's statistics on Indigenous youth over-representation (see below) led them to conclude that*: "Diversion is not fully effective for these (Indigenous) young people"* (Cant and Downey 1998; 11). This may be something of an under-statement.

It would appear that Indigenous youth are still subject significantly more "handling" by the system. Decisions to caution are frequently being made *after* young people have been detained by the police. This goes against the "arrest as a last resort" philosophy of cautioning – the system was introduced to divert young people from unnecessary contact with the police, not simply to divert them from court.

There are clear grounds for concluding that:

in many instances the cautioning system not only has failed to meet the objective of diverting many Indigenous children from the system but has had the opposite affect and has formally "marked" them when committing trivial offences, effectively ensuring that they are "known" to the system and are brought within its ambit of controls. Some Indigenous commentators suggested that the process of "becoming known to the police" is now instigated at an earlier age because of cautioning.

Moreover:

The lack of quality control over police decision making and any effective process of "secondary screening" around cautioning and decisions to prosecute - makes such outcomes not just likely but inevitable.

As we have suggested, Indigenous youth represent less than 4% of the youth population of Western Australia. Yet, they constituted 19% of offenders and 32% of all offences heard[21] in the Children's Court in 1998 and of those convicted 35% received a custodial order as opposed to 27% of non-Aborigines.

Repeat Offenders

There is a particular need to have mechanism in place to divert young Indigenous people from contact with the criminal justice system due to their tendency to become enmeshed at an early age. This enmeshment is compounded over time and Indigenous youth are more likely than non-Indigenous youth to be repeatedly arrested

[21] Note that the race of defendants was recorded in only 59% of cases.

by the police. Research by Broadhurst and Loh (1995) and Harding and Maller (1997) confirms the degree to which, once arrested, Indigenous people are almost certain to be arrested again. Harding and Maller's analysis of the age-arrest profiles in the WA offender population, focussing on "arrest careers", concluded that the earlier the age of first arrest the greater the likelihood of become a "career" offender. In relation to aboriginal people they found:

> …that male Aborigines entering the arrest population on average commence their arrest careers at a younger age, accelerate them more rapidly, and accumulate them to a markedly greater extent than any of the other race/sex subdivisions. (Harding and Maller, 1997, 369).

The findings are bleak indeed:

> The most striking observations are that the arrest profiles of male Aboriginal offenders begin at around 7 years of age and male Aborigines whose first arrest occurred at between 5 and 15 years of age can expect on average to have been arrested around 20 times by the age of 22. (Harding and Maller, 1997, 361).

They conclude that:

> "early entry into the criminal justice is itself a factor which exacerbates persistence…the longer that formal entry …can be deferred, the fewer will be the subsequent contacts" (Harding and Maller, 1977, 369).

Broadhurst and Loh's data also illustrates the greater risk of Aboriginal youth being re-arrested. They found, for example, that a non-Aboriginal youth arrested at 18 years of age had a 78% chance of being re-arrested, while an Aboriginal youth had a 94% chance (Broadhurst and Loh, 1995, 296).

The primary aim of diversion should be to slow down the rate of entry into the system and reduce the likelihood of Indigenous youth being labelled repeat offenders.

Juvenile detention

The situation in relation to rates of detention is also unacceptable. In relation to juvenile detention, in 1997/8 WA was behind only the Northern Territory in relation to the rate of juvenile detention and has the highest Aboriginal to non-Aboriginal ratio, at 38.3 - compared to 32.2 in the Northern Territory, 27.2 in New South Wales and 29.8 in Queensland (Australian Institute of Criminology, cited in Aboriginal Justice Council, 1999). In 1999 this Aboriginal to non-Aboriginal ratio had not altered in Western Australia and was still the highest in Australia. In 1999, the rate of Aboriginal incarceration was 714 per 100,000 compared with 19 per 100,000 for non-Aboriginal juveniles.

Comparisons of the rates of Indigenous youths caught up in Western Australia's Mandatory Sentencing regime and rates of involvement in diversionary programs tends to confirm the view that a distinct, *underlying systemic bias* against Indigenous offenders at work within the criminal justice system. Arrest statistics are, to some extent, artifacts of police practice. Practices which are inevitably subject to a range of influences. These include the kinds of offences reported to the police and:

> …police initiated targeting strategies, which in themselves may be influenced by community concerns as well as current social and political priorities. (Ferante, Fernandez and Loh, 2000).

While not discounting the factors in the backgrounds of many Indigenous youth which establish a pattern of – largely minor – offending & early involvement in the criminal justice system (disengagement from school, boredom, family violence, unemployment, drug and alcohol use, family-peer pressure).[22] There are also strong grounds for suggesting that other factors – involving the labeling, stereotyping and stigmatizing of Indigenous youth – are also involved.

[22] The term family-peer group is deliberately preferred to the concept of an age-peer group. The latter is an entirely Eurocentric construct that takes no account of the specific dynamics of Indigenous social relationships which tend to be based within family groups with elder/younger siblings, cousins and other kin (the practice of making distinctions between siblings and cousins is itself European).

Court versus police referrals to the juvenile justice teams

As we have suggested, court diversion was considered to be a "back-stop" in a system focused on diversion from the "font end" of the system.

While police referrals represent the main pathway to the teams there are a high number of court referrals. In 1999, there were 2,624 referrals from the police (2,214 distinct persons) compared with 1,335 from the court (1,173 distinct persons) (Ferrante, Fernandez and Loh, 2000, 115). Given that these referrals occur *after* arrest and processing it needs to be asked, why are the police not referring many of these cases? An examination of racial differences reveals that police and court referrals are roughly equal in terms of Aboriginality -23.3% of police referred cases are Aboriginal as opposed to 17.7% of court referred cases: while 76.7% of police referred cases were non-Aboriginal and 41.6% of court referrals were non-Aboriginal (Ferrante, Fernandez and Loh, 2000, 115). However, in 40% of the court cases the race of the offender was "unknown". Analysis of data kept by some juvenile justice teams reveals the referral rate of Indigenous youth from courts to be higher than by the police: in 1999/2000 56% of Aboriginal referrals were from the court as opposed to 44% by the police (statistics supplied by Fremantle Juvenile Justice Team). Clearly, a good many of the "race unknowns" are Aboriginal. Once again, highlighting some problems with police attitudes towards diverting Indigenous young people. The lack of clear court statistics on race is a serious barrier to monitoring the system for racial bias and there needs to be a concerted effort to improve the identification of Indigenous youth in the Children's Court.

Country and metro differences

Most cautions (around 50%) are given in the metro area. Country areas with higher numbers of Indigenous youth – such as the northern and eastern regions – accounted for less than 16% of all cautions in 1999 (Ferrante, Fernandez and Loh, 2000). In relation to Juvenile Justice Teams it is difficult to establish geographic differences from the available statistics. Department of Justice statistics for 1999/2000 reveal that there were 2,414 referrals to Teams in the metro area in that year. In contrast there

were 563 country referrals. Of these 151 were referred from courts and 385 from the police; of these 94 were Aboriginal and 438 were non-Aboriginal. Although unvariegated, these statistics reveal that diversion is an urban phenomenon in Western Australia. Cautioning and referrals to JJT is occurring less in country areas. Indigenous youth appear to be referred to JJT's less frequently than non-Indigenous youth

The schemes in operation

Interviews were conducted with Indigenous people and a range of professionals involved in the youth justice system, including lawyers and youth justice workers. The general view of many professionals in the department of justice, magistrates, etc, was that the scheme was successful in terms of reducing court numbers. There was, however, quite widespread unease about the lack of progress with Indigenous youth. There was a pessimistic feeling in some quarters – typified by one statement (by a coordinator of juvenile justice team), "things are getting worse as they get better": meaning that the successes in increasing diversion for non-Indigenous youth has only served to make the picture look more bleak for Indigenous youth. Others used terms such as "intractable", "no ready solutions", to describe the problem. A number of Indigenous people working in the system said that the formal process is not always good for Indigenous people, and some are trying to have additional "meetings outside of the meetings" to address "underlying issues".

The conference process is not necessarily the "Aboriginal way". Aboriginal people do not always feel comfortable dealing in a direct way with non-Indigenous people. It is not an "Aboriginal way" to sit "face to face": respect for another person is often expressed by avoiding eye contact, keeping silent, looking away. Gestures which may be interpreted as sullen, not listening, indifferent by non-Indigenous people (including the police when they are administering the "attitude test").

Also, workers were aware that Indigenous people have "so many other problems", attending a conference and ensuring that young people fulfill requirements from the conference may take second place to other issues.

Workers also said that conferences sometimes go wrong when the police are too dominant and " take over". This is a particular problem in the country, where officers (and juvenile justice workers) do conference work on top of other duties – and receive less training about appropriate practice in the conference setting. We have heard concerns that police sometimes use the conference as an "inquisitorial process" to find out about other offences and inculpate other offenders. Country teams are not full time and juvenile justice officers arrange conferences on top of existing work-loads: court reports and case supervision inevitable take precedence over convening conferences.

Commentators involved in the system stressed a number of issues. The majority believed that there were some intractable problems where Indigenous people were concerned in terms of the juvenile justice teams.

For example: the conference was not – on its own – sufficient to deal with the welfare issues.

- Indigenous families need to be supported after the conference, Indigenous organizations need to be involved in picking up the longer term and underlying issues.

- Many kids have chronic (glue) sniffing problems, alcohol and other drug problems. Many are victims of family violence;

- Families are "decimated" by problems of all kinds – there are multiple and compound crisis involving health and mental health, family violence.

- Aboriginal people are often victims too, but their victimization is of no concern to the system;

- Problems with police attitudes to Indigenous youth, discriminatory policing: "Driving While Black" is an offence, young Indigenous people are always stopped and hassled by police when driving. They suffer constant "name

checking"- (police use name checking as a way of moving youth on form public spaces (in Perth this is around the Railway station and Northbridge).

- Conferences are nor always appropriate for younger children – under 14 – who sometimes don't fully understand the process. Also, the conferences are sometimes too long and complex and the outcomes (in terms of amounts of community work) too excessive. In this respect, the process does not always take account of "a child's sense of time" (under s.7(k) of the Act).

It was also said that in county areas, magistrates and other court users are not always aware of this diversionary option.

The Aboriginal coordinator

The introduction of the Aboriginal coordinator, covering the Victoria Park, Thornlie and Fremantle teams is a positive development. As noted (page 11 above), the 1995 Act recommended that, "if it is practicable", their should be a "member of an ethic or minority group" on the team. This was a watered down response to the demands by Indigenous people that they should have a role as members of diversionary teams (State Government Advisory Committee on Young Offenders, 1991). The Cant & Downey report recommended that "a greater effort be made…to engage Aboriginal families with the Team process" (Cant & Downey, 1998, 72). In response the Department of Justice, besides extending the paid hours of sessional Aboriginal workers, has created a full time position – the Aboriginal coordinator. This position was created in mid 2001.

The coordinator position is intended to increase Indigenous involvement in the process by coordinating meetings involving Indigenous youth and contacting their families prior to the conference. Management suggests that her focused work with "problem families" in Fremantle has seen an 87% increase in their participation in conferencing. The introduction of more Indigenous people has increased Indigenous people's willingness to participate in the process. Aboriginal workers use their networks and knowledge of family groups to contact Indigenous people and explain the benefits of the juvenile justice team process. They bring a knowledge of the

family dynamics and Indigenous people tend to be more forthcoming when dealing with another Indigenous person. There are plans to ensure that all the teams in the Metropolitan area have an Indigenous person working for at least 15 hours per week.

This increase in the employment of Indigenous people re-instates a key principle. When the Teams were being formed in the early 1990s, the plan was to have an Indigenous worker on each team as a full time position. The worker would be involved in individual cases but also have a broader community development role, linking the teams with other development in Indigenous justice reforms – and facilitating alternative dispute resolution with Indigenous people outside the criminal justice system. There are isolated examples of this kind of practice. The Midland juvenile justice team is developing close links with the local Aboriginal Reference Group (a body established as part of the Midland Cyclical Offender Intervention Project, an early intervention scheme established in the area).

Aboriginal workers were successful in locating and engaging with Indigenous families who are transient and difficult to reach. Aboriginal workers were, however, sensitive to the potential for them to be used as "black trackers" - hunting down recalcitrant families and brining them into the justice system. They recognized that this could be a perception in some quarters, but believed that the scheme – if genuinely diversionary – could be a positive experience and spare children and young people unnecessary involvement in the justice system. Workers were also anxious to stress that the conference itself is only a part of their involvement with families. While conferencing has been claimed as part of the "justice model", families still have a range of welfare issues, around poverty, homelessness, family violence, drugs and alcohol, to deal with and, they workers believed, this has an impact on offending. Aboriginal workers, therefore, inevitably become involved in these family issues, rather than just seeing their role in terms of ensuring Indigenous participation in the conferencing system.

Aboriginal workers did not believe the system was an "Aboriginal way" of dealing with things, but as a kind of "compromise" between an Indigenous practice and the non-Indigenous system. They find the format of the conferences too formalized and "scripted" for Indigenous ways of discussing and resolving issues. Some suggested

that there needed to be a number of conferences, with some just involving indigenous people to resolve some of the deeper problems.

Aboriginal workers were also able to reassure families that it was safe to take their children to a family conference. There are concerns within the Perth Aboriginal community that victims will be able to identify a youth, stalk and attack him or her later. This follows an incident in 2000 where an Aboriginal youth was beaten to death by white people who believed he had burgled them (Indigenous youth also expressed this concern in interviews). Aboriginal people have a, justified, fear of vigilante justice in Perth due to moral panics about Indigenous youth offending.

Some Indigenous justice workers contacted said they were angry and frustrated with the system. They saw potential to use diversion to take younger Indigenous youth out of the system, whereas, as one said: "it seems to be getting worse, they are coming in younger".

Another said:

> A lot of our young people are not getting diverted when they could be, its police attitudes to our kids, a lot of police are ok, especially the ones who work on the teams, but a lot out there are callous. A couple of cautions and then off to court, rather than JJT.

Other Aboriginal workers said that the extensive number of charges young Aboriginal people are given (and which, later, enmesh them in the system) are often trivial and emerge as a result of police intervention – such as resisting arrest, assault on the police, swearing.

Perhaps the most serious concern in terms of the integrity – and credibility - of the juvenile justice team process is that of the status given to records of involvement in the process at some later judicial event. In discussions with workers on the juvenile justice teams (in Bunbury, Northam (country) & Victoria Park, Fremantle, Thornlie (metropolitan), including Indigenous workers who visited families, we were told that a key "selling point" of this alternative was that it would not lead to a criminal record:

> "I tell families that this way is better. It does not lead to a conviction. The young person will not have this on his record".

Another said:

> "I tell them it won't be there if he tries to get a job".

This principle is under serious threat due to a new practice in the Perth Children's Court where the Police Prosecutor has been citing the numbers of cautions and referrals to a juvenile justice team by young people – and without even explaining the reasons for the caution or referral (often they are on entirely unrelated matters, according to the Aboriginal legal Service). This practice has been going on for several years but has – according to youth lawyers – increased over the last six months.

Would Indigenous families be as willing to participate if they knew that what they were informed to be wholly diversionary proceedings, that would spare their child a criminal conviction and record, were employed as "previous convictions" in court?

