CHAPTER 6

ISSUES OF CONTEMPORARY SEPARATION AND MANAGEMENT OF CHILD PLACEMENT

Introduction

6.1 Several recommendations in *Bringing Them Home* were concerned with what was seen as a continuation of past removal or separation practices which had the effect of indigenous children being taken away from families and community. Such practices were perceived as maintaining past attitudes by failing to take into account the specific needs of indigenous people, and contributing to the further decline of cultural and community values.

6.2 The Committee has considered these recommendations and the statements of numerous witnesses that the only solution to current 'separation' practices is to implement national standards regarding the treatment of indigenous children and young people and national legislation to enforce a standard response.

Bringing Them Home Recommendations

6.3 Recommendation 42 states that COAG should address the social and economic disadvantages underlying the contemporary removal of Indigenous children and young people by:

- Developing and implementing a social justice package for Indigenous families and children in partnership with ATSIC and other specific bodies dealing with reconciliation, social justice and family and children's issues; and
- Pursuing the implementation of the relevant recommendations of the Royal Commission into Aboriginal Deaths in Custody.

6.4 Recommendations 43-53 are concerned with the capacity of indigenous communities to assume responsibility (including transferred responsibility from current authorities) for the management of children, young people and families[1] and the basis on which such management should operate. The essence of the principles is that:

- It is in the best interests of indigenous children to stay within the indigenous family, community and culture;

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1 *Bringing Them Home*, Recommendation 43b(2) and 94) and 43c(4) also refers to consideration of funding for families as well as children and young people

- removal of a child be a measure of last resort and only to be appropriate when the 'danger to the community as a whole outweighs the desirability of retaining the child in his or her family and community'; [2] and
- any placement of a child must be in accordance with the Indigenous Child Placement Principle (ICPP).[3]

6.5 COAG, ATSIC and other bodies are nominated as the relevant parties to negotiate national standards legislation.[4]

Response of the Commonwealth, States and Territories

6.6 The Commonwealth stated in its response of December 1997 that it had already developed a social justice package, although this was addressed to the broader indigenous community, and included health, housing and employment. It also advised that child welfare issues and policing matters were the responsibility of the states and territories. The 1997 MCATSIA meeting agreed that implementation of recommendations on contemporary separations and regulation of adoptions, child welfare and juvenile justice were best left to states and territories because they had responsibility in those areas. [5] States and territories all advised that they have relevant legislation and standards in place. While some were not wholly averse to discussions, most could see no particular benefit from national legislation.

Social justice package (Recommendation 42)

6.7 The MCATSIA status report advised that all jurisdictions were committed to measures addressing the disadvantages contributing to the contemporary removal of Indigenous children and continue their commitment to implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) report. With the exception of the Northern Territory, all jurisdictions, in consultation with indigenous communities, were seeking to address disadvantage through the development of justice plans. In addition, New South Wales, Victoria and the Australian Capital Territory were developing or implementing policies on health, education, training, child protection and juvenile justice.[6]

6.8 As far as the ACT was concerned, the relatively small size of the indigenous community and the fact that any separated people were likely to have come from other

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2 *Bringing Them Home*, Recommendation 48

3 *Bringing Them Home*, Recommendations 51-52

4 *Bringing Them Home*, Recommendation 44

5 The Ministerial Council for Aboriginal and Torres Strait Islander Affairs view appears to have been in accord with that of the Commonwealth. The response of the Minister for Aboriginal and Torres Strait Islander Affairs (*Submission 36*, Appendix 1) rejected the idea of the Commonwealth seeking to override the legislative and related responsibilities of States and Territories.

6 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

areas of the country, were seen as factors shaping the Territory's more generic approach, which was still a feature in 2000:

> … we have tended not to separate the *Bringing them Home* issues in terms of funding or generally in the way we operate from the way we are addressing a whole range of other indigenous issues in the ACT ... It simply would not be an appropriate way to operate, to try to separate these issues out ...
>
> From a government perspective we have taken a whole of government approach …[7]

6.9 The Northern Territory Government stated that almost all of the recommendations of the RCIADIC either had been, or were being, implemented. Those which addressed the underlying issues of social disadvantage were the basis of a wide range of policy approaches. For this reason the Northern Territory Attorney-General had refused to sign the communique of the RCIADIC National Summit in July 1997 because it focussed on the 'jail end' of the situation.[8]

6.10 The response of the Australian Capital Territory Government referred to its proposal to launch an indigenous employment strategy in December 1999[9] and to its strategic plan for Indigenous education, based on the goals of the National Aboriginal Education Program.[10]

6.11 However, MCATSIA did not address the fact that neither COAG nor the state and territory governments as an entity were looking at an overall social justice package for indigenous families and children.

Non-government responses

6.12 The Committee considered evidence from a range of organisations about the need for a social justice package which would address key issues and which could perhaps be the funding base of what is a major social policy – the development, implementation and management of policies relating to children, young people and families, operated by a specific community. As noted above, many indigenous child welfare issues are managed by the 'child care' agencies, the national body of which is the National Secretariat for Aboriginal and Islander Child Care.[11]

6.13 Organisations and individuals made several points about a social justice package, including that it was perceived as providing a holistic approach to social problems:

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7 *Transcript of evidence*, Australian Capital Territory Government, pp. 43-44, 52

8 *Submission 64*, Northern Territory Government, p. 1248

9 *Submission 42*, Australian Capital Territory Government, p. 808

10 *Submission 42*, Australian Capital Territory Government, pp. 810-812

11 See *Submission 53*, Secretariat of the National Aboriginal and Islander Child Care

> It must be acknowledged that social factors largely contribute to poor health status of Aboriginal people and therefore require a response that fits within the model of holistic care … the health department cannot be solely responsible for addressing all social determinants impacting on health, as many will fall outside their perceived jurisdiction, but it is essential that they take some leadership in developing strategic alliances and joint ventures around developing projects with health outcomes.[12]

6.14 Such an approach was essential if societies were to see causal factors as generic rather than as a series of individual acts:

> Overall, the Federal government's responses are distorted by the political determination to reject responsibility for harm resulting from past policies. This has meant that the measures taken are mostly in relation to the specific pain and disorders of the individual stolen generation such as with counselling or fostering and adoption records. This aspect is chosen because it obscures or ignores much of the cultural or political significance of the past policies and their continuing on Indigenous families and communities. It works on a welfarist model or even a social pathology model which emphasises the 'failure' of individual Indigenous people to 'cope with' their experiences.[13]

6.15 On the other hand, it was claimed that while a holistic approach was needed, it was one that specifically addressed the uniqueness of indigenous experience. One witness in particular noted that indigenous society should not be seen as just another a 'disadvantaged' group, but one requiring the power of self-management:

> It is not a question of programs in an isolated sense, because that rests on the assumption that Aboriginal people are simply a disadvantaged minority as any other disadvantaged minority in Australia.
>
> The issue of reparations in a broad sense goes back to the heart of the question of the abuse of human rights and, in the contemporary period, to the question of the recognition of Aboriginal self-determination.[14]

6.16 The extent to which a 'package' actually means sufficient funding for services to meet needs was not discussed in detail, but it was claimed by organisations that the reasons why inappropriate removals continued to occur was that indigenous organisations were insufficiently funded. There was a need for:

> … the commitment of additional resources to ensure agencies currently working in the child protection and welfare systems can effectively support families and thereby reduce the rate of child removal. [15]

