

**ROYAL COMMISSION INTO
ABORIGINAL DEATHS IN CUSTODY
NATIONAL REPORT
VOLUME 3
Commonwealth, New South Wales,
Victoria, Queensland, Western Australia,
South Australia, Tasmania and
Northern Territory**

**ROYAL COMMISSION INTO
ABORIGINAL DEATHS IN CUSTODY
NATIONAL REPORT
VOLUME 3
BY
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Australian Government Publishing Service
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ACRONYMS

A	Aboriginal Affairs Planning Authority
A	Aboriginal Advancement Trust Account
	Australian Broadcasting Corporation
	Australian Bureau of Statistics
EC	Aboriginal Secondary Assistance Scheme (now ABSTUDY Schooling)
EG	Aboriginal Secondary Education Grant (now ABSTUDY Schooling)
P	Aboriginal Community Affairs Panel
TUDY	Aboriginal Study Assistance Scheme
A	Aboriginals Benefit Trust Account
P	Aboriginal Community Affairs Panel
	Aboriginal Co-ordinating Council
	Aboriginal Development Commission (Now ATSIC)
A	Alcohol and Drug Foundation Australia (now known as Australian Council of Alcohol and Other Drug Associations)
	Aboriginal Education Assistant
G	Aboriginal Education Consultative Groups
P	Aboriginal Employment Development Policy
DO	Aboriginal Economic and Employment Development Officer
S	Aboriginal Enterprise Incentive Scheme
P	Aboriginal Education Strategic Initiatives Program
	Aboriginal Education Worker
S	Australian Government Publishing Service
	Aboriginal Hostels Ltd

Aboriginal Health Organisation
Aboriginal Health Service
Australian Institute of Criminology
Aboriginal and Islander Community Health Service
Australian Institute of Health
Australian Institute of Judicial Administration
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onyms

P

Australian Institute of Management
Aboriginal and Islander Teacher Education Program
Aboriginal Issues Unit (of Royal Commission)
Australian Journalists Association
Aboriginal Loans Commission

C

Aboriginal Land Fund Commission
Aboriginal Liaison Officer

C

Australian Law Reform Commission

M

Aboriginal Legal Rights Movement
Aboriginal Legal Service
Aboriginal Lands Trust

N

Australian Medical Association
Aboriginal Mental Health Network
Aboriginal Medical Service

O

Australian National Audit Office

P

Australian National Opinion Polls

WS

Australian National Parks and Wildlife

EP

Anangu Teacher Education Programme
Aboriginal Organisation Training Program
Anangu Pitjantjatjara Homelands
Aboriginal Participation Initiative
Australian Public Service

P

Aboriginal Services Action Plan

PA

Aboriginal Student Support and Parent Awareness

S

Aboriginal Tutorial Assistance Scheme

C

Aboriginal and Torres Strait Islander
Aboriginal & Torres Strait Islander Commission (Formerly DAA -Department of
Aboriginal Affairs)

CDC

Aboriginal and Torres Strait Islander Commercial Development Corporation
Aboriginal Visitors Scheme

MS

Broome Aboriginal Medical Service

C

Brucellosis and Tuberculosis Eradication Campaign

C

Central Australian Aboriginal Congress Inc

LAS

Central Australian Aboriginal Legal Aid Scheme

MA

Central Australian Aboriginal Media Association

College of Advanced Education

PR

Centre for Aboriginal Economic Policy Research

M

Conservation & Land Management

S

Carnarvon Aboriginal Medical Service

ARAC

Central Area Training Aboriginal Resource Accounting Corporation

T

Conservation Commission of the Northern Territory

R

Committee to Defend Black Rights
(Aboriginal and Torres Strait Islander) Commercial Development Corporation