It is disingenuous to suggest, as some judicial & police officers have, that these are read out to establish the "circumstances of the offence". They clearly breach the principles of diversion and may have the outcome of "up-tariffing" young people when decisions are made regarding punishment. There is some evidence to suggest that this may be occurring. The President of the Children's Court has given directions that previous referrals to teams and cautions should be counted as offences in certain instances – where they demonstrate a "well established pattern of offending". In one recent judgement [23] the President opined that there may be offences, such as home burglary, that, while not scheduled under the Act, are, nevertheless, 'serious', even though they may not have resulted in a court appearance (meaning that they had been referred to a team) and this should be taken into consideration when sentencing. In these circumstances, the child would be ineligible for referral to a team. In this

[23] Police v RMK (a child) 2001 WA CC4.

particular case the President had over-ruled a referral to a juvenile justice team made by a Children's Court Magistrate, for a child who had been convicted of a home burglary and had previous convictions in New South Wales. [24] The child was given a Community Order – a high tariff alternative to custody.

It is debatable under these circumstances whether the scheme is actually fulfilling a *diversionary* function at all if diversionary outcomes are being smuggled back into the system if young people end up in court

A few further points on this

Firstly, it needs to be borne in mind that these cautions and the process of conferencing take place without children having had the benefit of legal council. In New Zealand the child is represented by a Youth Advocate during a family conference and, as we have seen, the process, at all levels, is subjected to legislative over-sight as well as a number of internal and external screening processes (within the police and from outside bodies). While one can sympathize with the view taken in Western Australia that the restorative process should not be impeded or "captured" by the formal legal system, this has to be balanced against the reality that participation in conferencing has potential legal outcomes for participants. There may need to be consideration – as discussed further below – for additional screening and over-sight of cautions and referrals and for legal representation for children. Other Australian jurisdictions provide these. For example, section 47 of the *Young Offenders Act 1997 (NSW)* permits not only family and an adult chosen by the offender to attend but also a legal practitioner to advise the offender.

Secondly, the fact that participation in conferences counts as a "record", may conflict with the spirit of restorative justice anyway. Restorative justice principles are

[24] In s18 the President said, Although the offences included in Sch (1) and Sch (2) cover most serious offences there are obviously offences which do not fall within Sch(1) and Sch(2) which may nonetheless be classified as "serious" because of the circumstances of the commission of the offence. The most obvious example that falls into this category would be home burglary. On some occasions a young offender may not have appeared before a Court on a prior occasion but may have committed a significant number of offences that could be characterised as forming a "well established pattern of offending". In these circumstances it is likely that the Court will exercise its discretion not to refer the young offender to the juvenile justice team but impose a community based order or employ another appropriate disposition".

premised on the belief that once an event has been resolved to the satisfaction of the parties directly involved (Marshall's definition, above) then this should be the end of the matter. While there are obvious limits to this proposition – the balance, with juveniles, should be towards clear finality once a particular matter has been resolved.

A related point, is that the President of the Children's Court has made statements defining the principle of *"an established pattern of offending"* under the 1994 Act, in particularly narrow way. Courts are being told only to refer matters to a juvenile justice team when the offender has not had a previous opportunity to attend – rather than when the case seems to be one amenable to restorative solutions. This, again, seriously limits juvenile justice teams to the level of being simply an addition to cautioning scheme. We have also been told of situations where young people have been denied access to a team referral from court because they have had more than 2 cautions by the police – evidence they are "repeat offenders".

Young people

Aboriginal youth who had been through the diversionary process were interviewed. 12 in Banksia Hill Detention Center and 3 at the Warminda Intensive Supervision Program.

Their relationship with the police was the main issue they wanted to discuss. All believed that they and other Indigenous youth were "targeted" by police in public places.

They had some negative views towards the police:

"they don't care, they don't listen";
"they pick on us Nyoongars";
"we are watched all the time"
"we are watched in Northbridge and at the railway stations"
"I was told I was loitering when I was waiting for a train"
"The railway police are the worst, they just target us"

The majority had been cautioned at least once. Some times this was for relatively serious offences, such as damaging property, shop-lifting and stealing. However, most recalled being cautioned at an early age (around 10-12 years old) for minor offences such as: cycling without a helmet; walking through a school ground after school; spitting; loitering. While most had received 1 or 2 cautions (this tends to be the upper limit) only 2 has been to a justice team meeting. As mentioned above, a number were fearful about attending a meeting where a victim afterwards could "stalk and kill you". The majority of young people, on the other hand, thought that the conferencing idea was a good one – in theory at least – meeting a victim and making a direct apology was a "good thing". The few who had been through the system said it was "big shame" to see a victim and face their anger. They had been referred to the teams from court, rather than directly by the police.

In terms of procedural factors young people said that the juvenile justice team process had been fair and that things had been explained to them. The majority of youth who had been cautioned also said that the police had explained what the reasons for the caution were and most had been given the caution with family present.

Workers interviewed believed that Indigenous youth currently do not get a fair go from the system. They stressed that Indigenous youth were not given opportunities for diversion, they tended to be cautioned once or twice then face court.

Future directions

There was an acceptance amongst many professionals contacted that the process had, somehow, to be "given back" to the Indigenous community. Currently, it was believed, it was not working well enough for Indigenous people and their families. While the idea of conferencing, particularly if it was to avoid a criminal prosecution, met with approval, the actual process was not seen as being appropriately cultural.

Increasing controls over police powers and increasing the degree of secondary screening is essential. Legislative controls alone are, however, inadequate. Recent reforms to police control and management in Britain and Northern Ireland are focussing, therefore, on facilitating a "human rights" culture in the police. The Patten

report on reform of the *Royal Ulster Constabulary*, for example, concluded that the "fundamental purpose" of policing should be "the protection and vindication of human rights" (Patten, 1998, 7), while some senior police in England have been writing enthusiastically about reforms to policing based upon embracing human rights as the corner-stone of policing a ethnically diverse society (see Neyroud and Beckley, 2001).

Other reform agendas may include removing areas of justice away from the non-indigenous system altogether. Debate needs also to focus on imagining new ways of allowing Indigenous people to run their own youth justice system. Innovation such as the Community Justice Groups in Queensland (in Palm Island, Yarraba and Kowninyama) offer a model of practice that actively empowers Indigenous communities to run their own justice systems around issues such as youth crime and anti-social behaviour, alcohol abuse and family violence. An assessment found that they are making an impact on levels of over-representation, as well as issues such as youth suicide, metal health and rehabilitation. Members of the community conduct their own "bare-foot patrols" of troubles spots on communities, they run there own diversionary panels, hold family meetings, negotiate with police over alternatives to prosecution and sit in court with magistrates. This kind of holistic approach illustrates the capacity that exists in Indigenous communities to do much of their own work of this kind.

Western Australia should also look closely at the models of conferencing in other states, particularly in South Australia and New South Wales. The latter – in particular - has gone further than WA by actually employing community people – including Indigenous people – to coordinate and run conferences in the community (Trimboli, 2000). The dynamic established by having community people run conferences has been viewed by some observers familiar with schemes across Australia, as qualitatively different and less authoritarian than those run by criminal justice professionals[25].

[25] James MacDougal, Federation of Community Legal Centres. Mr MacDougal worked at the Youth Legal Service in Perth and in the Youth Conferencing Unit, Department of Juvenile Justice, NSW.. He said, "When police are present, particularly in a leadership role, people automatically look to them to be authoritative and lead. When a community person convenes a conference, it is more like a circle with no single, dominating authority".

Western Australia should also go back and revisit the philosophy and practice of the New Zealand model.

Post-apartheid South Africa also offers illustrations. The Zwelethemba project in South Africa was established to help black people take control over the governance of their communities. In this model, as in the Community Justice groups in Queensland and some developments in the Northern Territory (such as the Ali Curong and Lajamanu Community Justice Plans), the community has developed its own peacemaking and peacebuilding structures. They are based on wide participation by community members. Peacemaking includes dispute resolution and adjudication in conflicts as well as involvement in the resolution of law breaking in the community. The major difference with these schemes and orthodox forms of diversion and restorative justice is the extent to which they can deal with issues before they become defined as legal problems (Shearing, 2001). Indigenous people need to be empowered to work in a preventive way in their communities. While non-Indigenous agencies speak the language of empowerment they believe they can empower Indigenous people, without giving up any of their own.

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Attachment B to QoN 77

Human Rights Brief No.5

Best practice principles for the diversion of juvenile offenders

What is diversion?

Diversion is the term applied to various measures to 'divert' offenders from the formal criminal justice system. Several diversionary options exist for young offenders in Australia, although the extent of their use varies considerably among jurisdictions. These include verbal and written warnings, formal cautions, victim-offender or family conferencing and referral to formal or informal community-based programs. However, this list does not exhaust the range of appropriate diversionary options which could be developed.

Human rights obligations and diversionary options for young offenders

The UN *Convention on the Rights of the Child* (CROC) recognises the importance of diverting young offenders from the formal processes of the criminal justice system. CROC was adopted in 1989 and ratified by Australia in 1990.

By becoming a party to CROC, Australia has voluntarily undertaken to introduce appropriate diversionary measures for juvenile offenders and to ensure that such measures comply with a number of minimum standards. Article 40.3 of CROC states:

> *States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*
> *(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*

Diversionary options aim to avoid the stigma associated with prosecution and the danger of trapping young people in a pattern of offending behaviour. They seek to temper the punitive nature of criminal justice processes in recognition of the particular vulnerabilities of juvenile offenders. They also recognise that most juvenile offending is episodic and transitory - most young people mature out of criminal behaviour.

The obligation in CROC to develop diversionary options is elaborated upon by several United Nations rules and guidelines.

- UN *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules)
- UN *Standard Minimum Rules for Non-Custodial Measures* 1990 (Tokyo Rules)

- UN *Guidelines for the Prevention of Juvenile Delinquency* 1990 (Riyadh Guidelines)
- UN *Rules for the Protection of Juveniles Deprived of Their Liberty* 1990.

Diversionary options must also pay regard to Australia's general human rights obligations under CROC, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

Principles for juvenile diversion

These international standards establish the following principles for the development of diversionary options.

- **Viable alternatives to detention.** Diversion requires the provision of viable community-based alternatives to detention. Options that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are specifically commended. However, the specific form of diversion should be adapted to meet local needs. Public participation in the development of all non-custodial options should be encouraged (Tokyo Rule 17.1).

- **Availability of diversionary options.** Diversion may be used at any point of decision-making by the police, the prosecution or other agencies such as the courts or tribunals (Beijing Rule 6.1). It is clear that the earlier in the process diversion occurs, the more effective it can be in avoiding stigmatisation of the young offender. However, diversion should also be possible in the later stages of proceedings when the young person is before the court.

  The fact that a juvenile has previously participated in a pre-court diversionary option should not preclude future diversion or referral to diversion in subsequent legal proceedings. If a juvenile offender breaches the conditions of a diversionary option, this should not automatically lead to the imposition of a custodial measure (Tokyo Rule 14.3).

- **Offences where diversion is appropriate.** Diversionary measures should not be restricted to minor offences. Diversion should be an option 'whenever appropriate'. There may be mitigating circumstances which make diversion appropriate even when a more serious offence has been committed (Commentary on Beijing Rule 11.4).

- **Criteria for diversion.** Agencies with the discretionary power to divert young people from formal proceedings must exercise that power on the basis of established criteria. Access to diversionary programs must not be arbitrary. Tokyo Rule 3.1 requires that the 'introduction, definition and application of non-custodial measures shall be prescribed by law'.

- **Training of justice personnel.** All law enforcement officials involved in the administration of juvenile diversion should be specially instructed and trained to respond to the needs of young persons (Riyadh Guidelines 58; Beijing Rule 12.1).

Justice personnel should reflect the diversity of juveniles who come into contact with the juvenile justice system (Beijing Rule 22.2). Beijing Rule 6.3 requires that those who exercise discretion at all levels of juvenile justice administration shall be specially qualified or trained to exercise that discretion 'judiciously and in accordance with their functions and mandates'.

- **Consent.** Diversion requires the informed consent of the young offender (or the parent or guardian) to the particular diversionary option (Beijing Rule 11.3). Young people should be given sufficient information about the diversionary options available and any consequences of withholding consent. They should not feel pressured into consenting to diversion programs (for example, to avoid a court appearance). Care should be taken to minimise the potential for coercion at all levels in the diversion process.

- **Procedural safeguards**. Diversionary options must respect procedural safeguards for young people as established in CROC and the ICCPR. These include the presumption of innocence, the right to be informed promptly and directly of the charges, the right to silence, respect for the privacy of the young person and their family at all times, equal treatment before the law, the right to access to legal assistance, to the presence of a parent or a guardian and access to an interpreter.

- **Review and accountability**. Any discretion exercised in the diversion process should be subject to accountability measures. The Beijing Rules emphasise the provision of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions and accountability in juvenile justice administration (Beijing Rule 6.2). They do not specify precise mechanisms of review and accountability because it is not possible to cover all differences among justice systems. However, efforts must be made to ensure sufficient accountability for the exercise of discretion at all stages and levels.

- **Complaints**. Tokyo Rules 3.5 and 3.6 provide that the participant in a non-custodial program shall be entitled to make a complaint to a judicial or other competent independent authority on matters affecting their individual rights in the implementation of a non-custodial measure and in respect of any grievance relating to non-compliance with human rights.

- **Monitoring.** An effective, fair and humane juvenile justice system requires mechanisms for monitoring and evaluation to curb any abuses of discretionary power and to safeguard the rights of young offenders. Beijing Rule 30 also requires that 'efforts be made to establish a regular evaluative research mechanism built into the system of juvenile justice administration and to collect and analyse relevant data and information for appropriate assessment and future improvement and reform of the administration'. Tokyo Rule 2.4 similarly requires non-custodial measures to be monitored and 'systematically evaluated'.

Ensuring respect for general human rights principles

CROC requires that diversionary alternatives to formal judicial proceedings must respect human rights.

CROC requires that in all actions concerning children the best interests of the child is a primary consideration. The scope of this principle is considered in Human Rights Brief No.1 www.hreoc.gov.au/human_rights/brief.

CROC also requires that diversionary options are developed and implemented in such a way that they meet the following standards.

- Applicable to all juveniles without discrimination of any kind, including on the basis of race, sex, ethnic origin and so on. Discrimination can be found where a law or policy has a disparate impact or effect, notwithstanding that it is neutral on its face.

- Protect and guarantee the physical integrity of the child (For example, punishment that is cruel, inhuman or degrading is prohibited).

- Provide conditions under which children can develop their full human potential. Treatment should be appropriate to the age of the child. Children require special protection because of their particular vulnerability and stage of maturation.

- Allow children to participate and to express their views (CROC, article 12). For example, the child has a right to participate and express views in judicial and administrative proceedings.

- Culturally appropriate for Indigenous children or children belonging to ethnic, religious or cultural minorities. Positive steps to protect their cultural characteristics may be required.

- Recognise that in most circumstances the best interests of the child will be served by remaining with their family, and for the family to be involved in the child's development.