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12 *Transcript of evidence*, National Aboriginal Community Controlled Health Organisation, p. 76

13 *Submission 14*, Mr David Hollinsworth, p. 361

14 *Transcript of evidence*, Professor Chris Cunneen, p. 155

15 *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1000

6.17 The development of appropriate services and the acceptance of principles of child placement (ICPP)[16] were seen as incomplete unless there was sufficient funding to enable them to work properly:

> In essence States and Territories have tended to interpret the principle as a means through which to leave the care and protection of Aboriginal and Torres Strait Islander children to community based agencies without providing the required resources for that task.[17]

6.18 Although the issue of child welfare was seen as a state matter, witnesses advised that in fact the Commonwealth did contribute financially, but that the level of funding had been frozen because it was thought the states were not meeting their share:[18]

> I think we need the support of our federal government because it is an easy opt for state governments to say, 'It's a Commonwealth responsibility.' We need the Commonwealth to ensure that states are doing the right things.[19]

Underlying causes of current removals

6.19 Witnesses stated that there were multiple reasons for the current removal practice, including, as noted above, the view of people as inadequate individuals and the inability to understand the dynamics of a community. There was a strong suggestion that the ongoing problems had strong links to the past and to separation policies, [20] and this point was made by several witnesses. There is perhaps no specific identification of cause and effect factors identified,[21]rather a belief that there is a cycle of disadvantage which is extremely difficult to break.

6.20 It is not known if actions directly attributable to separation policies affect people past the second generation. General issues of poverty, violence, poor parenting and separation may have a greater and more direct impact on third and subsequent generations.[22]. However, even if this means that *Bringing them Home* funding should not be available to all, this is not to say that funding issues should not be addressed if there is a genuine commitment to reducing removals.

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16 See below, Paragraphs 6.66-6.68. See also Justice R. Chisolm, 'Placement of Indigenous Children: Changing the Law', *University of NSW Law Journa*l,4:3

17 *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1001

18 *Transcript of evidence*, Aboriginal and Torres Strait Islander Commission, pp. 8, 13-14; however, Secretariat of the National Aboriginal Islander Child Care (*Submission 53*, p. 1004) stated that only 11 out the 28 indigenous child care bodies received some funding from the Commonwealth

19 *Transcript of evidence*, Aboriginal and Torres Strait Islander Commission , p. 14

20 *Transcript of evidence*, Australian Council Of Social Services, pp. 161-162

21 See, for example, *Transcript of evidence*, Mental Health Council of Australia, pp. 91-92; Royal Australian and New Zealand College of Psychiatrists, pp.212-213;

22 See, for example, *Submission 37A*, Aboriginal Medical Services Alliance, Northern Territory

6.21 It was also argued that indigenous communities needed support in order to provide services which met multiple needs.[23] However, little reference was made to the parenting and family support program as a means of providing funding to develop projects which could assist existing programs in the provision of family and child support. In discussing the slow development of projects under this funding, officers from OATSIH advised that the emphasis had been on attempting to develop something that would last.[24] They believed that as there was little information available on need, work had to be done which addressed this. Although the Committee is concerned that little evidence was provided by the department demonstrating the link between the funded projects and stolen generation communities,[25] the program does have some potential as part of 'social justice' measures.

6.22 Organisations that were seeking funding for child welfare services did not appear to make much connection between the parenting and family support program and child welfare. However, it may be that this was because it was not clear exactly how the program was to operate:

> … most parent and family support services are run through state welfare departments, so there was a lack of clarity about where the program best sat. With [the] launch of the Stronger Families and Communities Strategy, it was very clear that it linked closely to some of that work and that it would better sit there and be a consolidated part of that program.[26]

6.23 Another reason may be that the program has taken some time to develop and, according to some indigenous sources, had not consulted with indigenous organisations. SNAICC, however, was aware of the possible source of funding from family programs in general, especially with respect to the source of funding of a 'social justice' package, but had not received much response.[27] It referred to the possible benefits of the 'National Families Strategy', which it hoped would be used by the government as a 'means to improve its response to *Bringing Them Home*.'[28]

6.24 NACCHO expressed concern that unless programs were carefully assessed, it was possible they could be adversely affect indigenous societies:

> The guidelines which are attached to a program, such as a parenting program, need to be very carefully looked at with a view to making sure that they are appropriate. The danger is, of course, that if we are funding parenting programs without proper consultation with community members,

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23 See above, Paragraph 6.13

24 *Transcript of evidence*, Office of Aboriginal and Torres Strait Islander Health, p. 40

25 See above, Chapter 2

26 *Transcript of evidence*, Office of Aboriginal and Torres Strait Islander Health, p. 39

27 *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1004

28 *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1007

> we may actually end up in a situation where we are funding people to do the very thing that the removal of children could not do – and that was assimilate.[29]

6.25 The benefits of co-located and probably integrated services may be demonstrated by the recent arrangement in Western Australia which brings together funding for a link-up service to family support and counselling.[30] The main drawback of such a service is that it can only meet limited needs given the size of Western Australia and the dispersal of indigenous communities and the separated population.

6.26 ACOSS considered that the problems of indigenous communities needed to be met with additional funding to existing services, although not expressing this as a 'social justice' package:

> Additional funding for the Aboriginal and islander childcare services themselves to help alleviate the caseloads they are currently operating within, developing additional services for communities that do not have access to indigenous child-care agencies, supporting family reunification where children have already been removed, primary prevention of family breakdown, parenting and holistic family support programs, and increased access to recognised training for staff in children and family support.[31]

The effects of current separations

6.27 A number of witnesses[32] pointed out that there were many effects on indigenous communities of current separations. These include:

- Being caught in a cycle of deprivation and poverty;
- Sense of non-achievement; and
- Loss of culture in the broadest sense.

6.28 The major underlying factor in the effect of removal is the high proportion of children and young people in the indigenous community, combined with the earlier death rate relative to the non-indigenous population. Although different rates were mentioned, children and young people may constitute between 50 and 70[33] per cent of

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29 *Transcript of evidence*, National Aboriginal Community Controlled Health Organisation, p. 78

30 See above, Chapter 2, Paragraphs 2.88-2.90

31 *Transcript of evidence*, Australian Council Of Social Service, p. 163

32 See, for example, *Submission 27A*, Mental Health Council of Australia, p. 454; *Submission 88*, Royal Australian and New Zealand College of Psychiatrists; *Submission 44*, Unit for Indigenous Mental Health Education and Research; *Submission 37A*, Aboriginal Medical Services Alliance, Northern Territory (AMSANT) which refer to the effects of removal in general; *Submission 43*, Victorian Aboriginal Child Care Agency, p. 898; *Submission 56*, Victorian Aboriginal Legal Service; *Submission 59*, Human Rights Committee, Law Society of New South Wales, p. 1131

33 See *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1006

the total indigenous population. The removal of substantial numbers from the community[34] can therefore have a substantial effect on:

- Their own development, including education;
- Emotional and other support of the family;
- Cultural development and maintenance; and
- Potential for continuation of negative lifestyle including violence and substance abuse.