P

Community Development & Employment Projects

AC

Catholic Education Aboriginal Advisory Committee

Catholic Education Commission

Commonwealth Employment Project

D

United Nations Committee on the Elimination of Racial Discrimination

Commonwealth Employment Service

Community Justice Panel

Central Land Council

Community Release Program

Criminology Research Unit

RO

Commonwealth Science and Industrial Research Organisation

	Community Service Order
	Computerised Tomography
	Department of Aboriginal Affairs (Now ATSIC)
	Department of Aboriginal Sites
	Department of Community Health
(1)	Department of Community Services
(2)	Department of Corrective Services
T	Department of Employment, Education & Training
AFE	Department of Employment, Technical and Further Education
AIA	Department of Family Services and Aboriginal and Islander Affairs
	Department of Finance
IT	Deeds Of Grant In Trust
IE	Department of Primary Industry and Energy
	Director of Public Prosecutions
D	Department for Planning & Urban Development
	Department of Sport & Recreation
	Department of Social Security
	Enterprise Employment Assistance
	Equal Employment Opportunity
	English as a Second Language
	Enterprise Support Units
S	Family and Community Services
ATSI	Federal Council for the Advancement of Aboriginal and Torres Strait
WAARD	Foundation of Rehabilitation with Aboriginal Alcohol Related Difficulties
	Good Neighbour Program
C	Home And Community Care
T	Healthy Aboriginal Life Team
A	Health Department of Western Australia
L	Homes on Aboriginal Land
OC	Human Rights and Equal Opportunity Commission
PR	International Covenant on Civil and Political Rights
	International Classification of Diseases
SCR	International Covenant on Economic Social and Cultural Rights
RD	International Convention on the Elimination of all Forms of Racial Discrimination
IAC	Incarcerated Peoples Cultural Heritage Aboriginal Corporation
	Justice of the Peace
	Justices of Peace Association
CC	Kimberley Aboriginal Law & Culture Centre
SC	Kimberley Aboriginal Medical Services Council
	Kimberley Land Council
LAS	Katherine Regional Aboriginal Legal Aid Service
	Legal Aid Commission
CG	Local Aboriginal Education Consultative Groups
	Local Government Council
NH	Northern Area Aboriginal Neighbourhood House
	National Aboriginal Congress
C	National Aboriginal Consultative Committee
U	North Australia Development Unit
C	National Aboriginal Education Committee
P	National Aboriginal Education Policy
SWP	National Aboriginal Health Strategy Working Paper
OC	National Aboriginal and Islander Day Organising Committee
IO	National Aboriginal Islander Health Organisation
SS	National Aboriginal and Islander Legal Services Secretariat
U	North Australia Research Unit

DA National Campaign Against Drug Abuse
 Nulungu Catholic College
 A National Employment Strategy for Aboriginals
 C National Federation of Land Councils
 MRC National Health and Medical Research Council
 Nganampa Health Council
 MS Northern Territory Aerial Medical School
 Office of Aboriginal Affairs
 Officer in Charge
 NZ Police Federation of Australia and New Zealand
 Public Intoxication Act
 ; Public Interest Advocacy Centre
 Prison Medical Service
 RM Preferred National Land Rights Model
 Public Service Commission
 C Queensland Corrective Service's Commission
 C Regional Aboriginal Land Council
 E Remote Area Teacher Education
 EP Remote Area Teacher Education Program
 GA Royal Commission on Australian Government Administration
 ADIC Royal Commission into Aboriginal Deaths in Custody
 S Royal Flying Doctor Service
 Special Broadcasting Service
 M Self Contained Accommodation Modules
 A St John Ambulance Association
 (1) Standardised Mortality Ratio
 (2) Standard Minimum Rules for the Treatment of Prisoners
 ICC Secretariat National Aboriginal Islander Child Care
 Special Purpose Grant
 S Special Weapons and Operations Section
 C Social Welfare Research Centre (now Social Policy Research Centre)
 E Technical & Further Education
 E Technical and Further Education
 Training for Aboriginals Program
 IP Town Campers Housing and Infrastructure Program
 Tertiary Entrance
 A Tertiary Education Program for Aboriginals
 Tactical Response Group
 United Aboriginal Mission
 Unemployment Benefit
 United Nations
 Uwankara Palyanyku Kanyintjaku
 SAI Victorian Aboriginal Community Services Association Incorporated
 AI Victorian Aboriginal Education Association Inc
 S Victorian Aboriginal Health Service
 S Victorian Aboriginal Legal Service
 HN Victorian Aboriginal Menial Heath Network
 DA Western Australia Alcohol & Drug Authority
 ECG Western Australian Aboriginal Education Consultative Group
 AE Western Australian College of Advanced Education
 C Western Australian Tourism Commission