CROC, article 40, requires governments to recognise the right of every child accused or convicted of a criminal offence to be treated in a manner

- consistent with the promotion of the child's sense of dignity and worth

- that reinforces the child's respect for the human rights and fundamental freedoms of others

- that takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

In addition, the ICCPR requires that criminal procedures for young people take into account the desirability of promoting their rehabilitation (article 14.4).

Diversionary options in Australia

At present, diversionary programs in Australia tend to be limited to either police cautioning or conferencing. The specific nature of these schemes and the legal framework within which they operate vary among jurisdictions.

Police have traditionally exercised discretion to divert young people from court proceedings by warning or cautioning them. In some jurisdictions cautions are governed to a limited extent by police instructions. In Queensland, Western Australia, South Australia, Tasmania, Northern Territory and NSW cautioning is covered by legislation. The caution must be expressed in language readily capable of being understood by the juvenile. The fact of a caution should not be referred to in subsequent legal proceedings, since this would amount to a conviction being recorded against a juvenile without the due process of a judicial hearing or the need to establish guilt beyond a reasonable doubt.

Victim-offender or family conferences are also used increasingly in states and territories either to divert young offenders prior to trial or as a sentencing option. All existing models of victim-offender conferencing used in Australia have been the subject of criticism. In their joint 1997 report, *Seen and heard*, HREOC and the Australian Law Reform Commission recommended that national standards for juvenile justice should incorporate best practice guidelines for conferencing. Matters for consideration should include

- the desirability of diversionary options being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer

- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence

- the need to ensure that young people do not acquire a criminal record as a result of participating in conferencing

- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person

- the child's access to legal advice prior to agreeing to participate in a conference

- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less ad hoc

- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.

Despite the shortcomings of existing diversionary options in Australia, they offer a number of advantages. They are more likely to recognise the particular vulnerabilities of juvenile offenders. They avoid the stigma associated with prosecution and

conviction and the contamination of a first/minor offender by more serious or recidivist offenders. Diversionary options may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour, and they may enable the child to participate meaningfully in the proceedings. They may also save resources for law enforcement and criminal justice agencies.

Aborigines and Torres Strait Islanders

The rate of over-representation of Indigenous young people and adults in detention in Australia is widely acknowledged. Indigenous juveniles are particularly vulnerable to being trapped in a cycle of contact with criminal justice processes. Yet studies show that Indigenous juveniles are less likely than non-Indigenous youth to benefit from mechanisms, such as conferencing, to divert juveniles from custody (*Bringing them home*, p 521-527; *Social Justice Report 1996*, 2). Similarly, there is evidence that Indigenous children have not received the benefit of police cautioning at the same rate as the general youth population (*Bringing them home*, p 513-516; *Seen and heard*, p 479).

The Royal Commission into Aboriginal Deaths in Custody recommended the following in relation to non-custodial options for Indigenous juvenile offenders (recommendations 109-115).

- There should be a wide range of non-custodial sentencing options available in each jurisdiction.

- In reviewing options for non-custodial measures, governments should consult with Aboriginal communities and groups, particularly Aboriginal legal services and Aboriginal employees within government departments.

- Adequate resources should be made available to provide support by way of personnel and infrastructure to ensure that non-custodial sentencing options are capable of implementation in practice, particularly in rural and remote areas with significant Aboriginal populations.

- Where non-custodial measures provide for community work or development programs, the authorities responsible for the program should ensure the participation of the local Aboriginal community in the planning and implementation of the program – including through Aboriginal community organisations participating in such programs.

- Departments and agencies running non-custodial programs should, wherever possible, employ and train Aboriginal people to implement such programs and train Aboriginal people to assist in educating and informing the community about the range of non-custodial options and their implementation.

- Governments should ensure that statistical and other information is recorded to enable an understanding of Aboriginal rates of recidivism and the effectiveness of diversionary options.

Bringing them home also recommended national framework legislation for the implementation of the right to self-determination and national standards legislation to provide for the involvement of accredited Indigenous organisations in juvenile justice decisions affecting Indigenous children, including pre-trial diversion, bail decisions and sentencing decisions (recommendations 43, 49 and 50).

Further research

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Convention on the Rights of the Child (CROC) –
www1.umn.edu/humanrts/instree/k2crc.htm

United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) http://www1.umn.edu/humanrts/instree/j2ungpjd.htm

United Nations Rules for the Protection of Juveniles Deprived of their Liberty - http://www1.umn.edu/humanrts/instree/j1unrjdl.htm

*United Nations Standard Minimum Rules for Non-Custodial Measures (*Tokyo Rules) www.un.org/documents/ga/res/45/a45r110.htm.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) - www1.umn.edu/humanrts/instree/j3unsmr.htm

Practitioner checklist

1. Viable alternatives to detention

- Is there a wide range of diversionary options available as an alternative to detention?
- Are programs adequately resourced by way of personnel and infrastructure?
- Has there been adequate consultation with Indigenous communities and organisations in the planning and implementation stages (particularly in areas with significant Indigenous populations)?

2. Availability

- Is recourse to diversionary options available at all stages of the criminal justice process?

- In determining whether diversion is appropriate, can the decision-maker take into account the circumstances of the offence, including mitigation?

3. Criteria

- Do the referral process and the diversionary option have a legislative base?
- Are there established criteria (and specific guidelines) for decisions concerning referral to diversionary options?

4. Training

- Do those making decisions have appropriate professional qualifications and expert training in juvenile justice?

5. Consent and participation

- Does referral to the diversionary option require the informed consent of the child, or his or her parents or guardian?
- Is the child given sufficient information to understand his or her options for diversion?
- Can the child express his or her views during the referral process and during the diversion process?
- Are safeguards in place to minimise coercion and intimidation of young people?

6. Procedural safeguards

- Are the following safeguards in place in the referral and diversion process?

    - Direct and prompt information about the offences alleged?
    - Presumption of innocence?
    - Access to legal representation?
    - Access to an interpreter?
    - Right to have parent or guardian present?
    - Right to silence?

- Does the diversionary option ensure that the child does not acquire a criminal record as a result of participating in the scheme?

7. Human rights safeguards

- Are the best interests of the child a guiding factor throughout the process of diversion?
- Does the diversionary option promote the child's rehabilitation and social reintegration? Avoid stigmatisation? Take account of his or her age and stage of maturation?
- Does the option apply to all children without discrimination?

- Is the option culturally appropriate for Indigenous children and children of ethnic, religious and cultural minority groups? Do evaluations of the option reveal that it is, in fact, accessible to such groups?
- Is the option consistent with prohibitions against cruel, inhuman or degrading punishments?

8. Complaints and review mechanisms

- Can the child make a complaint or request a review about the referral decision (including potential coercion to agree to participate)?
- Can the child make a complaint about his or her treatment during the diversionary program?
- Can the child make a complaint or request a review about the outcome of his or her participation in the diversionary option?
- Are the complaint and review processes administered by an independent authority?

8. Monitoring

- Does the diversionary scheme provide for independent monitoring of the scheme?
- Does the monitoring process include the collection and analysis of statistical data?
- Does the diversionary scheme provide for a regular evaluation of its effectiveness? Is such an evaluation carried out?
- Are the outcomes of diversionary options monitored to ensure that penalties agreed to are not significantly more punitive than those a court would impose, and for consistency?
- In reviewing options for diversion, is there a role for consultation with Indigenous communities and organisations?

 Date of last amendment: September 2001. **Contributing authors**: Rachel Crasnow, Chris Cunneen, Darren Dick, Susan Newell and Frith Way. **ISSN Number**: 1442-0813.

SENATE ESTIMATES COMMITTEE
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Regarding the report on mandatory detention laws in WA:

a) who was the consultant or researcher engaged to gather information for the *Social Justice Report 2001*

b) What was the cost of this work

c) Who the consultant/researcher met during the course of the evaluations of the report

d) Can the results of the report be provided to the committee?

I am advised that the answer to the honourable Senator's question is as follows:

There were two consultants engaged to gather information for the *Social Justice Report 2001*:

1.

a) In Western Australia HREOC commissioned Dr Harry Blagg to research the operation of diversionary schemes. HREOC staff conducted the research into mandatory detention in WA.

b) $12,000

c) The consultant held meetings with officials of the Department of Juvenile Justice, police, Aboriginal Legal Service, Children's Legal Service, Juvenile Justice Teams and young Indigenous offenders at two juvenile detention centres.

d) A copy of Dr Blagg's report is attached.

2.

a) The Commission hired Mr Chris Cunneen to assist in the development of best practice human rights principles for diversion of juveniles.

b) $5,000

c) Not applicable, no meetings were held

d) A copy of the final version of *Human Rights Brief No.5 Best practice principles for the diversion of juvenile offenders* which incorporates Mr Cunneen's research is attached.

SENATE ESTIMATES COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT
OUTPUT 1.2
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002:

Via consultation with Minister Ruddock, is it possible to provide the committee with a copy of the letter from the Commission to Minister Ruddock re the findings of your investigations at Woomera, mentioned on p.137 of the final transcript of 18 February 2002 Additional Estimates?

I am advised that the answer to the honourable Senator's question is as follows:

Please find attached a copy of the letter from the Human Rights and Equal Opportunity Commission to the Minister for Immigration and Multicultural and Indigenous Affairs concerning the Commission's visit to Woomera. The Minister and the Commission both agree to the release of the letter.

Also included is a copy of the Minister's response to the Commission's letter.

In an accompanying letter, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) requested that certain privacy issues relating to the Commission's letter be raised with the Committee when providing the material above. A copy of DIMIA's letter is attached for the Committee's consideration. The letter expresses concerns that members of the public may be able to determine the identity of particular children referred to generally in the Commission's published material.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Schacht asked the following question at the hearing of 27 May 2002:

a) Who was the person who made the complaint to the Attorney-General that led to him referring the movie *Baise-Moi* to the review panel to review its R18 classification
b) How many requests were received by the Attorney-General
c) Provide details of how many members of parliament wrote to the Attorney-General regarding the review of *Baise-Moi*

I am advised that the answer to the honourable Senator's question is as follows:

a) The Attorney-General read the Classification Board report for the film *Baise-Moi* before requesting the Classification Review Board to review the film. The Attorney-General did not make his decision on the basis of complaints received.

b) As at 30 June 2002 the OFLC had processed 399 letters addressed to the Attorney-General regarding *Baise-Moi*. Fifty nine of the letters received prior to the date of the Attorney-General's application for review of the classification decision. About one hundred letters received after the application for review was made, were from persons who either requested a review of the classification decision or were supportive of the Attorney-General's request for a review of the classification decision.

c) As at 30 June 2002 twelve members of parliament wrote to the Attorney-General regarding the review of Baise-Moi.

QoN 89

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Schacht asked the following question at the hearing of 27 May 2002:

Provide a statement explaining why the Classification Board think it is preferable not to identify themselves as to how they voted.

I am advised that the answer to the honourable Senator's question is as follows:

The community does not require information about the individual votes of Board members to understand a classification decision. Section 57(3) of the *Classification (Publications, Films and Computer Games) Act 1995* provides that where a decision is not unanimous, the majority view prevails. The Board's practice is that the statement of reasons in Board reports indicates the ratio of votes for and against the decision and includes reasons for the minority view as well as the majority. It would be inappropriate for the views or decisions of individual members to be the subject of public controversy.

Information about persons appointed to the Board is readily available. The Annual Report of the Classification Board and the Classification Review Board has profiles and usually photographs of all members appointed to the boards during the reporting year and OFLC's website includes news releases about more recent appointments.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Schacht asked the following question at the hearing of 27 May 2002:

Provide the name of the person in each state and territory who is the delegated officer that the OFLC contacts to advise the outcome of a decision.

I am advised that the answer to the honourable Senator's question is as follows:

The State and Territory censorship officers are:

ACT - Mr Brett Phillips, Director, Legal Policy Division, Department of Justice and Community Safety
NSW - Mr Andrew Osborne, Policy Officer, Attorney-General's Department
QLD - Mr David Cannavan, Film Classification Officer, Office of Fair Trading
WA - Mr Frank Morisey, Secretary, Censorship Office
SA - Ms Katherine O'Neill, Senior Legal Officer, Policy & Legislation Division, Attorney-General's Department
TAS - Mr Peter Maloney, Director, Legislation, Policy & Information Resources Division, Department of Justice
NT - Ms Ros Chenoweth, Censorship Officer, Attorney-General's Department
VIC - Ms Catherine Dineen, Censorship Officer, Legal Policy and Court Services, Department of Justice

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Schacht asked the following question at the hearing of 27 May 2002:

Of the 50,000 people who saw *Baise-Moi* during the 3 or 4 weeks it was shown, how many people complained to the Board about it?

I am advised that the answer to the honourable Senator's question is as follows:

As at 30 June 2002 the number of letters addressed to the Office of Film and Literature Classification (OFLC), including the Classification Board, regarding the film *Baise-Moi* was 169. Correspondents to the OFLC about classification decisions do not always disclose whether they have actually viewed the product complained about. However, of the 169 letters received, 16 correspondents clearly disclosed that they had seen the film, 2 of these complained about the R18+ classification, while 14 of these supported the R18+ classification. Hundreds of other letters about the film were addressed to the Attorney-General's office (see the response to Question on Notice 88).

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 27 May 2002:

What stage has the review of classification guidelines reached in respect of computer games? What are the future timelines for the review and for implementation?

I am advised that the answer to the honourable Senator's question is as follows:

In March 2002 Censorship Ministers agreed that the OFLC should develop a clear set of classification guidelines for both films and computer games and further consult with industry and the community, as appropriate. Ministers asked that they receive a mid-year report on the progress of the review and will consider final proposals to amend the guidelines on the completion of the review. Ministers are to meet on 26 July 2002. Ministers have not yet decided future timelines for the review and implementation.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 28 May 2002:

What research has the OFLC undertaken to assess the effect of computer games on children's behaviour. Has the OFLC assessed studies into the effect of computer games on children's behaviour as opposed to studies of community attitudes about computer games such as the Durkin and Aisbett study.

I am advised that the answer to the honourable Senator's question is as follows:

The Office of Film and Literature Classification does not undertake research into the effects of computer games on children's behaviour. The OFLC monitors research, including studies on the effects of computer game play on children, on an ongoing basis. The OFLC has in the past asked for expert assessments of studies on the effects of computer games.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 28 May 2002:

What consideration does the OFLC give to research that has been undertaken on the effect of computer games on children's behaviour.

I am advised that the answer to the honourable Senator's question is as follows:

Insofar as the question relates to the classification process, when making classification decisions, the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* ('the Classification Act') provides that the Classification Board, and the Classification Review Board, must apply the National Classification Code and the relevant Classification Guidelines. The Board and the Review Board are also obliged to take into account the matters set out in s.11 of the Classification Act. Such matters include the standards of morality, decency and propriety generally accepted by reasonable adults, artistic merit, the general character of the work and its likely audience.

The Classification Guidelines are regularly reviewed to ensure that they reflect current community standards.

The Office of Film and Literature Classification does otherwise monitor research on the effects of different media on an ongoing basis, including research on the effects of computer games play on children's behaviour.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 28 May 2002:

Is the OFLC aware of studies which provide evidence of aggressive or undesirable behaviour resulting from frequent use of computer games by children.