6.29 The earlier death rate reduces the number of persons available in the community to provide alternative care, continue traditions and provide cultural education, and fulfil other roles in the re-establishment of family and community structures. This can be compounded by the effects of ill health, substance abuse, and violence[35] on the capacity of people to contribute to the community and the family..[36]

Responsibility for current 'separation' practice

6.30 The Federal government response to the issue of current removals, that these matters were beyond the jurisdiction of the Commonwealth and were properly matters for the states and territories, was rejected. The argument was based on much the same principles used to assert that the Commonwealth should play a leadership role in respect of reparation and compensation: the importance of the issue and the need for a national approach to coordinate and lead:

> … if the Commonwealth does have some sort of leadership role in terms of preventing contemporary removals and a repeat of what has happened previously or a repeat in practical terms, I think self-determination means some kind of legislative and executive control over children and families. [37]

6.31 Other witnesses also advised of the need for a national approach. This would ensure that there was an awareness of the danger of repeating the past,[38] that uniform policies could be in operation across the country, and that sufficient funding was available to meet demand.[39] SNAICC submitted that the failure of the Commonwealth to take decisive action meant that the Commonwealth government was responsible for 'current failures in child protection.'[40]

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34 This was an issue also raised to the Committee in its inquiry on mandatory sentencing

35 See *Submission 59*, Law Society of New South Wales, p. 1131

36 See, for example, *Submission 81*, New South Wales Youth Advisory Council, pp. 1650-1651

37 *Transcript of evidence*, Ms Terry Libesman, pp. 151-152

38 See *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 999

39 See above, Paragraph 6.18

40 *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1005

6.32 More specifically, it was also stated that the Federal government should not leave the issue to the states in view of past experiences:

> … this response is grossly inadequate, in light of the past history of State treatment of indigenous children … Treating minimum standards as a 'States rights' issue ignores the national interest in recognising and rectifying past wrongs and achieving reconciliation between indigenous and non-indigenous Australians. [41]

Indigenous involvement in and management of services for children and young people

6.33 The MCATSIA status report noted that a number of frameworks were already in place to facilitate indigenous community involvement in matters directly related to policy and program development, including the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal People and Torres Strait Islanders* and health bi-lateral agreements involving the Commonwealth, states and indigenous-controlled organisations.[42]

6.34 States and territories considered they had provided some options for direct involvement by indigenous communities in the operation of various services, and that lessened the need for national legislation. The MCATSIA status report also commented that:

> All State and Territory jurisdictions support some concept of Indigenous self-determination. Jurisdictions have illustrated their support by referring to:
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> - establishment of Aboriginal consultative committees for advice to Government (Australian Capital Territory, Victoria and Western Australia);[43]
> - the inclusion of Indigenous communities in the delivery of programs to young people and children (New South Wales, Northern Territory, Queensland, Victoria and Western Australia);
> - efforts to recognise concepts such as the child placement principle in proposed and existing legislation (New South Wales, Queensland, Victoria, and Tasmania);
> - a commitment to discuss self-determination at a national level (Australian Capital Territory and Tasmania).[44]

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41 *Submission 26*, Liberty Victoria, p. 441

42 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 660. A similar point is made at pp. 105-6 of the *Social Justice Report 1998*, which points out that the National Commitment was endorsed by the Council Of Australian Governments in 1992 and reaffirmed by the Ministerial Council for Aboriginal and Torres Strait Islander Affairs in July 1996 and that the Prime Minister 'advertised' its reinvigoration in opening the Reconciliation Conference on 26 May 1997 in Melbourne

43 A similar point is made in the *Social Justice Report 1998*, pp. 106-7

6.35 In addition, the Social Justice Report stated that in New South Wales the Government held public forums in conjunction with Link-Up NSW with the aim of seeking advice on the most appropriate ways to target programs and policies to better suit the needs of the Stolen Generation.[45]

6.36 The February 2000 response of the Australian Capital Territory notes that the government has an Inter-Departmental Committee on ATSI Issues which had been dealing in particular with implementation of recommendations of both *Bringing Them Home* and the RCIADC since June 1999. The Committee had the task of developing an ATSI Policy Framework on consultation with the indigenous community in 1999-2000.[46] In addition, the ACT government response noted that an ATSI Consultative Council had been appointed by the Chief Minister to monitor the Government's implementation of RCIADIC and that ATSI representatives had been appointed to advisory bodies on health, heritage and education.[47] These responses also referred to the proposal to set up a separate Aboriginal Justice Advisory Committee as a partner of the Government in the development of strategic plans and agreements in the justice area[48] and the appointment of an Indigenous Justice Officer to assist in their production.[49]

6.37 The ACT Government also gave evidence that it had established an indigenous foster care program, managed and staffed by indigenous people and had handed the lease on the property occupied by Winnunga Nimmityjah Aboriginal Health Centre to the community.[50]

Need for community involvement

6.38 The basis of the argument that there needs to be greater involvement of the indigenous community in matters of child welfare was that attitudes towards indigenous people did not take into account a range of relevant factors:

> A lot of work in contemporary indigenous welfare indicates that the traditional case based method of investigating and child protection is in fact inappropriate in indigenous communities and that there should be a community style response, particularly where communities, as groups, have faced intergenerational removal and might have, on a collective level, a whole range of issues that need to be responded to. I think the question of

44 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 669

45 *Social Justice Report 1998*, pp. 107-108

46 *Submission 42*, Australian Capital Territory Government, p. 802

47 *Submission 42*, Australian Capital Territory Government, p. 774

48 *Submission 42*, Australian Capital Territory Government, p. 732

49 *Submission 42*, Australian Capital Territory Government, p. 809

50 *Transcript of evidence*, Australian Capital Territory Government, p. 45

> the group being identified as a group is essential in differentiating mainstream child welfare and indigenous child protection. [51]

6.39 Further, the relevant indigenous organisations had been established for a considerable period and were achieving some positive outcomes.

National Framework legislation

6.40 The 1998 Social Justice Report stated that Tasmania and New South Wales would support inter-governmental discussion of the notion of framework legislation.[52] It also noted that the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal People and Torres Strait Islanders*, the New South Wales Government's 'Statement of Commitment to Aboriginal People' (November 1997) and the Victorian Koori Services Improvement Plan (March 1998) were examples of policy frameworks which could be the basis for framework legislation.[53]

6.41 On the other hand, the Report noted that Queensland and Victoria expressly rejected the notion of national framework legislation.[54] In addition, the Northern Territory government response to *Bringing Them Home* did not support the development of national framework legislation on the basis that child welfare is a state/territory responsibility and adequate legislative provision already existed in the Territory.