PART D

REDUCING THE NUMBERS IN CUSTODY

It has been established in part B that the high number of deaths in custody of Aboriginal people in relation to the size of their population is explained, primarily, by their disproportionate detention rates. It is a matter of fundamental importance to address the reasons for this disproportion. Some of these reasons (ultimately the most important of them) are, in the opinion of Commissioners, related to what have been referred to in the work of the Commission as the 'underlying issues', that is, the social, cultural and legal factors which the Letters Patent authorise me to consider. But others of them are more immediately related to the processes of the criminal justice system itself, starting at the point of policing and carrying through to sentencing in those cases where a person has been charged with an offence and a finding of guilt made. This part of my report deals with this question.

*Chapter 21 deals with the procedures mainly relating to policing which cover the period in time from an Aboriginal person coming under notice of police on a particular occasion to the time when (in the ordinary course) that person leaves the province of the police and enters that of the courts. Particular attention is given to (1) the area of **public** drunkenness; (2) the area of policing practice and policy which can have significance for either increasing or decreasing the numbers of people, particularly Aboriginal people, in custody; (3) alternatives to arrest; and (4) the use of bail where arrest is, in fact, effected.*

Chapter 22 addresses questions relating to the court processes and, more particularly, the sentencing process, and the way in which these matters can affect the rate of detention of Aboriginal people.

The disproportionate rate of Aboriginal detention has been clearly demonstrated. A point must be reached at which that distressing observation is accepted as a definitive finding and attention is focused industriously on the task of righting such inequity. If that point has not already been passed, then the evidence provided to this Commission should put the question beyond doubt. The highest possible priority needs to be placed by governments and corrections authorities on measures to significantly reduce the number of Aboriginal people in custody.

Chapter 21 DIVERSION FROM POLICE CUSTODY

Alternative measures of diversion from police custody include a range of legislative and policing remedies, some requiring a raising of the threshold of police intervention by law reform and various social policy measures. The first part of the chapter considers possibly the most important of these, decriminalisation of drunkenness, an initiative already undertaken in some jurisdictions, but with mixed results.

Second, the contribution which might be made to reduced emphasis on custody by changes in police policies is addressed. An important dimension of this issue is the susceptibility of policing to become more intense in relation to Aboriginal people as a result of local law and order campaigns. Other issues include the allocation of

police resources, whether emphasising public order policing or crime control, or on the other hand, whether devoted to enhancing liaison, diversionary and preventive work.

Third, the chapter looks at the means by which police interventions might be avoided, or where unavoidable, might be dealt with by resolution short of arrest or detention in custody. Such means include cautioning programs, the use of summons rather than arrest and the assistance of community-based diversionary programs and facilities.

Fourth, the important matter of police and court bail is examined. The Australian evidence over some period of time is that Aboriginal people are less likely to benefit from existing bail provisions. The potential for maximising release from custody on police or magistrate's bail is considerable. The need to facilitate the early release from custody of arrested persons is evident in the Commission evidence of the incidence of deaths occurring in the first few hours of police detention.

21.1 DECRIMINALISATION OF THE OFFENCE OF PUBLIC DRUNKENNESS AND OTHER OFFENCES

21.1.1 In this chapter I consider some principal means of diverting Aboriginal people from police custody. By far the most potentially significant area for achieving this aim, which has been highlighted by the Commission's investigations, is that of public drunkenness. I deal with this issue first and foremost because of the crucial importance which detention for public drunkenness occupies in Aboriginal custodial over-representation. As I indicated in Chapter 7, the National Police Custody Survey highlights the heavy involvement of public drunkenness as a reason for police custody.