I am advised that the answer to the honourable Senator's question is as follows:

Yes. As the Office of Film and Literature Classification monitors media effects research on an ongoing basis, it is aware of the range of views regarding the effects of computer game play on children. The research is not conclusive. According to a recent (October 2001) summary of research on the influences of media violence published by the UNESCO Clearinghouse on Children and Violence on the Screen which is hosted by the Nordic Information Centre for Media and Communications Research (Nordicom):

"it should be emphasised that – as regards the new digital media – Internet and video/computer games – there are still too few studies on the influence of violent depictions to draw any safe conclusions."

The summary goes on to state that according to the research conducted so far:

"what seems possible to conclude about electronic games and aggression is that small children have become more aggressive in their play following game play – but these few studies have only employed one type of method. Among the few studies treating the influence of newer and more violent electronic games among older children and young people, there are some, above all in the US and Japan, indicating that the games can contribute to aggression. However, there are other studies that do not support or contradict that last-mentioned conclusion."

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 27 May 2002:

Did some submissions to the review present evidence of 'harm'?

I am advised that the answer to the honourable Senator's question is as follows:

Yes. Some submissions to the review of the Classification Guidelines for Films and Computer Games presented excerpts of some of the results of research material on 'harm' from particular perspectives. As the answer to Question on Notice 95 states, research in this area has been found to be inconclusive by the Nordic Information Centre for Media and Communications Research (Nordicom), which hosts the UNESCO Clearinghouse on Children and Violence on the Screen.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 27 May 2002:

Will the review of the guidelines consider this evidence and include an examination of what is meant by 'harm'?

I am advised that the answer to the honourable Senator's question is as follows:

No. The purpose of the review of the Classification Guidelines for Films and Computer Games is to ensure that the Guidelines reflect community standards. In particular, it is intended that the Guidelines deal adequately with issues arising from the convergence of traditional media, for instance in digital recordings. The review is also concerned with other issues arising from changes in entertainment media and community values which may have occurred since the introduction of the Computer Games Guidelines in 1994 and the review of the Film Guidelines in 1996.

SENATE ESTIMATES COMMITTEE
OFFICE OF FILM AND LITERATURE CLASSIFICATION
QUESTIONS ON NOTICE

Senator Harradine asked the following question at the hearing of 27 May 2002:

If studies provide evidence of 'harm' and this evidence is considered by the OFLC, is it given more weight or treated differently from community attitudes and views?

I am advised that the answer to the honourable Senator's question is as follows:

As outlined in the answer to Question on Notice 95, research on the effects of computer game play on children has been found to be inconclusive by the Nordic Information Centre for Media and Communications Research (Nordicom), which hosts the UNESCO Clearinghouse on Children and Violence on the Screen.

Insofar as the question relates to the classification process, as outlined in the answer to Question on Notice 94, the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides that the Classification Board, and the Classification Review Board, must apply the National Classification Code and the Classification Guidelines. The Board, and the Review Board, must also take into account the matters set out in s. 11 of the Act.

Insofar as the question relates to the review of the Guidelines for Films and Computer Games, the purpose of the review is to ensure that the Guidelines reflect community standards. Community attitudes and views which are obtained through the public consultation process inform the review and the content of the Guidelines.

SENATE ESTIMATES COMMITTEE
FEDERAL COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

Provide a comparative cost analysis against your normal proceedings and the trial eCourt De Rose native title matter.

I am advised that the answer to the honourable Senator's question is as follows:

The costs associated with hearing native title matters include judicial remuneration, court staff salaries (including secretary, associate and research assistant), and administrative costs. Unlike other matters heard by the Court, there are significant additional administrative costs associated with hearing native title matters on-country, including the need to conduct the hearing in regional and remote areas, the need for specialist transcript and specialist interpreter services, and the hire of four wheel drives.

The Court's experience to date is that the additional administrative costs associated with hearing native title matters on-country have varied significantly. Factors that influence these costs include the length of the hearing held in regional or remote areas, the logistical complexity of the hearing and the number of parties involved in the matter. The average additional administrative costs of matters either heard or part-heard by the Court on-country is approximately $60,000. However, actual costs have ranged up to in excess of $300,000 for logistically complex matters (excluding the De Rose matter).

The total expenditure to date on hearing this matter on-country is shown in the following table:

Item	Cost $
Court Reporting	79,000
Contractors to operate the electronic trial	75,000
Venue and equipment hire	32,000
Air Charters	18,000
Freight costs	2,000
Telecommunication costs	1,000
Short term vehicle hire (eg. 4 wheel drives)	17,000
Other travel costs (incl. other airfares, travel allowances)	87,000
Ringtail CourtBook Software	28,000
Information Technology Hardware	116,000
Cost of staff assisting during the on-country hearing	30,000
Other costs (including stores etc)	5,000
Total expenditure	**490,000**

Costs associated with the pilot electronic trial in *Peter De Rose & Ors v State of SA and Anor*[1] were higher than a normal native title matter heard on-country. The pilot required the Court to invest in a number of capital items which represent a one-off cost and thus are not likely to be incurred again. These included eight laptops (which were dust, moisture and shock proof), a digital camera (to record site visits, exhibits and witnesses), a digital video camera (to record dance and song for the purpose of preserving evidence and for that video evidence, if necessary or appropriate, becoming an exhibit in the proceeding). Other information technology hardware purchased specifically for the trial included scanners, printers, a mobile file server and backup server. In addition the Court purchased one Ringtail CourtBook™ licence at a cost of $28,000. This licence was used by all parties and the Court, and it enabled all users to access the documents and transcript as well as allowing the judge to annotate the transcript directly. These items were purchased rather than leased on the understanding that they would be used in other native title and non-native title electronic trials. In addition a generator was leased for the duration of the on-country hearing.

In addition, due to the matter being run as a pilot for the purpose of identifying standards and protocols to be applied in future electronic trials the Court commenced planning the matter six months prior to the trial date. This planning included the provision of training to court staff, the judge and judge's staff and the parties involved. As a pilot, the Court also contracted external contractors at a cost of $75,000 to operate the electronic trial, and to provide on-site training to court staff. The Court provided the equipment and training without charge to the parties. Again, given the emphasis on training court staff, it is expected that there will be considerable savings for future electronic trials.

[1] The pilot electronic trial in *Peter De Rose & Ors v State of SA and Anor* was presided over by Justice O'Loughlin, and was predominantly heard on-country in an area 470 kilometres south of Alice Springs. This pilot was managed under the umbrella of the Court's e-Court strategy.

SENATE ESTIMATES COMMITTEE
FEDERAL COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

Provide a breakdown of costs spent on native title in 1996, 1997 and for each of the four years to 2005-06, including the 2001-02 part year.

I am advised that the answer to the honourable Senator's question is as follows:

Funds expended by the Court are shown in Attachment A. Costs incurred by the Court in undertaking work associated with the native title jurisdiction are varied and have to date included judicial remuneration, salaries and associated costs of Court staff, as well as a wide range of administrative costs, such as communication costs, airfares, travel allowances, venue and vehicle hire costs.

These costs are shown by activity undertaken. An explanation of some of these activities is provided below. Unfortunately the Court does not have cost information relating to work undertaken on native title matters prior to 1997-98. Projected costs for 2005-06 are currently being identified as part of the cross-portfolio review of native title funding, and will be provided to the Committee as soon as they have been finalised. In addition to projecting costs for 2005-06, the Court is also currently reviewing workload projections and associated costs for the 2002-03, 2003-04 and 2004-05 financial years.

Staff Undertaking Native Title Work

Native title claims differ from other proceedings in the Federal Court and as such have been managed as a specialist area of work. Complexities of native title work include the processing and regular dealings with multiple parties, as well as increased docket support to judges. Specialist staff are also required to conduct case management conferences, mediation in respect of a narrow area of dispute and other judge delegated functions, legal analysis and the development of new procedures.

Given this increased workload and the special nature of the native title jurisdiction it was necessary to establish throughout the Court units, comprising staff with specialist skills and knowledge, to process and case manage native title claims.

Native Title Coordination Committee

The Court has a number of standing Committees that assist the Chief Justice and Registrar in the administration of the Court. The Committees within the Court consist mainly of judges but also include officers of the Court to support the work of the Committees. One of these committees is the Native Title Coordination Committee. The role of the Committee is to provide advice to the Court on practice and procedure relevant to the native title jurisdiction with the aim of ensuring that the Court adopts a nationally consistent approach to the management of the jurisdiction.

User Groups

The Court convened a number of User Group meetings for those involved in native title cases. The aim of a native title user group meeting is to allow the Court to explain its processes and procedures to the people who use the Court and to allow the users to explain to the Court their requirements. Importantly the user groups provide a focus on the extent to which the Court's practices and procedures can be modified to better assist the parties and the process.

Information Technology

Funds have been expended on:

- enhancements to the Court's existing case management system FEDCAMS following the amendments to the *Native Title Act*,
- the development and implementation of a database in order to effect correspondence with the numerous parties associated with native title matters and listing notices,
- increased information technology support requirements due to the establishment of the native title units, and
- the specific information technology requirements of hearing matters in remote locations.

Native Title Workshops and Cross-Cultural Training

Judicial and Court staff participate in Native Title Workshops and cross-cultural training sessions from time to time

Attachment A: Native Title Costs for the period 1997-98 to 2000-01 and Projected costs for the period 2001-02 to 2004-05

Activity	**1997-98**	**1998-99**	**1999-00**	**2000-01**	**2001-02**	**2002-03**	**2003-04**	**2004-05**
	$' m	$' m	$' m	$' m	$' m	$' m	$' m	$' m
Matters Heard	1.850	1.365	1.781	1.937	3.064	3.307	3.293	3.200
Staff undertaking native title work	0.854	1.984	2.354	3.219	4.167	4.696	4.051	4.010
Workshops and Cross-cultural training	-	0.122	0.167	0.220	0.117	0.126	0.131	0.131
Native Title User Group Meetings	-	0.081	0.083	0.032	0.039	0.042	0.044	0.046
Regional Case Management	-	-	-	0.199	0.067	0.190	0.183	0.063
Co-ordination Meetings	-	0.082	0.034	0.038	0.066	0.069	0.072	0.075
Notification	-	-	0.344	1.453	1.335	0.491	0.350	0.291
Registration Test Reviews	-	-	0.210	0.166	0.129	0.154	0.127	0.062
Management of amendments	-	0.577	0.602	-	-	-	-	-
Appeals - Registration Test Reviews	-	-	-	0.147	0.120	0.096	0.050	-
Other Case Management	-	-	-	0.318	0.754	0.738	0.754	0.784
Review Hearings	-	0.371	0.400	0.464	0.463	0.421	0.400	0.318
Full Court Appeals	-	-	-	0.044	0.360	0.375	0.450	0.208
Panel of Anthropologists	-	-	-	-	0.094	0.094	0.094	-
Additional support in IT Support Section	-	0.046	0.048	0.054	0.058	0.061	0.066	0.066
Information Technology	0.288	0.359	0.372	0.587	0.320	-	-	-
Native Title Courtroom – Perth, Western Australia	-	0.650	-	-	-	-	-	-
Community Education Program	-	-	-	0.105	0.127	0.067	0.069	0.072
Total Costs	**2.992**	**5.637**	**6.395**	**8.983**	**11.280**	**10.927**	**10.134**	**9.326**

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

Clarify in detail whether the information given to Mr Jull on 10 February 1999 in answer to a question on notice is 'unreliable and misleading'.

I am advised that the answer to the honourable Senator's question is as follows:

In answers to a number of questions asked previously by the Honourable Senator, it was mentioned that information on sitting days of judges of the Family Court prior to July 1999 was unreliable or misleading for the purposes of those questions. While the information available prior to July 1999 was not "unreliable or misleading" per se, or for the purposes of administering the Court, it was at the time supported by a set of partly automated and partly manual information systems, covering defended hearings and duty list work of judges. The sum of the separate systems would have produced double counting of days in which "a judge sat and heard cases" without manually intensive checking of individual diaries of judges. Integration of the systems has since been completed.

The Family Court is among the leaders in courts anywhere in introducing comprehensive performance analysis systems for judicial workload. It has developed these progressively over the past three years from its own resources and will continue to enhance them. The development of best practice systems has occurred in accordance with appropriate priorities set for the expenditure of Court funds.

In responding to the Honourable Senator's questions, the Family Court has reviewed the answer provided to Mr Jull in response to Mr Jull's question on notice. I am advised, on the basis of the information now available, the Court believes that answer was unreliable as the source information cannot be verified. The Chief Executive Officer of the Court has spoken to Mr Jull about this.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

The Family Court said that "it is not considered appropriate to provide information as to the identity of individual judges in relation to sitting days, as this would adversely affect the integrity of the court", however all the judges are named and the sitting days for 1996-97 and for 1997-98 are included. Provide a detailed response.

I am advised that the answer to the honourable Senator's question is as follows:

The reasons why the Court does not consider it appropriate to provide detailed information on individual judges are set out in the letters dated 10 October 2000 and 30 March 2001 from the Chief Justice to the Attorney-General, provided to the Committee previously and attached.

AUSTRALIA
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30 March 2001

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

My dear Attorney-General

As you are aware, the Family Court of Australia has just spent a considerable amount of time, effort and resources attempting to answer the detailed questions put on notice, by Senator Mason in particular, at the last Senate Estimates hearing. I am writing to you to again put on the record my concerns about the impact which these questions are having on the Court's operations.

Many of the issues touched on below were dealt with in my letter to you dated 10 October 2000, a copy of which is attached.

As explained in previous correspondence and in numerous answers to questions on notice, the Court's operational and financial/human resources records were not automated for at least part of the extended periods for which detailed answers have been sought by Senator Mason. This historical legacy is not a unique situation for Commonwealth or private organisations; the difference with the Court is that it has since become a world leader in areas such as court and judicial resource deployment and management information, through its own efforts and resources and in a short period of time. While this will allow more comprehensive reporting on performance in the future (and has allowed so for over a year or so already), it is simply not reasonable to overlay contemporary demands for detail on historically appropriate but different recording systems.

The level of detail sought in recent questions must raise issues of just what should be expected of any agency, let alone a Court, under concepts of accountability to Parliament. On the one hand, Parliament has, through passage of the FMA legislation and the ongoing reform of annual reporting and PBS requirements, made very clear that agencies should be accountable for outputs and delivering value for money. Ethical and values-driven approaches to executive management have received legislative force through other legislation (eg the Public Service Act 1999). I need not repeat the principles, for agency governance and otherwise, under which the executive components of Commonwealth agencies are to be held accountable, but I would have to say that I have difficulty seeing how the sorts of questions asked recently of this Court could be regarded as advancing those principles.

It is indeed curious that the Estimates process should require an agency to account for expenditure which, on any view (audit or common sense) is not material or relevant. While, in the interests of seeking to improve relations, I have sought to answer the questions as best I can, I must put on the record my disquiet about being asked, for example, to detail expenditure on motor vehicle expenses for particular officers who have motor vehicle entitlements going back over five years (or crockery expenses). I hasten to add here that the audit function is a very strong component of the Family Court's governance processes, the Court having been one of the earlier Commonwealth agencies to have completely outsourced the internal audit function and established strong Audit Committee processes. I should also add that the Court is one of the relatively few Commonwealth agencies to have secured consistently unqualified financial statement audits over the past few years, during which all agencies have been under pressure from the fundamental reforms to Commonwealth financial processes.