6.42 The Northern Territory government also noted that the principles underpinning the recommendations were not only supported, but were at that time in current practice in the Territory. Self-management in Aboriginal child placement was also supported, Aboriginal communities could negotiate agreements with the Government, and Community government councils and incorporated associations were able to undertake certain child welfare functions. The Territory Aboriginal Law and Justice Strategy and Alternative Dispute Resolution measures included some sharing and cooperation in police, judicial and/or departmental functions in relation to young people and families.[55]

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51 *Transcript of evidence*, Ms Terry Libesman, p. 152. Ms Libesman also supported her argument by reference to the rights of indigenous people in the United States to in respect of the transfer of responsibility for child welfare matters (*Transcript of evidence*, Ms Terry Libesman, p. 1530). Such legislation had been in place since 1978 and applied to persons living on reservations. Two other organisations also referred to the influence of this practice: *Submission 53*, Secretariat of the National Aboriginal Islander Child Care, p. 1000, and *Submission 56*, Victorian Aboriginal Legal Service, p. 1099: 'Indian tribes also have rights in State child welfare courts over reservation or status Indian children. This approach has ensured the abuses committed in the past in the US were not repeated'.[51]

52 *Social Justice Report 1998*, p. 110

53 *Social Justice Report 1998*, p. 111

54 *Social Justice Report 1998*, p. 110

55 *Submission 64*, Northern Territory Government, pp. 1249-1250

6.43 In contrast, the ACT Government response stated that any transfer of legal jurisdiction outside the existing justice system raised issues about the equity and universality of the justice system as a whole. Current community service orders were served by indigenous clients under the supervision of indigenous organisations. The Government opposed the recommendations on child protection as not feasible in the ACT, partly because of the small size of the indigenous population. It did intend to improve communication and liaison with the indigenous community to build better relationships. [56]

National standards legislation

6.44 The MCATSIA status report advised that the majority of states and territories did not support national standards legislation, although they had jointly developed national standards for out of home care for young people. Reference was also made to the fact that the Australian Capital Territory, Tasmania and Western Australia would consider participating in discussions on national standards, although Western Australia would especially consider national guidelines.[57] The ACT Government advised it was prepared for involvement in discussions on feasibility and that if national standards legislation was feasible and was agreed, then the ACT would support the inclusion of identified standards in child protection and youth justice in particular.[58]

6.45 In its Implementation Status Report of February 2000 the ACT government notes that that the Children and Young People Act 1999 incorporates the following principles –

- The child's best interests are paramount for judicial/administrative decisions
- Any government intrusion should be as little as possible
- If removal is necessary, first consideration is to be given to family placement
- The child's sense of racial, ethnic, cultural identity is to be preserved.[59]

6.46 The Social Justice Report advised that Queensland and Victoria expressly rejected the notion of national standards legislation,[60] The Northern Territory, although rejecting the idea of national standards legislation (on the same basis as national framework legislation), did not oppose national negotiations on standards or best practice on Aboriginal child welfare. Upon attaining self-government, the Territory had reviewed welfare and juvenile justice legislation and new legislation was developed, and the Government stated that many of the recommendations

56 *Submission 42*, Australian Capital Territory Government, pp. 775-776

57 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 669

58 *Submission 42*, Australian Capital Territory Government, p. 776

59 *Submission 42*, Australian Capital Territory Government, pp. 820-821

60 S*ocial Justice Report 1998*, p. 110

pertaining to the treatment of juveniles had been practised by Northern Territory Correctional Services for many years.[61]

6.47 Queensland proposed development of a 'Statement of Standards for Aboriginal and Torres Strait Islander Child Protection' which reflected the recommendations of *Bringing Them Home* and which was consistent with legislation and policy. The proposed statement of policy would be negotiated with relevant indigenous organisations.[62]

Organisational responses

6.48 The emphasis on the need for a national approach and for Commonwealth involvement in key aspects of indigenous child welfare should not, however, suggest that the control of such welfare is seen by indigenous organisations to be in the hands even of the Commonwealth. The importance of legislation was primarily that it would help communities, and limit the extent of 'intrusion'[63] into the lives of indigenous children:

> The national framework model was proposed in order to ensure Aboriginal communities and families were empowered in relation to their children as against the powers of State governments, in order to stem the continuing high rates of removal of Aboriginal children from their families….and to restore some of the rights that Aboriginal families have over their children. It is meant to provide greater uniformity of rights throughout Australia for all Aboriginal communities while also permitting greater empowerment for those communities.[64]

6.49 The Victorian Aboriginal Legal Service also noted that while it was important on occasion to take into account differences and variations, it was also important in some areas to have a national and consistent approach:

> Political changes in Australia over the years have established a critical fact, backed up by constitutional change in 1967, that in relation to Aboriginal affairs, a strong, uniform, principled approach is required to, firstly, undo the damage caused by past policies; and, secondly, to ensure that Aboriginal people and their organisations have a base independent of State and Territory governments to pursue appropriate change.[65]

6.50 There was some scepticism as to whether states' and territories' legislation or principles actually provided protection to indigenous children, regardless of what they declared. There was also concern that, given the absence of effective monitoring

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61 *Submission 64*, Northern Territory Government, p. 1227

62 *Social Justice Report 1998*, p. 143

63 *Submission 56*, Victorian Aboriginal Legal Service, p. 1102

64 *Submission 56*, Victorian Aboriginal Legal Service, p. 1098

65 *Submission 56*, Victorian Aboriginal Legal Service, p.1102

processes,[66] any discrepancies between theory and reality would not be made public and therefore open to change.

6.51 Information available from other reports does suggest that there have been limited if any reductions in the separation of indigenous children within the last few years. Although generally there have been pressures on community based services and departments which have meant an increased case load, the proportion of increase in respect of indigenous children appears higher.

6.52 The report of the Australian Institute of Health and Welfare Child Protection Australia 1998-99[67] provides national data on children who came into contact with government community service departments 'for protective reasons'. It should be noted that the figures in this report include children on care and protection orders and 'out-of-home' overnight care[68] which is available also for times when parents are ill, or family 'time out' is required.[69] Different methods of reporting incidents will also affect the rates of incidents per state or territory.[70] A new system has recently come into operation in the Northern Territory and therefore the information from there is incomplete.

6.53 The information about indigenous[71] children in the above report can be summarised as follows:

- There is a higher rate of substantiated charges in respect of indigenous children in all states except Tasmania, ranging from 2:1 to5.8:1; indigenous children were much more likely to be the subject of a substantiation of neglect;[72]
- 'The rate of indigenous children on care and protection orders was highest in New South Wales (28.7 per1,000) and lowest in the Northern Territory (3.9 per 1000)';[73]
- Indigenous children 'were much more likely than other Australian children to be in out-of-home care', with the rate ranging from 1.3:1 in Tasmania to 9.4:1 in New South Wales.[74]

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66 See above, Chapter 5

67 Australian Institute of Health and Welfare, *Child Protection Australia 1998-99*, Canberra 2000

68 This can continue for very long period of time – see *Child Protection Australia 1998-99,* p. 38

69 *Child Protection Australia 1998-99,* pp. 1, 5

70 *Child Protection Australia 1998-99,* p. 8

71 The Institute advises that children are only counted as indigenous if they are identified as such, and therefore figures may be an underestimate: *Child Protection Australia 1998-99,* p. 52

72 *Child Protection Australia 1998-99,* pp.16-17

73 *Child Protection Australia 1998-99,* p. 32

74 *Child Protection Australia 1998-99,* p. 40

- The proportion of indigenous children 'who were placed with either an Indigenous carer or a relative ranged from 40% in Tasmania to 80% in Western Australia.'[75]

Standards

6.54 *Bringing Them Home* also outlined a series of standards (and rules) that should form the basis of action in respect of indigenous children subject to care and other orders

Recommendations 46a and b (Standard 1): the national standards legislation to indicate how to establish the best interests of an indigenous child. The initial presumption should be that the best interest of the Indigenous child is to remain in his or her family, community and culture (46a) The decision maker must also consider the need of the child to maintain contact with his or her indigenous family, community and culture, the significance of his or her indigenous heritage for his or her future well-being, the views of the child and his or her family and the advice of the appropriate accredited Indigenous organisation(46b)

6.55 In its response, the ACT Government said it supported in principle the recommendations which accord with the Convention on the Rights of the Child (CROC).[76] Its response of February 2000 states that the *Adoption Act* 1993 provides that indigenous children be adopted only as a last resort.[77] The response of the Northern Territory Government to *Bringing Them Home* states that the *Community Welfare Act* 1983, apart from dealing with the order of preference of people to be given custody of an indigenous child in need of care, contained important gate keeping mechanisms to ensure that only children in need of care were dealt with.[78]

Recommendation 47 (Standard 2): the national standards legislation to provide that in any judicial or administrative decision affecting the care and protection, adoption or residence of an Indigenous child the best interest of the child is the paramount consideration.