21.1.2 The National Police Custody Survey report indicates that a total of 8,536 cases of public drunkenness leading to custody occurred, making up, nationally, 35% of the cases for which the reason for custody is available. (This proportion varied between the jurisdictions, with the Northern Territory having the highest proportion: 70%.) Overall, some 46% of the public drunkenness cases were Aboriginal people and more than three-quarters of the female drunkenness cases (78%) were Aboriginal. Drunkenness cases made up 57% of the Aboriginal custodies compared with 27% of the non-Aboriginal custodies. These data indicate that, throughout Australia, a substantial proportion of the work of police officers involved in community policing and lockup supervision was that of handling public drunkenness cases. This applies in all jurisdictions regardless of the legal status of public intoxication.

21.1.3 The Commission has noted repeatedly the high rates of incarceration or detention in police cells of Aboriginal people for public drunkenness. As part of a more general movement to limit the involvement of police in essentially non-criminal behaviour, law reform in a number of Australian jurisdictions has aimed to decriminalise public drunkenness. One objective of such reform has been to reduce the role of police in responding to public intoxication. Yet the statistical evidence available indicates that the number of police interventions and detentions in police custody usually increases after decriminalisation. Moreover, in some regions this phenomenon has particularly affected Aboriginal people.

21.1.4 The reasons for the only limited success of decriminalisation from this perspective vary from region to region. In some cases, there is inadequate provision of alternative custodial facilities or shelters. In others, police practices appear particularly oriented towards addressing non-Aboriginal political and social priorities, with too little attention to responding to the social contexts of Aboriginal

behaviour and negotiating with local Aboriginal communities to address such.

21.1.5 The impact of the harmful use of alcohol on Aboriginal communities is documented elsewhere in this report. A priority for future policy in this area should be the development of programs and options which reduce the availability of police detention for non-criminal behaviours. The development of such programs, however, is fraught with difficulty. The following pages examine the Australian experience of decriminalisation of drunkenness. It is suggested that, insofar as a reduction in police detention was one of the aims of decriminalisation, it has not been achieved to date.

21.1.6 It should be noted that drunkenness is not the only so called 'police offence' which affects Aboriginal people adversely. Other public order offences, especially those of vagrancy ('having insufficient lawful means of support') and obscene or offensive language charges are used frequently against Aboriginal people, though not to the same degree as arrests or detentions for drunkenness. In particular, the police records of some of those persons whose deaths were investigated by the Commission indicate the frequency with which these laws were applied. In many instances, this resulted in a gaol term being imposed either as a primary sentence or as a consequence of default in payment of fines imposed by the court in relation to the offence.

21.1.7 Decriminalisation has also been adopted in some jurisdictions in relation to some of these charges, notably vagrancy (for example South Australia in 1985 and New South Wales in 1979). Other offences, notably those involving offensive, indecent or obscene language, continue to be used frequently against Aboriginal people. Although the following discussion of decriminalisation focuses on drunkenness--the greatest cause of detentions--there is a continuing aggravation to Aboriginal experience of the criminal justice system on account of the use of language charges. There should be a high priority on addressing this area of often hypocritical policing, especially when the language arises in the context of police-occasioned intervention. As Commissioner Wootten commented in his report of inquiry into the death of David Gundy:

It is surely time that police learnt to ignore mere abuse, let alone simple 'bad language'. In this day and age many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language... does nothing for respect for the police. It is particularly ridiculous when offence is taken at the rantings of drunks, as is so often the case. Charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others---resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily 'offended'.¹

THE POLICING OF DRUNKENNESS

21.1.8 The police have traditionally played the principal role in the control of public drunkenness. Charges available in legislation have made possible the detention in custody of persons found drunk in a public place or in other circumstances, depending on the particular Act. Historically, this has meant that a

substantial portion of police resources and detention times have been occupied by the control of public drunkenness. The 'protected' status of many Aboriginal people in Australia during the twentieth century meant that these provisions had only a minor impact on many of them for some decades. The lifting of reserve controls, including availability of alcohol, in a number of jurisdictions from the 1950s resulted in a great increase in the risk of Aboriginal people facing police attention under the public drunkenness statutes.