Contrary to some perceptions, the Family Court does not have large administrative overheads. The consequence of attempting to answer these latest questions has been to divert operational resources into searches for paper records at registry level covering extended periods and large volumes of information.

In my letter to you of 10 October 2000 I also explained my concerns about how some earlier questions asked by Senator Mason may have challenged principles of judicial independence. I am concerned to note that amongst his most recent questions are ones which appear to move beyond the point of incompatibility between accountability requirements and judicial independence. I understand your office agrees that, for example, this Court would not consider it appropriate to answer Question 20 in the terms asked.

I repeat my earlier offer to discuss with you privately, or provide to you confidentially any information on, any issue relating to detail or otherwise where there is any concern or question about resourcing, resource deployment or judicial productivity. It would be timely if we could meet as soon as possible to discuss this and other matters.

I would be grateful if, when the answers are supplied to the Senate Estimates Committee, a copy of this letter could accompany them, as I am again anxious that the Court's position should be understood.

Yours sincerely

FAMILY CC
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10 October 2000

CONFIDENTIAL

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

My dear Attorney-General

Further to our discussion in Sydney on 28 September concerning questions asked at Senate estimates, I have, as I indicated, given further consideration to the amplification of some of the draft answers and in particular to the issue of identifying particular judges in relation to them.

In the course of our discussion, when I indicated that I would reconsider the content of the draft answers to those questions that sought the identity of individual judges, you indicated that the delivery of the same was very much out of time. While I agree with this, for the record I would point out that most of the answers were delivered to your department within time and the remaining drafts within a few days thereafter. The resulting delay has been largely brought about by our mutual difficulties in finding time to discuss the matter.

In 1999-2000, the Court kept statistics in relation to the sitting days of individual judges that were divided into hearings commenced by the usual initiating application for a property settlement or a child order on the one hand and other applications on the other hand. Cases in the "other" category are primarily interlocutory matters but also include final defended hearings in relation to matters such as Hague Convention applications, appeals against the decisions of State and Territory Magistrates, reviews of decisions of Judicial Registrars and Registrars, child support applications and enforcement proceedings.

One difficulty that does arise in relation to sitting days is that some judges sit in both categories on the same day. This particularly applies to administrative and/or list judges, before whom short matters are often listed before or after they sit their normal day of defended hearings. Accordingly there is an element of estimation about figures in relation to individual judges, although I am assured that they are reasonably accurate.

While such figures are useful from the point of view of judicial administration, when they are made available as raw figures they can be very misleading. In particular, they take no account of the time spent out of court by judges working on their judgments. Also the figures do not take into account the days that such judges sat on appeals. A judge from the trial division normally is a member of the four judges assigned to appeals in any week of sitting. Also, they do not include days upon which judges were available to sit but the case/cases settled or were adjourned

So far as judges of the Appeal Division are concerned, the Court is able to say in which weeks particular judges sat on appeals, but we do not keep figures as to particular days sat. Although we may do so in the future I would question the value of such figures, because, as you will be aware, a half day appeal can give rise to many days of consideration and judgment writing. All Appeal judges are entitled to take a week out of Court after each sitting for this purpose. However this has often proved to be insufficient. In my own case, it has proved almost impossible to do so.

The Appeal Division has been under some strain because its numbers were reduced to seven on the retirement of the Deputy Chief Justice and his subsequent non-replacement. I have accordingly been forced to direct that so far as possible, two members of the Appeal Division cease to sit at first instance until further notice. I should stress that this decision involves no criticism of those particular judges. Appeal work is onerous and requires great attention to detail. Some judges need more time for consideration than others do. An additional first instance workload can and does create impossible strains for such judges.

I refer to these matters as a background to the amplifications that I have made to two of the answers. In this regard I have given individual figures of sitting days for 38 judges of the Trial Division who were in office throughout the year.

I have excluded judges who either retired or were appointed during the relevant period, as such figures would be obviously misleading. I have no figures in relation to the judges of this Court who are also judges of the Family Court of Western Australia. I have also excluded judges of the Appeal Division, in that the quotation of first instance figures in relation to them gives an entirely distorted account as to their workload.

I have not identified individual judges and as I point out in the draft answer, such figures on an individual basis are not made available to individual judges within the Court itself.

I have not amended the answer to the question that seeks the identity of judges whose judgments have been outstanding for more than six months. The problem of outstanding judgments is one common to many courts and is normally a by-product of increasing workloads, stress and other illness. In the case of judges of this Court I believe that stress is a very real factor in relation to the particular judges who have judgments outstanding. The causes of this stress are both external and internal.

I have taken appropriate steps to address the particular problems of outstanding judgments in this Court, usually by reducing the particular judge's workload and providing additional research assistance. The situation is well under control.

I am concerned that he public disclosure of raw details on outstanding judgments will, inexorably, draw personal information about judges into the public domain. While this would be unfair in itself, it may reasonably be expected to have the consequence of publicly shaming individual judges, and increasing the pressures that they are currently experiencing in this regard.

However, as I have discussed with you, I would be more than happy to supply all of the information sought by these questions on a confidential basis

I take the view that individual disclosure of names in so far as these questions seek it would be deleterious to the harmonious working of the Court. The exercise of judicial function should not, in my opinion, be a matter of competition or the achievement of particular statistical results by individual judges.

I do not believe that any principle of accountability should be capable of being used to impose unfair pressures upon individual judges or on the Court itself to produce decisions or to increase the tempo of sitting days to a point incompatible with the primary duty of doing justice between parties according to law. There is I believe a point where accountability requirements become incompatible with principles of judicial independence and I believe that we have reached this point here.

You mentioned in our discussion that you had received some advice in this regard to the effect that accountability principles required the provision of all of the material sought in these questions. The advice that I have received from the former Solicitor General is to the contrary. Of course the Court must be accountable in so far as such accountability does not compromise the principles of judicial independence and the answers that have been given, in my view, achieve this.

I would be most grateful if, when the answers are supplied to the Senate Estimates Committee, a copy of this letter could accompany them as I am anxious that the Court's position should be understood.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

How many days did each justice of the Family Court sit in the duty list and trial division in financial years 1998-99, 1999-00, 2000-01 and up to 31 December 2001 – to include all judges from the most recently appointed to the chief justice – provide a coding system instead of individual names to enable tracking?

I am advised that the answer to the honourable Senator's question is as follows:

The attached table ranks total sitting days in descending order for each judge for each of the years 1999/2000 and 2000/01 and the half-year to 31 December 2001. As explained in the answer to previous questions, information prior to July 1999 is unreliable or misleading for the purposes of detailing total sitting days for judges and, accordingly, it is not included in the attached table.

The information does not include days sat by Trial Division judges when sitting in appeals nor days sat by Appeal Division judges when sitting in appeals. It includes judges who were absent for lengthy periods as a result of illness or long leave and judges who sat for only part of the year as the result of retirement or appointment.

A coding system has not been included in the response to this question as such a system has the potential to identify individual judges. As explained in answers to previous questions and as detailed in the letters tabled in response to question 102, it is not considered appropriate to provide this information.

Days Spent Sitting by Judicial Officers in Defended Hearings and Duty Lists,
1 July 1999 to 31 December 2001 - All Registries (ranked yearly from highest to lowest total)

1999/2000 FY			2000/2001 FY			1/7/2001 - 31/12/2001		
Total Days	**Defended**	**Duty**	**Total Days**	**Defended**	**Duty**	**Total Days**	**Defended**	**Duty**
197	154	183	**197**	176	98	**105**	84	93
181	181	12	**197**	174	176	**96**	75	88
181	136	120	**194**	160	143	**94**	65	43
179	147	110	**190**	130	172	**94**	78	56
178	148	119	**189**	162	85	**92**	71	55
178	102	97	**188**	141	155	**92**	76	81
177	137	113	**181**	111	136	**91**	71	54
173	132	104	**180**	164	108	**88**	82	40
170	152	118	**177**	155	49	**88**	78	29
169	138	86	**176**	160	60	**86**	66	60
169	124	107	**173**	133	61	**86**	73	25
166	137	64	**171**	150	107	**85**	58	43
163	139	55	**167**	126	103	**84**	78	28
163	129	66	**167**	127	112	**84**	65	50
162	136	50	**165**	118	92	**82**	62	36
161	124	100	**163**	137	95	**82**	58	48
160	153	77	**162**	134	110	**81**	64	39
158	126	72	**157**	121	74	**81**	60	31
157	129	77	**153**	116	97	**81**	71	27
157	139	31	**153**	91	105	**78**	69	45
157	128	88	**151**	102	68	**76**	62	30
155	111	83	**146**	120	48	**76**	56	59
152	123	61	**145**	104	82	**74**	51	44
152	111	82	**145**	120	69	**74**	46	42
151	110	74	**145**	100	60	**74**	44	58
151	117	54	**143**	114	50	**74**	64	31
151	124	71	**142**	115	93	**73**	43	46
149	118	67	**141**	84	101	**72**	57	27
146	105	70	**141**	117	58	**72**	49	44
142	111	50	**136**	118	63	**70**	60	41
137	80	109	**136**	111	61	**69**	48	33
132	124	51	**132**	117	37	**67**	51	26
132	104	57	**129**	83	53	**67**	36	35
132	70	95	**125**	95	59	**63**	12	58
129	122	25	**124**	111	38	**63**	54	43
129	46	109	**119**	98	26	**62**	47	21
129	111	36	**113**	75	79	**61**	2	60
128	85	80	**84**	34	58	**59**	46	22
123	85	78	**78**	57	28	**52**	38	28
123	112	59	**76**	29	62	**50**	0	50
116	97	37	**68**	52	57	**49**	34	31
115	87	76	**66**	33	44	**47**	41	14
102	77	35	**60**	48	24	**37**	31	8
80	20	69	**39**	22	18	**34**	9	28
35	15	21	**27**	21	9	**28**	16	19
33	1	32	**11**	3	8	**6**	0	6
33	30	3	**6**	0	6	**5**	0	5
19	19	0	**3**	0	3	**2**	2	0
17	9	15	**3**	0	3			
10	8	3	**1**	1	0			
6759	5223	3451	**6335**	4870	3503	**3306**	2403	1880

Note: Total Days is the number of calendar days spent sitting in the period. A Judicial Officer may sit in a Defended hearing and a Duty hearing on the same day.
One day will be counted in Defended and one day will be counted in Duty, but a total of ony one day is counted for Total Days. Therefore Defended + Duty does not equal Total Days.
Does not include days sitting in Appeals.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

a) In relation to the answer to QoN 22 of May 2000, do the 38 judges in the trial division include judge administrators?
b) If not, why it was not included in the answer?

I am advised that the answer to the honourable Senator's question is as follows:

As outlined in the answer to QoN 28 of May 2000, the role of Judge Administrator (a statutory position established to provide assistance to the Chief Justice in the judicial administration of the Court in nominated parts of Australia) was replaced from 1 July 1999 by a system of delegations from the Chief Justice to certain judges, inter alia to perform judicial administrative functions in particular geographical areas. Details of the sitting days for those judges were included in the answer to QoN 22 of May 2000, and again specifically in the answer to QoN 28 of May 2000. Details of the other judges now performing national administrative roles not equivalent to the role of Judge Administrator (generally and in relation to appeals) were not included but are now included in the table provided in response to Question 103.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

a) Is it true that Auscript charges by the hour for its transcription services?
b) Does the Family Court keep records of invoices that they have received from Auscript?
c) How far back would those records go?
d) Is it true that the Family Court did receive invoices from Auscript each month detailing hours and days judges have sat?

I am advised that the answer to the honourable Senator's question is as follows:

a) Yes. However, Auscript is no longer the provider of the Family Court's recording and transcription services.

b) Yes.

c) 1995/96 financial year.

d) As explained in the answer to Question 21 of 19 February 2001, Auscript did not record all hearings of the Family Court. For example, Auscript did not record circuit hearings or all duty lists. Invoices received from Auscript comprised individual accounts for each occasion that recording and/or transcription services were provided to the Court. While on some invoices the name of a judicial officer was included, there was no consistency in this and, in any case, the detail of the hours of recording in a courtroom was not an accurate measure of the hours individual judges actually sat in court. Invoices received from Auscript did not provide complete or accurate information on the days judges sat in court.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Mason asked the following question at the hearing of 28 May 2002:

In relation to the Brisbane registry, how many hours each judge (all judges) sat in the duty list and trial division in financial years 1998-99, 1999-00, 2000-01 and up to 31 December 2001 – provide a coding system instead of individual names to enable tracking.

I am advised that the answer to the honourable Senator's question is as follows:

The provision of such information in relation to registries with small numbers of judges may allow the identification of individual judges. As explained in answers to previous questions and as detailed in the letters tabled in response to question 102, it is not considered appropriate to provide this information.

SENATE ESTIMATES COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT
OUTPUT 1.1
QUESTIONS ON NOTICE

Senator Cooney asked the following question at the hearing of 28 May 2002:

How long is it since there has been an increase in the number of judges allowed – the number of judges that are made available by the system?

I am advised that the answer to the honourable Senator's question is as follows:

The *Family Law Act 1975* provides, at subsection 21(3), that the Court shall consist of:

(i) a Chief Judge
(ii) a Deputy Chief Judge, and
(iii) Judge Administrators, Senior Judges and other Judges not exceeding, in total, such number as is prescribed.

The Family Law (Judges) Regulations currently provide that for the purposes of subsection 21(3) the prescribed number is 54. Previously, the prescribed number was 47, but this was increased to 54 in 1986. This enabled judges of the Family Court of Western Australia to be given dual appointments on the Family Court of Australia.

SENATE ESTIMATES COMMITTEE
FAMILY COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Cooney asked the following question at the hearing of 28 May 2002:

How much public service work do judges do outside their actual work in the court?

I am advised that the answer to the honourable Senator's question is as follows:

The Judges of the Family Court of Australia make a very significant contribution to the wider Australian Community, outside of the demands of their judicial duties. It is not considered appropriate to individually name judges and their respective community roles, but in general terms contributions are made in the following areas:

The Law

Many judges are very active in their own time in activities directly associated with the law. They are involved in providing Continuing Legal Education in a range of fora from secondary schools to universities to specialist groups of lawyers. Judges are involved with Bar Associations in developing suitable and relevant Bar Readers Courses for newly graduated lawyers and in advising specialist lawyers on changes occurring within the jurisdiction.