6.56 The ACT Government response stated that it supported this recommendation in principle, on the basis that it accorded with CROC.[79] In its Implementation Status Report of February 2000, it said that the *Children and Young People Act* 1999 incorporates the principle that the best interests of the child are paramount for a judicial or administrative decision.[80]

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75 *Child Protection Australia 1998-99,* p. 41

76 *Submission 42*, Australian Capital Territory Government, p. 777

77 *Submission 42*, Australian Capital Territory Government, p. 821

78 *Submission 64*, Northern Territory Government, pp. 1250-1252

79 *Submission 42*, Australian Capital Territory Government, p. 777

80 *Submission 42*, Australian Capital Territory Government, p. 820

Recommendation 48 (Standard 3): the national standards legislation to provide that the juvenile justice system is to remove Indigenous children from their families and communities only as a last resort, having regard to the danger to the community as a whole.

6.57 The response of the Northern Territory to *Bringing Them Hom*e noted that the administration of the juvenile justice system on racial grounds is unacceptable.[81] On the other hand, the first response of the ACT government to the report,[82] advised that the Bail Act and the Children's Services Act reflected the paramountcy of the considerations in recommendation 48. The Implementation Status Report says that the *Children and Young People Act* 1999 reflected recommendation 48 in that any young person may only be detained in custody as a last resort.[83]

Recommendation 49 (Standard 4): the national standards legislation to provide that in any matter concerning a child the decision-maker must ascertain if he or she is Indigenous and, if so, ensure that the appropriate accredited Indigenous organisation is consulted. In care and protection matters the organisation must be involved in all decision making from the point of notification to seeking a court order. In juvenile justice matters it must be involved in all decisions including those about pre-trial diversion and bail.

6.58 The MCATSIA status report noted that all State jurisdictions[84] had initiated relationships with accredited indigenous organisations, as reflected in –

- legislation (New South Wales/Victoria/South Australia/Tasmania)
- negotiated protocols (Victoria/Western Australia)
- a proposed protocol (Queensland)

6.59 However, it reported also that the ACT and Tasmania believed that the involvement of accredited Aboriginal organisations should be subject to the wishes of the relevant child and its family.[85]

6.60 The Northern Territory government noted that, under the Community Welfare Act, Territory Health Services child welfare workers must ascertain whether the child

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81 *Submission 64*, Northern Territory Government, p. 1252

82 *Submission 42*, Australian Capital Territory Government, p. 777

83 *Submission 42*, Australian Capital Territory Government, p. 822

84 This is slightly misleading in so far as there is no appropriate accredited indigenous organisation in the Australian Capital Territory. However, the first response of the Australian Capital Territory Government to *Bringing Them Home* says that it will offer the indigenous community the chance for training in child protection and foster care with a view to the establishment of an indigenous child care agency - see *Submission 42*, Australian Capital Territory Government, p. 778

85 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 669. The first response of the Australian Capital Territory Government to *Bringing Them Home*, dated July 1998, would require the child to be old enough to decide – see *Submission 42*, Australian Capital Territory Government, p. 778

is indigenous. Protocols between Territory Health Services and Aboriginal and Islanders Child Care Agencies encouraged consultation on indigenous children in substitute care. Most Child Protection Teams, which reviewed all investigated child protection notifications, had Aboriginal representatives. However, the investigation of child maltreatment notifications was an emergency function requiring great coordination and was best centralised in one agency, although there was scope for involvement in decisions. Karu Aboriginal and Islander Child Care Agency and Central Australian Aboriginal Child Care Agency (CAACCA) were both involved in pre-trial diversion, admission to bail and conditions of bail.[86]

6.61 The ACT Government response stated that the Australian Federal Police rejected the idea of consultation with an accredited indigenous organisation on pre-trial diversion of juveniles because the ACT scheme was based on independent judgments of individual police members.[87]

6.62 The MCATSIA report noted that South Australia considered the proposal to include accredited indigenous organisations in all matters of care and protection was too rigid.[88]

Recommendation 50 (Standard 5): the national standards legislation to provide that in any matter concerning a child the court must ascertain if the child is indigenous and, if so, ensure that he or she has a separate representative of his or her choice or from the appropriate accredited Indigenous organisation.

6.63 The MCATSIA status report noted that all jurisdictions supported the recommendation, although at varying levels. Thus, the Northern Territory said it was consistent with current practice; Tasmania and the ACT[89] supported it in principle; protocols in New South Wales and Queensland enabled accredited indigenous organisations to participate in hearings involving indigenous young persons. Victoria, Western Australia and South Australia agreed with its spirit, and in Victoria, non-legal representation was allowed with the leave of the court although South Australia thought that any representative should be legally qualified.[90]

6.64 In addition the ACT government submission says that Youth Justice court officer gives advice and support to magistrates, indigenous clients and families and community–based support agencies.[91]

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86 *Submission 64*, Northern Territory Government, p. 1253

87 *Submission 42*, Australian Capital Territory Government, p. 778

88 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 669

89 The Australian Capital Territory's response of July 1998 said that the recommendation accorded with practice, subject to the wishes of the child who was old enough to decide – see *Submission 42*, Australian Capital Territory Government, p. 779

90 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 669-70

91 See *Submission 42*, Australian Capital Territory Government, pp. 734-5

Recommendations 51a-e (Standard 6): the placement, temporary or permanent, of an Indigenous child removed from his or her family, to be made in accordance with the Indigenous Child Placement Principle (ICPP).

6.65 The MCATSIA status report noted that the ICPP was enshrined in all jurisdictions as part of existing or proposed legislation.[92] The Social Justice Report 1998 says that it operated in every jurisdiction: by legislative requirement in New South Wales, Victoria, South Australia, Tasmania and the Northern Territory, or at the policy level in Queensland and the ACT.[93] The ACT Government response stated that the ICPP was recognised in the *Adoption Act* 1993. However, it also acknowledged practical difficulties, such as a shortage of indigenous carers and the absence of an accredited indigenous organisation.[94] In its Implementation Status Report the government stated the ICPP had been incorporated in the *Children and Young People Act* 1999, the formal child protection policy of the Department of Education and Community Services and the ACT Standards for the provision of foster care.[95]

6.66 The response of the Northern Territory government refers to the *Community Welfare Act* 1983, section 69, which requires custody of an Aboriginal child in need of care to be arranged within the child's extended family, or with Aboriginal people who have the correct customary law relationship with the child. If neither of these arrangements could be made without endangering the child's welfare, the child's parents and other persons responsible at customary law for the welfare of the child and appropriate Aboriginal welfare organisations were to be consulted and a placement be made, taking into consideration preference for custody with suitable Aboriginal persons, the geographical proximity of the family or other relatives of the child and undertakings by the custodian to encourage and facilitate contact of the child and its kin and culture.[96]

6.67 The ACT government's Implementation Status report stated that the ICPP was incorporated in the *Children and Young People Act* 1999, and incorporated into policy of Department of Education and Community Service.[97] The then Chief Minister gave evidence that the *Children and Young People Act* 1999 ensures that the racial, ethnic and cultural identity of indigenous young people is recognised and preserved in any arrangement, including a fostering arrangement.[98]

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92 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 670

93 *Social Justice Report 1998*, p. 141

94 *Submission 42*, Australian Capital Territory Government, pp. 779-80

95 *Submission 42*, Australian Capital Territory Government, p. 870

96 *Submission 64*, Northern Territory Government, pp. 1254

97 *Submission 42*, Australian Capital Territory Government, p. 821

98 *Transcript of evidence*, Australian Capital Territory Government, p 45

Recommendation 52 (Standard 7): an Indigenous child not to be adopted unless in its best interests and for any such adoption to be 'open' unless not in its best interests and for the terms of any such open adoption order to be reviewable at any time.