21.1.9 The constancy with which such laws were applied is reflected in the criminal history records of many of the Aboriginal people whose deaths were investigated by this Commission. As was noted in Chapter 2, drunkenness was the most frequent offence of the deceased persons. Keith Karpany was one such person. In my report of inquiry into Keith's death, I highlighted the senselessness sometimes associated with the offence of drunkenness and other alcohol-related offences:

Keith's life illustrates another lack of compassion and (I would say) commonsense in the society. This is not a matter which relates only to Aborigines. Keith had some 450 convictions--an endless and useless procession of convictions for alcohol-related offences. Putting aside altogether what that meant for him and his parents, the waste is phenomenal. His convictions would represent thousands of hours out of the time of police officers for arresting and reporting, watch-house keepers, prosecutors and other police personnel; magistrates, justices of the peace, clerks of court, clerical workers in the court system who filed, recorded and issued warrants; other police officers who executed the warrants, those who supervised Keith in custody: and this is to leave aside the cost of the hospitalisation and medical treatment for alcohol-related health problems which afflicted Keith.

It seems to me that not only compassion but common sense compels a different approach.²

21.1.10 I wish to underline that, what I was there criticising was attitudes in the society, not the police. It is absolutely clear that the broad Australian society has over decades supported laws which made it an offence to be drunk in public and expected the police to enforce that law and to arrest offenders. In living memories of the time of 'six o'clock closing' police did so in full view of, and with support from, the public as the hotels turned their patrons onto the street. I have no doubt that some police officers arrested more frequently and more roughly than others and this exacerbated complaints. But the policy is a community policy and the community cannot hide behind the police in respect of it in relation to the arresting of Aboriginal or non-Aboriginal people.

21.1.11 There are a variety of rationales put forward for sustaining policing of public drunkenness. These rationales are reflected in the various legislative provisions and police instructions governing public drunkenness. They include:

- the management of public order, on streets or in public places;
- the prevention of offences as a result of drunkenness;
- the protection of intoxicated persons;
- the protection of other people from the threats, abuse or assaults of intoxicated persons; the removal from public visibility of intoxicated people;
- the addressing of local concerns over the state of law and order;

- the surveillance of the population for other criminal justice system purposes, such as the serving of warrants.

21.1.12 Each and all of these different rationales has been argued to be relevant to the high rate of detentions of Aboriginal people for drunkenness. Moreover, these different policing functions continue to operate to some degree when drunkenness is 'decriminalised'. To understand the factors affecting the policing of Aboriginal drunkenness, evaluation of the experience of the last fifteen years is necessary.

DECRIMINALISATION--FORM AND IMPLEMENTATION

21.1.13 Beginning with the Northern Territory in 1974, a number of Australian jurisdictions have moved towards decriminalising public drunkenness. 'Decriminalisation', however, is something of a misnomer. Drunkenness has been, at least in the more recent past, a minor offence, with little penalty and few consequences with regard to criminal record. I would add, however, that this has not always been the case. In South Australia, for example, the maximum penalty for a conviction for public drunkenness was one month's imprisonment. A number of those whose deaths were investigated in South Australia received the maximum penalty on numerous occasions during their lifetimes. In those jurisdictions which today retain drunkenness as an offence, bail of 10 cents is common and the vast majority of offenders do not appear in the magistrates court. At one level, to 'decriminalise' does little more than recognise in statute what actually occurs in practice.