In the wider legal world judges hold appointments as follow:

National Law Journals - Published Family Law Service Directories	Editorial Board Co Author
Australian Institute of Judicial Administration	Board members
Australian Judicial Conference	Council member
Legal Aid	Committee member
Commonwealth Judicial Education Institute	Board member
World Congress on Family Law and the Rights of Children and Youth	Organising Committee member

Education

Judges are active in the educational environment from secondary schools to universities as follows:

Secondary Schools	Board, council and executive positions
University Law Faculties (numerous)	Board and Committee positions
University Colleges	Fellows and Board members
Churchill Fellowships	Selection Committee member
Special Needs Schools	Management Committee member
Secondary School Student Support Group	Committee member

Public Service

Many judges make contributions to the community in the area of Public Service as follows:

Counselling/Welfare Support agency	Advisory Board member
Aged Care Homes/Services	Honorary Consultant
Aged Care - Multicultural Emphasis	Leadership Committee
Public Hospital	Ethics Committee
Housing for Disadvantaged people	Leadership Committee
Rotary Clubs	Vice President
Drug Foundation	Director
Social Services Provision	Leadership Committee
Former Prisoner Rehabilitation	Chair
Fund Raising - Children with Cancer	Chair
Benevolent Society	Board Member
Royal Agricultural Society	Council/Leadership Positions

Cultural and Sporting

Judges are involved in the cultural and sporting life of the nation as follows:

Theatre Trusts	Chair
Australian Opera	Advisory Council Member
Australian Chamber Orchestra	Fundraising activities
Equestrian Activities	Senior Leadership Positions
Queensland Netball Commission	Member
AFL Club Womens Network	Chair

This response is not exhaustive, but it does illustrate that judges of the Court are actively involved in community activities at all levels (national, state and local) within Australian society. These activities are undertaken in judges' own time and they are in addition to a demanding judicial workload.

SENATE ESTIMATES COMMITTEE
ADMINISTRATIVE APPEALS TRIBUNAL
QUESTIONS ON NOTICE

Senator Cooney asked the following question at the hearing of 28 May 2002:

In regard to the 6,800 tax applications which were lodged, who was handling those cases? Were they permanent members, part-time members, or what?

I am advised that the answer to the honourable Senator's question is as follows:

The majority of applications seeking review of objection decisions relating to particular mass marketed tax planning schemes have been dealt with administratively by the Tribunal to date. With the consent of applicants and the Australian Tax Office, directions have been made by the Tribunal which have the effect of postponing these matters pending the outcome of test cases in the Federal Court. Directions were made in each Registry by members of the Tribunal assigned to the Taxation Appeals Division. Where applicants did not consent to directions being made delaying their matters, the former President of the Tribunal, Justice Deirdre O'Connor, conducted directions hearings and made directions accordingly.

All presidential members, including Deputy Presidents, are assigned to the Taxation Appeals Division. In addition, the following Senior Members and Members have also been assigned to that Division:

<u>New South Wales</u>

Senior Member MD Allen
*Senior Member G Ettinger
Senior Member PJ Lindsay
Senior Member MJ Sassella
*Ms C Prime
*Ms JA Shead

<u>Victoria</u>

Senior Member JR Dwyer
Senior Member JR Handley
*Senior Member BH Pascoe
*Mr WG McLean

<u>Queensland</u>

*Senior Member KL Beddoe
Senior Member DW Muller
*Dr EK Christie
*Mr JD Horrigan
*Mr BJ McCabe
*Mr IR Way

<u>South Australia</u>

Senior Member WJF Purcell
*Mr DJ Trowse

<u>Western Australia</u>

*Senior Member RD Fayle

<u>Tasmania</u>

*Ms AF Cunningham

<u>Australian Capital Territory</u>

Mr GA Mowbray

* indicates that the member is part-time

Where the issue before the Tribunal is not one that is before the Federal Court, the Tribunal has proceeded to review the applications. This has occurred in relation to the *Clockers* scheme which was dealt with by Deputy President SA Forgie. Deputy President Forgie is also dealing with the *Majestic Films* scheme. Senior Member Richard Fayle is dealing with the *Servcom* scheme matters.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

Provide a list of those eight cases (that the validity of the legislation will be called into question).

I am advised that the answer to the honourable Senator's question is as follows:

The names of the eight cases were provided in Mr Doogan's letter dated 29 May 2002 to the Senate Legal and Constitutional Legislation Committee.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Scullion asked the following questions at the hearing of 28 May 2002:

Provide

a) the details of the conversations that you and your staff may have had with the Department of Finance on that matter (chronology of FOI requests for Justice Kirby's Comcar records), particularly any discussions you may have had with regard to the accuracy of the alleged document, and
b) if it turns out that members of your staff had seen that document, who actually had access to it, if any copies were in fact made of the document, and those people to whom that document may have been circulated.

I am advised that the answer to the honourable Senator's question is as follows:

This information was provided in Mr Doogan's letter dated 29 May 2002 to the Senate Legal and Constitutional Legislation Committee.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

On Tuesday 28 May 2002, Mr Doogan stated that he could not recall any conversation with Department of Finance and Administration (Finance) officials about the accuracy of the 'Chronology' document. Was that statement correct?

I am advised that the answer to the honourable Senator's question is as follows:

On Tuesday 28 May 2002, Senator Scullion said "As part of your discussions with the department of finance, did you perhaps touch on the accuracy of information in that document?" Mr Doogan responded by saying "Actually, I just cannot recall. I would have to check to see what records I have available". This was subsequently dealt with at the Senate Legal and Constitutional Legislation Committee hearing on Friday 31 May 2002.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following questions after the hearing on 31 May 2002:

a) Did Mr Lex Howard call a Finance official responsible for FOI matters, on the morning of 14 March 2002?
b) Was Mr Howard asked or directed to make that call?
c) If so, by whom?
d) Why did Mr Howard make that call?
e) Did the Finance official indicate to Mr Howard that he considered the conversation to be confidential?
f) What was the substance of that conversation?
g) Did Mr Howard make any notes of the telephone conversation?
h) If so, can these be provided to the Committee?
i) If not, how did Mr Howard expect to remember the detail of the conversation?
j) Who had access to these telephone notes, or copies of these notes?
k) Did Mr Howard give these notes, or copies of these notes, to anyone?
l) If so, to whom?
m) Did Mr Howard relate the substance of his conversation with the Finance official to anyone in any form, including written and/or verbal and/or electronic form?

I am advised that the answers to the honourable Senator's questions are as follows:

a) Yes.
b) Yes.
c) Justice Kirby through Mr Doogan.
d) Because Justice Kirby had asked Mr Howard, in his capacity as FOI Coordinator for the Court, to speak to Mr Greg Rynehart in the FOI Coordination Section of the Department of Finance and Administration for the purpose of getting any relevant background information following the allegations made about Justice Kirby by Senator Heffernan in the Senate on 12 March 2002.
Justice Kirby had received correspondence from Mr Rynehart dated 12 December 2000 (following which Justice Kirby had spoken to and written to Mr Rynehart) as well as a further letter dated 23 March 2001 relating to Freedom of Information requests received within the Department of Finance and Administration in relation to Justice Kirby's use of Comcar.
e) Yes. However, Mr Rynehart was informed by Mr Howard that the information would be passed on to Justice Kirby.
f) The substance of that conversation is outlined in paragraph 2 of Mr Doogan's letter of 15 March 2002 which was provided to the Senate Legal and Constitutional Legislation Committee under cover of a letter dated 29 May 2002 from Mr Doogan.
g) Yes.
h) No.
i) On 14 March 2002, a short time after speaking to Mr Rynehart, Mr Howard briefed Justice Kirby on the information provided to Mr Howard by Mr Rynehart. Mr Howard then destroyed the notes of his conversation with Mr Rynehart.

j) Mr Howard did not provide to any person access to the notes of the telephone conversation which he had with Mr Rynehart nor did he make any copies of those notes.
k) No.
l) Not applicable.
m) Yes - Justice Kirby and Mr Doogan.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Did Mr Howard create or provide information to other persons for the creation of the 'Chronology' document?

I am advised that the answer to the honourable Senator's question is as follows:

No. The subject matter of this question was dealt with in Mr Howard's letter of 30 May 2002 to the Senate Finance and Public Administration Legislation Committee and was also dealt with at the Senate Legal and Constitutional Legislation Committee hearing on Friday 31 May 2002.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following questions after the hearing on 31 May 2002:

a) Did Mr Doogan have a telephone conversation with Ms Jan Mason from Finance, on or around midday on 14 March 2002?
b) Was Mr Doogan asked or directed to make that call?
c) If so, by whom?
d) Why did Mr Doogan make that call?
e) What was the substance of that conversation?
f) Did Mr Doogan make any notes of the telephone conversation?
g) If so, can these be provided to the Committee?
h) If not, how did Mr Doogan expect to remember the detail of the conversation?
i) Who had access to these notes, or copies of these notes?
j) Did Mr Doogan give these notes, or copies of these notes to anyone?
k) If so, to whom?
l) Did Mr Doogan relate the substance of his conversation with Ms Mason to anyone in any form including written and/or verbal and/or electronic form?

I am advised that the answers to the honourable Senator's questions are as follows:

a) Yes. The subject matter of this question was dealt with in Mr Doogan's letter of 15 March 2002 to Dr Watt, a copy of which was forwarded to the Senate Legal and Constitutional Legislation Committee under cover of Mr Doogan's letter of 29 May 2002 and was also dealt with at the Senate Legal and Constitutional Legislation Committee hearing on Friday 31 May 2002. The letter of 15 March 2002 was also tabled in the Senate Finance and Public Administration Legislation Committee hearing on Wednesday 29 May 2002.
b) Yes.
c) Justice Kirby.
d) Because he had been asked to do so by Justice Kirby.
e) This is dealt with in Mr Doogan's letter of 15 March 2002 to Dr Watt - refer answer to question 115(a) above.
f) Yes.
g) The content is reflected in Mr Doogan's letter of 15 March 2002 to Dr Watt which is referred to in the answer to question 115(a) above.
h) Not applicable.
i) Mr Doogan and his Personal Assistant, Ms Karen Weiss.
j) Yes.
k) To each of the seven Justices of the High Court of Australia.
l) Already answered in 115(k) above.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Did Mr Howard relate to Mr Doogan any information about his telephone call with the Finance official earlier on the morning of 14 March 2002 in verbal and/or written and/or electronic form, before Mr Doogan spoke to Ms Mason on 14 March 2002?

I am advised that the answer to the honourable Senator's question is as follows:

Yes.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

If Mr Doogan did not receive any advice from Mr Howard, where did he get the information on the purported FOI processes within the Department of Finance which he related to Ms Mason in his telephone conversation?

I am advised that the answer to the honourable Senator's question is as follows:

Not applicable.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following questions after the hearing on 31 May 2002:

a) Did Mr Doogan write a letter to Dr Ian Watt, Secretary of the Department of Finance and Administration, on 15 March 2002?
b) What was the substance of that letter?
c) Can that letter be tabled?

I am advised that the answers to the honourable Senator's questions are as follows:

a) Yes - refer answer to question 115(a) above.
b) Already dealt with in answer to question 115(a) above.
c) The letter was tabled in the Senate Finance and Public Administration Legislation Committee on Wednesday 29 May 2002 and it was also subsequently tabled in the Senate Legal and Constitutional Legislation Committee.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Does the first sentence of paragraph 2 of the letter state: "I informed Ms Mason that Justice Kirby understands that copies of dockets purported to be Comcar dockets were provided by a journalist from the Brisbane Courier-Mail to your predecessor, Dr Boxall, and that following Departmental examination of the documents they were determined to be bogus."?

I am advised that the answer to the honourable Senator's question is as follows:

Yes.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Given that this information had not been in the press to that date, and was peculiarly and specifically inaccurate, what information did Mr Doogan have in his possession that would allow him to make such a statement?

I am advised that the answer to the honourable Senator's question is as follows:

Justice Kirby's understanding of the situation as quoted in question 119.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Did Mr Doogan create or provide information to other persons for the creation of the 'Chronology' document?

I am advised that the answer to the honourable Senator's question is as follows:

No. This was dealt with at the Senate Legal and Constitutional Legislation Committee hearing on Friday 31 May 2002.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

When Mr Doogan asserted that no officer of the High Court had prepared the 'Chronology' document, did he include the Judges of the High Court in his definition of "officer of the High Court"?

I am advised that the answer to the honourable Senator's question is as follows:

From an examination of the Hansard of the Senate Legal and Constitutional Legislation Committee hearings between Monday 27 May 2002 and Friday 31 May 2002, Mr Doogan has been unable to find any such assertion as attributed to him in this question.

Mr Doogan did, however, say to the Senate Legal and Constitutional Legislation Committee on Friday 31 May 2002 "I again reject categorically any suggestion that I or Mr Howard or any of my staff in the High Court have produced and circulated this document". If this is intended to be the assertion referred to in the question, then clearly it does not include "Judges of the High Court".

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Will Mr Doogan conduct an investigation into whether officers of the High Court prepared or assisted in the preparation of, or provided any information for, the 'Chronology' document and report back to the Committee on the results of that investigation?

I am advised that the answer to the honourable Senator's question is as follows:

This issue was raised by Senator Scullion in his last question in the Senate Legal and Constitutional Legislation Committee hearing on Tuesday 28 May 2002 and was subsequently dealt with at page 3 of Mr Doogan's letter of 29 May 2002 to the Committee.

SENATE ESTIMATES COMMITTEE
HIGH COURT OF AUSTRALIA
QUESTIONS ON NOTICE

Senator Lightfoot tabled the following question after the hearing on 31 May 2002:

Did officers of the High Court transmit the 'Chronology' document to Members of the Federal Opposition or their staff, or to members of the Federal Parliamentary Press Gallery?

I am advised that the answer to the honourable Senator's question is as follows:

Not to the knowledge nor belief of Mr Doogan nor Mr Howard.

SENATE ESTIMATES COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT
OUTPUT 1.2
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

In relation to the task force report into lawyer bankruptcy:

(a) Why has the report been delayed?

(b) Does the Attorney-General regard the report to be of less significance in the sense of maintaining public confidence in the personal insolvency system?

(c) Does the Attorney-General not believe that the release of a report of that nature would assist ITSA in carrying out its investigatory and regulatory functions in ensuring that bankruptcy is not used for other than legitimate reasons?

(d) Will the government implement the recommendations, if any, in the report?

(e) If there are any recommendations, will ITSA be charged with the carriage of the matter or the overall implementation of the recommendations?

(f) If so, will ITSA be provided with additional resources to assist them in dealing with these areas, which might create additional work?

I am advised that the answer to the honourable Senator's question is as follows:

(a) The report (which was developed by a task force made up of officers from the ITSA, the Attorney-General's Department, the Australian Taxation Office and the Treasury) was presented to the Attorney-General and the Assistant Treasurer on 18 January 2002. The report is comprehensive and detailed. The task force's recommendations remain under consideration by Ministers.

(b) The Government takes abuse of the bankruptcy system to avoid payment of tax very seriously. The task force was established by the Government with the express purpose of examining the legislative and administrative changes that may be needed to prevent unscrupulous debtors using bankruptcy to defeat creditors.

(c) As part of the task force, ITSA contributed its experience in carrying out its regulatory and investigatory functions to the development of the report. The Government's intention is that, in addressing the issues identified in the report, it will ensure that bankruptcy is used only for legitimate reasons.

(d) Refer to answer (a) above.

(e)&(f) The question of ITSA's role in implementing recommendations and whether ITSA would require any additional resources cannot be answered until decisions have been made on the recommendations in the report.

SENATE ESTIMATES COMMITTEE
INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002.

a) Give an explanation of when ITSA would seize goods and chattels (in a bankruptcy). Is that an ordinary course of dealing? What do you then do with them after you seize them?

b) In relation to the case where ITSA allegedly raided a café owner, did that happen? Does ITSA normally raid premises, remove the stock, not issue a receipt and close the business down (because of alleged actions)? Please identify how you operated in that instance.