6.68 The MCATSIA status report advised that all jurisdictions supported the recommendation through existing legislation or procedures.[99]

Recommendations 53a and 53b (Standard 8): the legislation establishing minimum standards of treatment for Indigenous children to require certain rules to be followed in every justice matter involving a child or young person[100] and to make inadmissible against the child or young person any evidence obtained in breach of the rules except at the instance of the child or young person.[101]

6.69 The MCATSIA status report said that states and territories claimed to have largely reformed their juvenile justice laws consistently with the recommendations.[102] The ACT government response said the admission of improperly obtained evidence should be decided by the court and not at the discretion of the child or young person concerned.[103]

6.70 It appears from the MCATSIA status report that most jurisdictions agreed with most of the proposed rules. However, there were some notable exceptions: for example, no jurisdiction supported the suggestion in proposed rule 15 that courts provide reasons for sentences to their Attorneys-General. There was little, if any, support for the suggestion in proposed rule 12 that any indigenous juvenile confined overnight in a police cell be accompanied by an indigenous adult responsible for him or her. Some jurisdictions opposed the suggestions in proposed rules 6 and 8 that witnesses (as opposed to suspects) be cautioned before interview and that their interviews be recorded.

6.71 In some cases, objections to proposed rules were raised by only one or very few jurisdictions. For example, South Australia objected to proposed rule 5 requiring interviews with suspects or witnesses about offences to be conducted in the presence of a parent and a lawyer and the Northern Territory objected to the specific prohibition on mandatory sentences in proposed rule 15.

Age of an 'adult'

Recommendations 53a and b

6.72 One important matter that arises in connection with recommendations 53a and b is the age at which a person ceases to be a child (or young person) and becomes an

99 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 670

100 *Bringing Them Home*, Recommendation 53a

101 *Bringing Them Home*, Recommendation 53b

102 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 656

103 *Submission 42*, Australian Capital Territory Government, p. 780

adult for the purposes of the criminal justice system. In most jurisdictions in Australia, this is 18 years but, as pointed out in the Committee's report on its Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999, in March 2000, three jurisdictions (Northern Territory, Victoria and Queensland) placed the transition point at 17 years.

6.73 On 10 April 2000, the Prime Minister and the Chief Minister of the Northern Territory issued a joint statement in which they said that the Northern Territory legislation would be amended so that a person would be treated as an adult from 18 years of age rather than 17. The legislation was amended on 1 June 2000.

6.74 On 12 April 2000, the Commonwealth Attorney-General announced that he had written to his counterparts in Victoria and Queensland asking them to take steps to ensure that young people aged 17 were treated as juveniles in their jurisdictions. The Committee understands that the relevant legislative changes have not yet been made in these jurisdictions, although the Victorian Attorney-General announced on 14 April 2000 that the Government was considering raising the age limit of the jurisdiction of the Children's Court from 17 to 18 years. A discussion paper was to be issued in early November 2000.

6.75 As pointed out by this Committee in its report on the Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999[104], the Western Australian legislation offered the court a choice between imprisonment and detention on the one hand and a supervisory order of some kind on the other whereas, for the Northern Territory 'second strike juvenile' mandatory sentencing legislation, the position might be different because imprisonment or detention was the first choice for the court. However, there was not even a second choice for the court in the case of 'third strike juvenile' prosecutions; there was only imprisonment or detention.

6.76 The Joint Statement by the Prime Minister and the Chief Minister of the Northern Territory, dated 10 April 2000, announced that the Commonwealth would make funds available for diversionary programs for juveniles and that the General Orders of the Northern Territory police would be changed:

a. to require police to divert at the pre-charge stage in the case of minor offences;

b. in more serious cases to provide discretion for police to divert offenders and on successful completion of a program not to pursue charges.

6.77 The Committee understands that these changes have been or are in the course of being made. However, the Prime Minister and the Chief Minister also announced that, apart from the age of adulthood being raised from 17 to 18 years, the mandatory sentencing provisions of the existing law would remain unchanged. The Committee is

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104 Senate Legal and Constitutional References Committee, Report on the *Inquiry into the Human Rights* (*Mandatory Sentencing of Juvenile Offenders) Bi*ll 1999 (Canberra, March 2000) Paragraphs 8.8-8.9, p.115

not convinced, therefore, that the objectionable features of juvenile mandatory sentencing have been removed. [105]

6.78 Many organisations were also of the same belief, one stating that:

> The Federal Government's response to this recommendation will inevitably be inadequate if the issue of mandatory sentencing in Western Australia and the Northern Territory is not addressed.[106]

Proposed rules

Proposed rule 1 would allow arrest and charge to be used only as a last resort and police officers would warn a child or young person reasonably suspected of committing an offence without charging them or requiring admissions.

6.79 The MCATSIA status report noted that all jurisdictions preferred to encourage cautioning and use arrest as a last resort and that, in Queensland, respected members of indigenous communities may administer cautions.[107] However, the responses of the Northern Territory[108] and ACT[109] governments both rejected the obligation to caution and the prohibition on requiring an admission.

Proposed rule 2: would allow a child or young person to be charged only with an indictable offence and would require his or her presence at court to be secured with a summons or attendance notice except where it is reasonably believed that he or she is about to commit a further indictable offence or will not comply with the summons or notice.

6.80 The MCATSIA status report commented that most jurisdictions agreed in principle but that, in Western Australia and South Australia, the practice allowed for summons and arrest processes to apply to all offences. It appears from the response of the Northern Territory Government that the practice was the same there.[110] The ACT government response mentions that some non-indictable offences such as 'take and use motor vehicle' and 'assault' were sometimes dealt with by charge.[111]

Proposed rule 3:where a child or young person has been arrested, the appropriate accredited Indigenous organisation must be notified and arrangements made for a representative to attend.

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105 See also additional comments below, at Paragraph 6. 85

106 *Submission 57*, Defenders of Native Title Inc, p. 1109. See also *Submission 59*, Law Society of New South Wales, p. 1132, and *Submission 13*, National Assembly of the Uniting Church, p. 357

107 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 670

108 *Submission 64*, Northern Territory Government, pp. 1255-1256

109 *Submission 42*, Australian Capital Territory Government, pp. 781-782

110 *Submission 64*, Northern Territory Government, p. 1256

111 *Submission 42*, Australian Capital Territory Government, p. 784

6.81 The MCATSIA status report said that New South Wales, Victoria and the Northern Territory had mechanisms in place for contacting the appropriate accredited indigenous organisations but that there were none in the juvenile justice field in Western Australia and the ACT. In South Australia and Tasmania, the presence of such an organisation was subject to the wishes of the child. Queensland was considering the possibility of members of Community Justice Groups attending at police interviews.[112]

6.82 The response of the Northern Territory Government to *Bringing Them Home* stated that when police interview juveniles, a parent, guardian or other suitable person had to be in attendance. Moreover, when an Aboriginal juvenile is involved, police and correctional services endeavoured to immediately notify the relevant Aboriginal Legal Aid Service.[113] The ACT government response observed that police had to notify a parent of a child who had been placed under restraint or charged.[114] Reference is also made to the AFP Aboriginal Community Liaison Officer who liaised with members of the Aboriginal Friends Call Out Roster – these were indigenous volunteers who attended police interviews with indigenous people where a relative, friend or lawyer was not available.[115]

Proposed rule 4 requires the appropriate accredited Indigenous organisation to be consulted on the appropriate means of dealing with every Indigenous child or young person who has been arrested.

6.83 The MCATSIA status report advised that most jurisdictions supported this recommendation in principle. In New South Wales and Victoria, consultative mechanisms with accredited indigenous organisations were in place. Other jurisdictions balanced the desirability of such consultative mechanisms against the wishes of the relevant young person (South Australia) or the general safety concerns of the broader community (Western Australia). The response of the Northern Territory Government to *Bringing Them Home* indicated that the relevant Aboriginal Legal Aid Service was consulted by police and normally attended any bail application to a magistrate. Karu Aboriginal and Islander Child Care Agency and Aranda House were also involved in pre-trial diversion, admission to bail and conditions of bail.[116] As indicated above, there was no accredited indigenous organisation in the ACT.

Proposed rule 5 would require a suspect or witness to be interviewed about an alleged offence in the presence of a parent or responsible person (unless the presence of the parent or responsible person is unacceptable to the suspect or witness or is not practicable) and a legal adviser or representative of the appropriate accredited

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112 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 671

113 *Submission 64*, Northern Territory Government, p. 1256

114 *Submission 42*, Australian Capital Territory Government, p. 784

115 *Submission 42*, Australian Capital Territory Government, p. 744

116 *Submission 64*, Northern Territory Government, p. 1256

Indigenous organisation and an interpreter (where English is not the first language of the suspect or witness).

6.84 The MCATSIA status report advised that, with the exception of South Australia, jurisdictions largely adhered to this recommendation through existing legislation or Police Standing Orders.[117] No indication was given as to the problems South Australia had with the proposed rule. The ACT government response to *Bringing Them Home* queried the need to apply the proposed rule to witnesses and suggested that some people whose first language was not English may not need an interpreter.[118] The Northern Territory government response to *Bringing Them Home* indicated that then current police practice was consistent with the recommendation, except that an interpreter, although sought, might not always have been found.[119]

6.85 The Joint Statement of the Prime Minister and the Chief Minister of the Northern Territory, dated 10 April 2000, said that the Prime Minister agreed that the Commonwealth would jointly fund an Aboriginal interpreter service. A news release by the Commonwealth Attorney-General, dated 16 October 2000, stated that the Aboriginal interpreter service was in operation, using existing interpreters, with the training of further interpreters a key part of the initiative. On top of the funding for annual training, the Commonwealth was providing an additional allocation of $250,000 in the first year for the training of interpreters. The Commonwealth would also directly fund Aboriginal legal services to enable them to purchase interpreter services.

Proposed rule 6 would prevent any suspect or witness being interviewed about an alleged offence unless the caution has been explained in private by his or her legal adviser or representative and the interviewing officer is satisfied that the suspect or witness understands the caution and the suspect or witness consents to the interview.

6.86 The MCATSIA status report advised that the recommendation was largely supported by most jurisdictions although Tasmania did not support witnesses (as opposed to suspects) being cautioned prior to interview or being given an explanation of the caution by a legal adviser or representative.[120] In its response to *Bringing Them Home* the ACT government objected to witnesses being cautioned and to any rigid requirement for the caution to be explained to suspects, particularly by a non-lawyer.[121]

6.87 The Northern Territory government response to *Bringing Them Home* rejected the idea of cautioning witnesses. The use of Aboriginal language interpreters was

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117 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 671

118 *Submission 42*, Australian Capital Territory Government, pp. 785-6

119 *Submission 64*, Northern Territory Government, p. 1257

120 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 671

121 *Submission 42*, The Australian Capital Territory Government, p. 787

encouraged and tapes explaining the caution, other rights and the role of an interpreter were being translated into all the major Aboriginal languages.[122]

Proposed rule 7 would require an interview to be discontinued immediately on the withdrawal of consent by the suspect or witness.

6.88 The MCATSIA status report noted that most jurisdictions largely supported the principle but Western Australia considered that it would restrict the investigation of offences.[123] The Northern Territory Government advised that the proposed rule stated what was normally done but that questions could still be asked to clarify a point or give the suspect the opportunity to refute an allegation.[124]

Proposed rule 8 would require a recording to be made of every interview, including the discussions which led to the interviewing officer's satisfaction that the suspect or witness understood the caution and consented to the interview.

6.89 The MCATSIA status report said that the proposed rule was largely supported by Western Australia, the ACT and the Northern Territory. In New South Wales, only indictable offences were recorded. Victoria and Tasmania opposed the requirement for recording of witness interviews; Victoria did not record interviews in relation to summary offences. South Australia used written records which were then read onto video tape.

Proposed rule 9 would make unconditional bail a right, variable only when the suspect's past conduct leads to the reasonable belief that conditions are necessary to ensure his or her attendance or the nature of the offence or threats by the suspect lead to the reasonable belief that remand in custody is necessary in the interests of the community as a whole.

6.90 The MCATSIA status report noted that New South Wales, Victoria and the Australian Capital Territory supported the proposed rule and viewed the remanding of young persons as a last alternative. South Australia, Tasmania and the Northern Territory opposed any right to unconditional bail.[125] The Northern Territory government referred to the need of the courts for flexibility but said that a juvenile was refused bail only very rarely.[126] The ACT response to *Bringing Them Home* said that police tried to grant bail to young offenders whenever possible and had to notify the Aboriginal Legal Service if bail was denied.[127]

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122 *Submission 64*, Northern Territory Government, p. 1257

123 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 671

124 *Submission 64*, Northern Territory Government, p. 1257

125 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 672

126 *Submission 64*, Northern Territory Government, p. 1258

127 *Submission 42*, Australian Capital Territory Government, pp. 788-9

Proposed rule 10 would give every suspect the right to the review by a senior police officer of bail conditions or the refusal of bail and the further right to review by a magistrate of the refusal of bail.

6.91 The MCATSIA status report noted that most jurisdictions supported the proposed rule through existing legislation or procedure. Western Australia was currently considering bail review.[128] The Northern Territory government said that then current practice was consistent with the proposed rule[129] and the ACT government said that, as at July 1998, the AFP operated under similar conditions.[130]

Proposed rule 11 would require a suspect refused bail to be remanded in the custody of any available Indigenous bail hostel, group home or private home administered by the appropriate accredited Indigenous organisation.