I am advised that the answer to the honourable Senator's question is as follows:

a) The *Bankruptcy Act 1966* imposes a statutory duty upon a bankruptcy trustee to 'forthwith take possession of all the property of the bankrupt'. Certain property of a bankrupt, such as clothing, ordinary household furniture, tools of trade to a limited value and a motor vehicle worth $5,000 or less is 'protected' and cannot be seized by the trustee.

Other unencumbered property, such as antiques, art work, a business, trading stock, motor vehicles worth in excess of $5,000 and cash vest in the trustee and are either seized by, or surrendered to, the trustee. Seized or surrendered chattels are normally sold at public auction. The proceeds are used to pay the trustee's fees and any costs associated with the administration, and the balance becomes available to the creditors. Seizure of property is not an everyday occurrence, but it can be regarded as being in the ordinary course of administering bankrupt estates.

b) What occurred in the instance referred to was not a raid. The bankrupt filed his own petition by post. In his statement of affairs, he indicated that he had been operating a business. As the business and any assets that it owned vested in the trustee at the time of bankruptcy, a meeting was arranged between the trustee's staff and the bankrupt at the business premises. This was so that the trustee's staff could explain the ramifications of bankruptcy in relation to the operation of a business and so that they could inspect the premises and books, with a view to establishing whether or not the business might be sold as a going concern. An examination of the books indicated that the business had operated at a loss since it opened and it was determined that the trustee would not attempt to sell it as a going concern or incur any unnecessary losses by continuing its operation. The trustee's staff then took possession of a stock of liquor and the cash in the cash register, and effectively closed the business.

Bankruptcy Regulation 16.03 requires that an inventory of items seized be given to the bankrupt or the custodian of the items 'as soon as is reasonably practicable'. ITSA accepts that the delay in this instance of three weeks between the seizure of the goods and the issue of an inventory to the bankrupt was unacceptable. Changes to ITSA's practices have been made to ensure that, wherever possible, an inventory or receipt is issued at the time goods are seized.

SENATE ESTIMATES COMMITTEE
INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 27 May 2002.

a) In relation to Part X bankruptcies, do you have any statistics on what the settlement rate is, what the return would be either in percentage or dollar amounts, where Part X arrangements are entered into – and additionally Part IX?

b) How many complaints have been lodged against ITSA in relation to their conduct under Part X or Part IX arrangements?

c) Do you keep statistics on the number and type of complaints you receive for such operations?

(if the type and nature of the complaint is easily identifiable it would be helpful, if not, perhaps you can just give the total number and let us know that the search might prove too exhausting)

I am advised that the answer to the honourable Senator's question is as follows:

a) ITSA does not collect or maintain statistics on the rates of return to creditors in Part X arrangements.

As ITSA processes all Part IX debt agreement proposals, it publishes the proposed rates of return in the Annual Report on the operation of the Bankruptcy Act. In 2000-2001 the average proposed rate of return was 73%, an increase over the previous year's proposed rate of return, which was 64%. These rates are only those contained in proposals put to creditors. The proposals are not necessarily adhered to by the debtors.

b) ITSA administers few Part X arrangements (23 in 2000-2001; none between July 2001 and May 2002) and relatively few Part IX debt agreements (44 in 2000-2001 and 39 in the period to May 2002). There have been no complaints about ITSA's administration of either. However, there has been one recent complaint against ITSA in its regulatory role. The complaint was that ITSA had failed to have an allegedly fraudulent Part X arrangement overturned by the court. It was determined that ITSA did not have the relevant standing to make an application to the court in that instance. Ten complaints about aspects of Part X arrangements administered by private trustees were received in the 2000-2001 financial year. From July 2001 to May 2002 there have been 23 complaints lodged about aspects of Part X arrangements.

In relation to Part IX debt agreements, there have been no complaints about ITSA. As it currently has no regulatory powers over commercial administrators of Part IX agreements, ITSA keeps no formal record of complaints about their administrations.

c) Relevant statistics maintained by ITSA only record complaints relating to aspects of Part X matters, because ITSA has regulatory powers in respect of these.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

What amount of time might be spent on countering people-smuggling?

I am advised that the answer to the honourable Senator's question is as follows:

AFP time attribution records indicate that in the financial year to 31 May 2002, the organisation has attributed 62,828 hours to the investigation of people smuggling.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

Identify any of the other Indonesian agencies that your agents work with, other than the Indonesian National Police.

I am advised that the answer to the honourable Senator's question is as follows:

The AFP Jakarta office, in pursuing organised people smuggling activities, works with the following Indonesian agencies:

Indonesian Immigration;
Indonesian Navy; and
Indonesian Army and Marines.

QoN 130

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

Identify the frequency of the people smuggling strike team meetings for last year.

I am advised that the answer to the honourable Senator's question is as follows:

The Board of Management overseeing the Joint AFP/DIMIA People Smuggling Strike Team met on the following dates during 2001:

3 January;
7 February;
22 March;
19 April;
25 May;
26 June;
1 August;
11 October; and
22 November.

QoN 131

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

What, if any, was the role of the strike team in relation to the '*Palapa'* the occupants of which ended up on the *Tampa*?

I am advised that the answer to the honourable Senator's question is as follows:

The joint Australian Federal Police/Department of Immigration and Multicultural and Indigenous Affairs People Smuggling Strike Team received intelligence related to the organisation of the *Palapa 1* people smuggling venture. That information was disseminated to the following Commonwealth agencies:

- Department of Immigration and Multicultural and Indigenous Affairs;
- Department of Foreign Affairs and Trade;
- Coast Watch;
- Australian Customs Service;
- Department of Defence - DIO and Norcom; and
- Office of National Assessments.

The role of the Strike Team ceased once the *Tampa* entered Australian waters.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

Provide a copy of the original MOU and protocol with the Indonesian Police.

I am advised that the answer to the honourable Senator's question is as follows:

The *Memorandum of Understanding between the Australian Federal Police and the Indonesian National Police Concerning Cooperation in Law Enforcement* dated 5 August 1997, and the *Protocol under the Memorandum of Understanding Between the Indonesian National Police and the Australian Federal Police on the Targeting of the People Smuggling Syndicates Located in the Republic of Indonesia* dated 15 September 2000, are both operational documents.

The content of those documents was formed with the input of both the Australian Federal Police and the Indonesian National Police. As such, the documents are not solely the property of the Australian Federal Police and therefore cannot be released without the express permission of the Indonesian National Police at this stage.

QoN 133

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

Does the protocol go to financial assistance?

I am advised that the answer to the honourable Senator's question is as follows:

The AFP funded the initiative.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Faulkner asked the following question at the hearing of 28 May 2002:

Provide details of any further developments in the AFP's work with Indonesian authorities in terms of substantive nuts and bolts outcomes following the Ministerial summit in February, including any arrangements with the Indonesian police or forces.

I am advised that the answer to the honourable Senator's question is as follows:

The AFP has appointed a project manager who is a full time member of the Department of Foreign Affairs and Trade, Inter-Departmental Committee on People Smuggling, Trafficking in Persons and Related Transnational Crimes, chaired by the Ambassador for People Smuggling Issues;

The AFP project manager works with an AFP project team led by the General Manager International and comprising the Directors of Intelligence and International Operations. The team draws on a range of other relevant AFP areas for assistance including the Law Enforcement Cooperation Program (LECP) team.

Some of the projects undertaken specific to Indonesia are:

- Increasing the AFP Indonesian Liaison Officer capability with the future deployment of intelligence and operational skilled personnel;

- In April 2002 the AFP sponsored the visit of the Chief of Police Indonesian National Police (INP) for the Nusa Tengarra Timur Region, his deputy and the head of intelligence to Darwin and Canberra for Whole of Government briefings on People Smuggling issues relevant to this region of Indonesia. This region had historically played an important role in off shore disruption programs working closely with the AFP. This region was one of the key people smuggling staging points for embarkation to Australia. After a number of successful joint AFP and INP disruption operations there has been no departures of vessels to Australia for about twelve months.

- On the 13 and 14 June 2002 senior officers from the AFP and INP conducted their 5th Annual AFP INP Memorandum of Understanding Working Group meeting in Perth. The meeting identified common transnational crime threats and confirmed arrangements for the implementation of programs in areas including:

    - Operational training;
    - Criminal Intelligence training;
    - Provision of police equipment;
    - Officer exchange programs in intelligence, operations and training;

- On the 13 June 2002 the Commissioner AFP and Chief of the INP, Police General Da'i Bachtiar, signed a new MOU on transnational crime and cooperation. The MOU identifies three key areas for collaboration under intelligence sharing, joint operations and capacity building through cooperation. The MOU builds on previous MOUs and lists eight transnational crime types as common threats to both countries. The crime types include:

    - Terrorism
    - Trade in narcotics and other illicit drugs
    - Firearms trafficking
    - Sea piracy
    - Money laundering
    - People smuggling, trafficking in persons
    - Cyber crime
    - Transnational economic crime

- A protocol to the MOU will be written to address the gift by the Australian Government of five (5) runabout boats to combat the activities of persons involved in people smuggling and related transnational crime.

- Later this year a senior delegation of INP officers from intelligence, criminal investigations and training will visit Australia to develop a project plan with implementation strategies for the outcomes of the 5th Annual AFP INP MOU Working Group Meeting;

- In August 2002 the AFP will sponsor the 2nd Asia Region Heads of Criminal Intelligence Working Group meeting in Kuala Lumpur. The meeting will build on strategies developed during the inaugural meeting in Bangkok in 2001. The AFP under the LECP funding arrangements will sponsor delegates from about nineteen countries including the INP.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 28 May 2002:

Would it constitute an offence against the Commonwealth if an unaccompanied minor in detention had their lips sewn while accompanied by an adult or with an adult involved in the Woomera lip sewing incident

I am advised that the answer to the honourable Senator's question is as follows:

This question is similar to the question regarding the Commonwealth's responsibility for immigration detainees that the AFP provided a written response to the Committee on 29 May, ie the day following AFP participation at the Budget hearing.

The following reiterates the 29 May response.
Under the *Commonwealth Places (Application of Laws) Act*, State provisions are applied as Commonwealth law to criminal assaults against a person, who is not a Commonwealth official, when the offence occurs in a Commonwealth place.

The structure of the *Commonwealth Places (Application of Laws) Act* provides for the relevant States to administer and enforce the provisions of the applied law. Under this arrangement, offences against the person occurring in Commonwealth places are normally enforced by State policing authorities. Some offences at immigration detention centres are subject to the *Migration Act 1958*. Examples of a Commonwealth offence include escaping detention and possession of weapons in a detention centre. Other incidents are not subject to specific Commonwealth law and State law is applied, eg assault of a detainee by another detainee.

Sometimes there is not a clear division of responsibilities and it may be subject to arrangements between the Commonwealth and the relevant State jurisdiction. Negotiations are in progress with the various States in relation to such jurisdictional responsibilities at detention centres.

In short the response to Question on Notice No 135 is as follows:
the AFP is not aware of specific Commonwealth offences appropriate to this type of conduct. Offences under South Australian state law may be available, applied by virtue of the *Commonwealth Places (Application of Laws) Act 1970.*

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

Regarding the 24,903 documents the AFP sought disclosure on through section 282 of the *Telecommunications Act* during 2001:

a) provide a breakdown indicating the sort of information that was disclosed or the documents that were disclosed during that period;
b) indicate how many telephone records were disclosed;
c) whether it was telephone information or whether they were telephone accounts or SMS messages;
d) whether there were any emails as part of that group;
e) how the data that is obtained under s282 is being stored; and
f) how many arrests and convictions resulted from those 24,903 requests for disclosure.

I am advised that the answer to the honourable Senator's question is as follows:

In responding to this series of questions it would be beneficial to first provide a definition of terms:

- subscriber details - a record of the name and address of a person who subscribes to a particular telephone number; and
- call charge record - a list of the telephone calls made (or received) by a particular telephone number.

The above information does not incorporate any transcript / detail / content of an actual telephone conversation.

a) Information received as a result of requests under section 282 of the *Telecommunications Act 1997* includes either / or subscriber details (telephone number account holder name and address record) and call charge records (a record of the number(s) made (or received) by a specific telephone). It would be necessary to conduct a manual search of the AFP's case management system to determine a breakdown of the volume (numeric only) of requests made for either or both the above records. It would be extremely resource intensive to conduct such a manual search of AFP records. As will be evident from the above definitions the information obtained from requests under section 282 does not incorporate e-mailed documents or detail of actual telephone conversations.

b) See response to (a) above. Also, of the 24,903 requests, those that related to call charge records would have no doubt listed more than one telephone number that received a call from (or sent a call to) the subscriber number subject to the section 282 request.

c) and d) The AFP does not receive emails nor SMS messages under the provisions of section 282. The information available under section 282 relates only to subscriber details or call charge records.

e) Requests can be made under section 282 by each state office of the AFP. Responses to section 282 requests are generally received in electronic form and stored within the individual investigation/case in PROMIS, the AFP's corporate case management system. However, in some cases the response is provided in hard copy and stored on the specific operation file. Accordingly, it is not possible to automatically extract from PROMIS the number of such records held. Access to, and use of, information obtained by the AFP under section 282 is covered by secrecy provisions of legislation such as the *Australian Federal Police Act 1979* and the *Privacy Act 1988.*

f) While information received as a result of a section 282 request is a valuable investigative tool its value will vary for each request, for example, it might:

- negate an allegation;
- provide a stepping stone within the investigation; or
- form part of the evidence in a prosecution.

However, arrests and convictions would not be justified as a result from such information alone. Accordingly it is not feasible to attempt to measure the number of arrests or convictions that might have eventuated from the contribution of information gained under section 282 provisions.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

In relation to prosecutions for leak inquiries in the last year, were the six finalised matters finalised through court action

I am advised that the answer to the honourable Senator's question is as follows:

No.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

Has information been sought under the Telecommunications Act about parliamentarians' records and other information?

I am advised that the answer to the honourable Senator's question is as follows:

No.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

In relation to an article in the Age on 28 May 2002, provide details of why the convicted people smugglers are in Maribyrnong detention centre?

I am advised that the answer to the honourable Senator's question is as follows:

This particular matter did not involve the Australian Federal Police. It relates to prosecution by the Department of Immigration and Multicultural and Indigenous Affairs.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

Provide a copy of the protocol that determines whether there is a link between the matter under investigation and the requirement for the record

I am advised that the answer to the honourable Senator's question is as follows:

In order to assist members in making requests under section 282 the AFP has developed specific guidelines being the *AFP Practical Guide For Law Enforcement And National Security Agencies' Access To Call Record Information And Call Tracing* - see Attachment A.

QoN 141 Attachment A

AFP PRACTICAL GUIDE FOR LAW ENFORCEMENT AND NATIONAL SECURITY AGENCIES' ACCESS TO CALL RECORD INFORMATION AND CALL TRACING

(This Guide was developed as a result of an industry agreement between carriers and law enforcement and national security agencies and is only applicable to these parties.)