6.92 The MCATSIA status report noted that only New South Wales had indigenous operated bail hostels, and other states did not have bail hostels at all. Tasmania supported the idea in principle and South Australia was developing culturally appropriate accommodation. Other jurisdictions' alternatives to bail hostels were:

- access to mainstream hostels – Western Australia and Northern Territory;
- access to shelters – Australian Capital Territory;
- funding to Koori organisations for accommodation services - Victoria.[131]

6.93 The Northern Territory government response to *Bringing Them Home* said that Aranda House in Alice Springs was used for bailed juveniles and that part of it was to be used by Correctional Services as a short-term holding facility, not a traditional remand or full-time detention facility.[132]

Proposed rule 12 would prohibit the confinement in police cells of any suspect if alternatives are available and particularly the overnight confinement of any suspect in a police cell without the company of an Indigenous person responsible for him or her.

6.94 The MCATSIA status report said that in most jurisdictions, youths were detained in cells only in exceptional circumstances. Most jurisdictions did not provide for a responsible adult to accompany a suspect in a cell.[133]

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128 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 672

129 *Submission 64*, Northern Territory Government, p. 1258

130 *Submission 42*, Australian Capital Territory Government, p. 789

131 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 672

132 *Submission 64*, Northern Territory Government, p. 1258

133 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 672

6.95 The Northern Territory government advised that Alice Springs cells were used for overnight detention as a last resort and that it was difficult to envisage people offering to spend time in police cells in company with an alleged offender.[134]

Proposed rule 13 would make custodial sentences the last resort. Subject to the child's consent, any sentence must be to a non-custodial program administered by an accredited indigenous organisation or by an Indigenous community and chosen in consultation with such an organisation and the child's family.

6.96 The MCATSIA status report advised that in most jurisdictions, custodial sentences were considered in the last resort. A Tasmanian Bill proposed a similar approach. Mechanisms for developing programs culturally appropriate for sentenced indigenous youths, including arrangements to consult family and community members, were in place in New South Wales, Victoria, Western Australia and the ACT.[135]

6.97 However, the Northern Territory government stated that adults (then 17 years or more) committing property offences were subject to mandatory sentences, and juveniles (10 to 16 years) were subject to mandatory sentencing for second and subsequent property offences.[136] The Committee considered this matter in its earlier report on mandatory sentencing. [137]

Proposed rule 14 would require a sentencing court to take account of the best interests of the child or young person, the wishes of his or her family and community, the advice of the appropriate accredited Indigenous organisation and the principle that Indigenous children are only to be removed from family and community in extraordinary circumstances such as when the danger to the community as a whole becomes excessive.

6.98 The MCATSIA status report advised that South Australia disagreed with the proposed rule but does not say why. Most jurisdictions had mechanisms to assist courts to consider a range of personal factors when passing sentence. Tasmania at that time had proposed legislation containing such provisions and the issues were under review by the Law Reform Commission in New South Wales.[138] The Northern Territory government stated that Judges and Magistrates took into account the best interests of the child and community safety when sentencing a juvenile offender, except where mandatory sentencing was involved.[139]

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134 *Submission 64*, Northern Territory Government, p. 1258

135 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 672

136 *Submission 64*, Northern Territory Government, p. 1259

137 Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999, March 2000

138 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 673

139 *Submission 64*, Northern Territory Government, p. 1259

6.99 The ACT government response to *Bringing Them Home* mentioned other criteria, including encouragement of appropriate reparation to any victim and the desirability of ensuring that the child was aware that he or she must take responsibility for doing anything contrary to law.[140]

Proposed rule 15 would prohibit courts from giving any child or young person an indeterminate custodial sentence or a mandatory sentence and would require them to make any sentence to be for the shortest appropriate period of time and to provide reasons for it to the Attorney-General and the appropriate accredited Indigenous organisation.

6.100 The MCATSIA status report noted that mandatory sentences were not imposed on young people in New South Wales, Victoria or the ACT. In the Northern Territory, at that time, 15 and 16 year olds found guilty of second or subsequent property offences were subject to mandatory sentencing. In Western Australia, mandatory sentencing was restricted to home burglaries and targeted repeat offenders.[141] Chapter 4 of the Social Justice Report commented that the mandatory sentencing provisions in Western Australia and the Northern Territory at that time did not conform with proposed rules 1, 13, 14 and 15.[142]

6.101 The MCATSIA status report said no jurisdiction supported the proposal that reasons for sentence be forwarded to the relevant Attorney-General.[143]

Submissions on rules and standards

6.102 There was a certain amount of scepticism from submitters about the responses of states and territories. Some organisations believed that although states claimed principles were in place, they did not really deal with issues in the holistic fashion intended:

> … State and Territory governments have subverted the positive intent of the national framework legislation by sifting away this aspect of the recommendations and reducing them to principles which they claim to have implemented in their existing legislation. It has thus become a reason for inaction once again.[144]

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140 *Submission 42*, Australian Capital Territory Government, p. 792

141 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 673. In the Committee's view, expressed at page 115 of the report arising from its Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999 (dated March 2000), the Western Australian Children's Court can choose between imprisonment or detention on the one hand and a supervisory order on the other so that, strictly speaking, mandatory sentencing does not apply. Nevertheless, the Committee recommended that the legislation be repealed

142 *Social Justice Report 1998*, p. 142

143 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 673

144 *Submission 56*, Victorian Aboriginal Legal Service, p. 1098

6.103 Other witnesses supported this view, by referring to areas where principles or rules were ignored, although theoretically observed:

> In many other cases, recommendations from the report …have not been adopted, but even in cases where the letter of the text has been implemented, the spirit of the text has been ignored. For instance:
>
> Standard 1:46b: In several recent cases the advice of the appropriate accredited indigenous organisation has either not been sought or has not been followed by the government department concerned.
>
> Standard 4:49 This is not being followed. Instead the government department concerned has set up its own Aboriginal section, staffed from within the department, and has been perceived at times to pit the internal unit against the accredited Aboriginal agency.'[145]

6.104 The Victorian Aboriginal Legal Service went through several of the proposed rules, indicating that in some instances these could not operate effectively simply because there was no funding to ensure the presence of an organisation, there was no right to be present in some circumstances, or there were insufficient services available to cover the extent of need.[146] Sometimes indigenous children were indirectly excluded from a service on the basis of its rules:

> Schemes often work against Aboriginal children and young people. At the present time there are pilot schemes in Mildura and Broadmeadows. No Aboriginal people have been through them as they exclude children and young people with priors.[147]

6.105 Liberty Victoria noted that there was no particular reason why states or territories would change laws, and that it was a responsibility of the Commonwealth government to take the appropriate step.[148] However, from the evidence provided it seems that there is a need for a real commitment to change. National legislation is one option, but by itself would not achieve the outcome. Unless states and territories are prepared to commit required resources to address the basic causes of indigenous children and youth being in welfare or detention, substantial change is unlikely.

Conclusion

6.106 The Committee notes that there has been considerable difficulty in obtaining evidence from the states and territories on this matter. In addition, the constitutional issues involved in developing separate regimes for particular groups in the community means that this matter requires further detailed consideration. This should be

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145 *Submission 24*, Yorganop Child Care Aboriginal Association, p. 418, and see also p. 426

146 *Submission 56*, Victorian Aboriginal Legal Service, pp. 1101-1102

147 *Submission 56*, Victorian Aboriginal Legal Service, p. 1102

148 *Submission 26*, Liberty Victoria, p. 441

undertaken by the Standing Committee of Attorneys General (SCAG) and considered at the National Summit.