Interpretation and Application

1. Call Record Information is used to describe information derived from an information system of a carrier or service provider. It is not generally available until after call completion and may not be available until a particular system has received and processed data. It may include, but is not limited to -

(a) information about calls from a particular service;

(b) information about calls to a particular service;

(c) for mobile telephony, information about the location of a call, or calls made from a particular location, and

(d) for GSM, information that associates particular handsets and particular customer information.

2. Call Tracing is the recording of call set-up information by the public network operator, either while the call is in progress or shortly after completion. The particular information sought from the call-set up information will vary, but typically relates to the maker of the communication.

3. This Guide only applies to the extent that it is not inconsistent with the provisions of the *Telecommunications (Interception) Act* 1979. In particular, this Guide would not usually deal with Call Record Information or Call Tracing derived or obtained from the use of analogue Call Charge Analysis System equipment because the use of that equipment may constitute the interception of a communication.

4. This guide applies to the providers of telecommunications services and law enforcement and national security agencies such as -

(a) the Australian Federal Police,

(b) a police force or service of a State or a Territory,

(c) the National Crime Authority,

(d) the Australian Security Intelligence Organization,

(e) the New South Wales Crime Commission,

(f) the Independent Commission Against Corruption of New South Wales, and

(g) the Criminal Justice Commission of Queensland.

Legislation

5. Section 47(2) of the *Telecommunications Act* 1991 requires AUSTEL, carriers and service providers to give reasonably necessary help to officers and authorities of the Commonwealth and of the States and Territories for specified purposes. Call Record Information and Call Tracing, where reasonably necessary, are forms of assistance which may be available to law enforcement and national security agencies. However, any disclosure to law enforcement and national security agencies of information resulting from Call Record Information or call tracing activities may only be made to the extent permitted by section 88(3) of the Telecommunications Act 1991.

6. Section 88(3) of the *Telecommunications Act* 1 991 permits the disclosure of certain information by a carrier's employees or a service provider or its employees in certain circumstances, including if:

(a) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue (section 88(3)(g));

(b) the disclosure of information by a carrier's employees or a service provider or its employees is to an officer or employee of the Australian Security Intelligence Organization and in connection with the performance of its functions. (section 88(3)(c)); and

(c) the person who makes the disclosure believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of a person (section 88(3)(e)(iii)).

Reasonableness Test

7. The "reasonableness test" in section 47(2) shall be satisfied where criteria set out below in relation to both the matter under investigation and the procedures followed by the agency making the request have been met. There are differences in access and procedure for Call Record Information and Call Tracing, and these differences reflect technical limitations as well as judgements related to reasonableness. In particular, carriers and service providers have made the judgement that in view of the resource demands and the intrusive nature of Call Tracing, it can in general be considered reasonably necessary only for the purposes of the enforcement of the criminal law by police services and for safeguarding national security. The agencies listed in paragraph 4 acknowledge the intrusive nature of Call Tracing and the judgement made on that basis.

Criteria Common to Call Record Information and Call Tracing Requests

8. The "reasonableness test" in relation to the matter under investigation shall be satisfied where disclosure of information derived from Call Record Information and Call Tracing is made in relation to the investigation of –

(a) conduct which, if proved, would constitute -

(i) an offence punishable by two years' imprisonment or more; or

(ii) specific conduct, or a specific offence (whether criminal or civil), which, while not carrying a penalty of two years' imprisonment or more, is agreed between the carrier and the agency concerned to be sufficiently serious, or to have such special circumstances for its investigation, as to justify the release of information derived from Call Record Information and/or Call Tracing, or

(b) activities relevant to national security; or

(c) a complaint to the police of receiving harassing or menacing calls, (section 85ZE of the *Crimes Act* 1914), notwithstanding that such offences are punishable by one year's imprisonment or

(d) a situation where a person is in threat of death or serious injury.

9. The following procedures relate to requests for both Call Record Information and Call Tracing. There are also procedures relating to each of these requests which must also be satisfied where applicable, set out in paragraphs 10 and 11 respectively.

(a) all requests are to be individually signed by an authorised representative of the requesting agency, although urgent call tracing requests may be made verbally in the first instance;

(b) records are to be kept by the carriers in relation to requests submitted and disclosures made;

(c) where requests are not fulfilled for technical reasons, although the procedural criteria have been met, the carrier or service provider will provide whatever Call Record Information or Call Tracing information as is reasonably possible in relation to the matter under investigation, and will state in writing the reasons for the non-compliance or partial compliance with the request;

(d) requests to be made/authorised at an appropriately senior level and to be accompanied by a supporting statement for the request so that the carrier may be satisfied that the assistance being provided is reasonably necessary under the terms of section 47(2) or is otherwise authorised; that is the disclosure requested is in fact reasonably necessary for the enforcement of the criminal law or safeguarding national security or is in relation to the investigation of harassing or menacing calls or is necessary to prevent or lessen a threat of death or serious injury; and

(e) the supporting statement to contain an assurance or certificate that any disclosure made in response would be in the circumstances specified in paragraph 88(3)(g) or 88(3)(e)(iii) where the request is made by a law enforcement agency; or as specified in paragraph 88(3)(c) where the request is made by the Australian Security Intelligence Organization.

Criterion for Call Record Information

10. The following procedural criterion relevant for Call Record Information requests is additional to those in paragraphs 8 and 9 above -

(a) requests for Call Record Information are to be made to a specified area or unit of the carriers for processing. If the carrier does not have the information, it may be necessary to make the request to a service provider.

Criteria for Call Tracing Requests

11. The following are the procedural criteria for Call Tracing requests and are additional to those in paragraphs 8 and 9 above -

(a) where an agency judges that its purposes are equally served by requesting Call Record Information or Call Tracing, it will pursue Call Record Information rather than Call Tracing;

(b) requests for Call Tracing must indicate the degree of their urgency;

(c) carriers, service providers and agencies must nominate agreed contact points for Call Tracing requests and responses, and requests for Call Tracing are made to the area or unit of the carrier or service provider specified for requests made with that degree of urgency and at that time;

(d) where a request is made verbally because it must be acted upon immediately if the required information is not to be lost, an appropriately authorised request will be forwarded to the carrier or service provider before the information gained is released;

(e) where a request is made verbally because of a situation where a person is in threat of death or serious injury, the information is to be provided immediately and an appropriately authorised request will be forwarded to the carrier or service provider as soon as possible afterwards;

(f) a request for call tracing should be for no longer than a week, although it will be possible to request a renewal; and

(g) requests for Call Tracing information may not be fulfilled, even when the procedural criteria are met, because it is not technically possible to supply the information. *(For further information on relevant technical limitations, see the Call Tracing Specification (LEAC Sub Committee B, version dated 9 September 1996)).* In this situation, the carrier or service provider will provide whatever information is possible in relation to the matter under investigation.

12. In addition to the procedural criteria in paragraph 11 above, as general guidance, Call Tracing may be a reasonably necessary form of assistance -

(a) where a person receiving harassing or menacing calls complains to the police;

(b) in situations where a person may be in danger of death or serious injury;

(c) where the investigation satisfies the reasonableness test; and

(d) where crimes are or may be committed using computers and/or telecommunications systems.

(Although this Guide enables Call Tracing to be requested where a crime is being or has been committed using computers and/or telecommunications systems, provided the criteria for reasonableness are met, it is the intention that more detailed procedures be developed by Sub Committee B in relation to this category of offences.)

Cost Basis

13. The basis on which carriers or service providers will bill agencies for the provision of Call Tracing and Call Charge Records information is that the costs of meeting that request are recovered, taking into account matters such as the technology used, the amount of staff time involved, time of day and whether staff had to be called out.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Allison asked the following question at the hearing of 28 May 2002:

Provide information about whether there were whistleblowers about whom information was sought.

I am advised that the answer to the honourable Senator's question is as follows:

The AFP does not differentiate between 'whistle-blowers' and any other complainants who refer a matter for investigation.

Accordingly it would not be possible, even on a manual search of all 'leak' investigation records stored in the AFP's PROMIS case management system, to determine whether a request for information lodged under section 282 of the *Telecommunications Act* was relative to someone colloquially termed, in an area outside the AFP, as a 'whistle-blower'.

It is, therefore, not possible to provide the information sought.

The response to QoN 136 is also relevant to this issue.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 27 May 2002.

How long has the ABCI been seeking additional funding to upgrade its criminal intelligence database?

I am advised that the answer to the honourable Senator's question is as follows:

Two years.

SENATE ESTIMATES COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT
OUTPUT 2.2
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 28 May 2002:

When the Attorney was recently in the United States, he indicated – in what might be described in Australia as being a doorstop – that he had made a request on behalf of the families of both individuals (Mr David Hicks and Mr Mamdouh Habib) to the authorities in the United States. Do you know whether there has been a response to that request?

I am advised that the answer to the honourable Senator's question is as follows:

Overall access to Mr Hicks and Mr Habib is currently a matter for United States authorities as both men are in the custody of the United States.

The Australian Government understands the families' concerns. Requests by the family for access to both men have been passed to United States authorities. The Government has been advised that at this stage no family access is being given to any of the detainees in Guantanamo Bay. We have passed this information on to the Hicks and Habib families through their lawyers with whom this Department is in regular contact.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 28 May 2002:

Provide costs to date to the AFP in relation to their involvement in the detention of Mr Hicks and Mr Habib.

I am advised that the answer to the honourable Senator's question is as follows:

The AFP's involvement with Mr Hicks and Mr Habib has been in relation to the investigation of possible offences that they may have committed.

The direct costs recorded in the AFP's corporate case management system (PROMIS) as at 12 June 2002 are:

		$
Employee expenses		142,436.42
Other expenses		28,641.00
	Total:	**171,077.42**

QoN 145

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Cooney asked the following question at the hearing of 28 May 2002:

When people are seconded to the BCI royal commission, and if there were any evidence of criminal activity, would it come back to the AFP?

I am advised that the answer to the honourable Senator's question is as follows:

An extract of Section 6P of the *Royal Commissions Act 1902* is attached.

QoN 145 Attachment

ROYAL COMMISSIONS ACT 1902

- **SECT 6P**

- **Commission may communicate information**

(1) Where, in the course of inquiring into a matter, a Commission obtains information that relates, or that may relate, to a contravention of a law, or evidence of a contravention of a law, of the Commonwealth, of a State or of a Territory, the Commission may, if in the opinion of the Commission it is appropriate so to do, communicate the information or furnish the evidence, as the case may be, to:

(a) the Attorney-General of the Commonwealth, of a State, of the Australian Capital Territory or of the Northern Territory; or

(aa) the Director of Public Prosecutions; or

(c) a Special Prosecutor appointed under the *Special Prosecutors Act 1982*; or

(d) the Commissioner of the Australian Federal Police or of the Police Force of a State or of the Northern Territory; or

(da) the Director of the Australian Bureau of Criminal Intelligence; or

(e) the authority or person responsible for the administration or enforcement of that law.

(1A) A reference in subsection (1) to a contravention of a law is a reference to a contravention for which a person may be liable to:

(a) a criminal penalty; or

(b) a civil or administrative penalty.

(2) Where, in the course of inquiring into a matter, a Commission:

(a) obtains information;

(b) takes evidence; or

(c) receives a document or thing;

that, in the opinion of the Commission, relates or may relate to a matter into which another Commission is required or authorized to inquire, the first-mentioned Commission may, if in its opinion it is appropriate so to do, communicate the

information or furnish the evidence, document or thing, as the case may be, to that other Commission.

(2A)
Where, in the course of inquiry into a matter, a Commission:

(a)
obtains information;

(b)
takes evidence; or

(c)
receives a document or thing;

that, in the opinion of the Commission, relates or may relate to an investigation being conducted by the National Crime Authority, the Commission may, if in its opinion it is appropriate so to do, communicate the information or furnish the evidence, document or thing, as the case may be, to the National Crime Authority.

(3)
A reference in subsection (2) or (2A) to the furnishing of a document or thing includes a reference to the furnishing of the contents of the document or a description of the thing.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

In relation to the Commonwealth Bank letter of 13 February to the AFP, clarify the issue of the verbal and written confirmation.

I am advised that the answer to the honourable Senator's question is as follows:

Responding to the question requires the identification and expansion across three issues.

Firstly, the AFP maintains that a verbal response to the Commonwealth Bank was made on the working day following their notification which queried the "Shining Path" record store and band management company's bank account. That communication was made on 31 December 2001, to the effect that the account was not linked to a proscribed terrorist or related organisation and this was in accordance with the established communication procedures at the time.

This established communication procedure was implemented at a meeting held on 16 November 2001, with representatives from the major financial institutions and the AFP; at which the Commonwealth Bank was represented.

Subsequent contact from the bank's investigation officers on 6 February 2002, led to follow up investigations by the AFP. Written confirmation, dated 13 February 2002, was despatched to the bank on 14 February 2002, to the effect that "Shining Path" was not a terrorist organisation.

Secondly, the AFP recognise that a communication breakdown had occurred and arising from this confusion, a thorough examination of our records and member's recollections of events was undertaken. The purpose of this examination was to facilitate our continued liaison and communication with the Commonwealth Bank such that an open and frank understanding of what lead to the above incident could be established.

Thirdly, since the issues described in the above two points, a revised system of communication and response between the AFP and the banking sector in general has been established. These negotiations included representatives from the Commonwealth Bank.

This system now removes individual communication arrangements and replaces them with established AFP liaison teams. Specifically, communications from the banking sector now go directly to the National Assessment Centre (NAC). The requests are acknowledged immediately as having been received by the NAC and are then disseminated to Regional Financial Investigation Teams (FIT) for action. Replies to the banks are then only made back to the nominated contact-banking officer who originated the referral to the AFP by the FITs and this is to be completed within 2

business days. The NAC is able to monitor these communications through the AFP's PROMIS database.

These procedures ensure continued maintenance of effective, timely, auditable and co-ordinated communications.

Finally, the Commissioner of the AFP has personally contacted the Chief General Counsel of the CBA to reinforce these new arrangements.

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator McKiernan asked the following question at the hearing of 28 May 2002:

What was the total cost incurred by the AFP, i.e. salaries and other costs, using the PROMIS system in pursuing the investigation into the alleged leaks of classified Defence information concerning events in East Timor in 1999?

I am advised that the answer to the honourable Senator's question is as follows:

The direct costs recorded in the AFP's corporate case management system (PROMIS) as at 12 June 2002 are:

	$
Employee expenses	177,622.27
Other expenses	4,584.00
Total:	**$182,206.27**

SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE

Senator Ludwig asked the following question at the hearing of 28 May 2002:

As indicated on p.62 of Budget Paper No. 2, provide a breakdown of how the AFP will expend the $1.7 million over the next five years?

I am advised that the answer to the honourable Senator's question is as follows:

As Senator Ludwig stated (p. 207 draft Hansard), the total funding provided to the AFP for its part in the E-Security National Agenda is some $6.8million over four years. The $1.7m Senator Ludwig subsequently referred to is the approximate average allocation for each year of that particular funding, ie not the total provision over four years.

An outline of how those funds will be applied was provided during the hearing (draft Hansard page 207). The funds will provide additional staff for National Information Infrastructure incident analysis and response, e-security intelligence analysis, electronic forensic support and tools development. There will also be an investment in equipment, training, and research and development.