21.1.14 An important question is, therefore, not so much whether public drunkenness has been decriminalised, but by what tests and according to what criteria are police making decisions to detain in custody people who are intoxicated. As well, there is the issue of whether facilities other than a police cell are available for intoxicated persons and what other laws are being enacted requiring some form of custody.

LEGAL PROVISIONS

21.1.15 Briefly, the current legal position in each jurisdiction in relation to public intoxication is as follows.

Northern Territory

21.1.16 The Northern Territory was the first jurisdiction in which drunkenness was decriminalised, in 1974. The current relevant statutory provision is Section 128 of the *Police Administration Act 1979* which provides for police to take into custody a person believed, on reasonable grounds, to be intoxicated, who is in a public place or trespassing on private property. The precursor to this provision, amended in 1983, specified particular situations in which the power to apprehend intoxicated persons could be exercised. The section as it currently stands provides a more general discretionary power to apprehend. Sections 129 to 133 govern the operation of these 'protective custody apprehensions', including provisions for release of the detainee into the care of another person and protection of the detainee from police questioning, fingerprinting, photographing or charging during the period of detention. There is no statutory guidance governing the place at which apprehended persons should be detained.

21.1.17 Over the last decade, police have had the option of taking a detainee to a 'sobering-up shelter', in Darwin (this centre was closed in 1987, but a new centre is proposed to be opened in the near future), Alice Springs, Tennant Creek and most recently Katherine.

21.1.18 Although substantial numbers of persons apprehended are taken to the shelters, police cells have been the location of most protective custodies, except in a few places. These detentions are overwhelmingly of Aboriginal people, and of males, but there are significant numbers of females involved as well.

New South Wales

21.1.19 *The Intoxicated Persons Act 1979* provides that 'a member of the police force or an authorised person' may detain and take to a 'proclaimed place' (which currently includes police stations) an intoxicated person who is found in a public place, behaving in a disorderly manner, behaving in a manner likely to cause injury to persons or property, or who is in need of physical protection because of their state. The Act permits police to use police cells for such detention for temporary purposes or where another 'proclaimed place' is unavailable.

21.1.20 The effect of the Act was to increase the rate of detentions compared with the previous *Summary Offences Act*, in fact to double them by the mid-1980s. Over these years there was an increasing trend to holding the detainees in places other than police cells. The majority of detainees in New South Wales are now held in a proclaimed place other than a police cell.

21.1.21 According to some writers on the topic, the Act has continued to play a major role in justifying the detention of large numbers of Aboriginal people in New South Wales, especially in the intensively policed Far Western districts where there are few proclaimed places other than police stations.³

Australian Capital Territory

21.1.22 Public drunkenness was decriminalised in the Australian Capital Territory in 1983. A member of the police force may now take into custody any person found in a public place and who is behaving in a disorderly manner, behaving in a manner likely to cause injury to him/herself, others or property, or who is incapacitated by intoxication to the extent that he/she is unable to take care of him/herself.

South Australia

21.1.23 Public drunkenness was decriminalised in South Australia in 1984. Under Section 7 of the *Public Intoxication Act 1984*, (PIA) police may apprehend and detain a person believed to be under the influence of a drug or alcohol and 'unable to take proper care of himself'. Section 3 provides, like the New South Wales legislation, a number of options for police to follow, including release at the person's place of residence or an 'approved place', or detention in custody at a police station or 'proclaimed place'.

21.1.24 For a number of years there were practically no 'proclaimed places' so police cells were used for detaining most apprehended persons.⁴ There are now a number of sober up centres 'approved' (for voluntary admission) or 'proclaimed' (for custodial admission) in Adelaide and in some country centres.

Western Australia

21.1.25 This is the most recent State to decriminalise public drunkenness. Sections 53 (drunk in a public place) and 65(6) (habitual drunkenness) of the *Police Act 1982* were repealed by Parliament in December 1989 and the *Detention of Drunken Persons Act* proclaimed in April 1990. The detention provisions of the new section 53 are substantially the same as in the Northern Territory, and there is no provision regarding the place of detention. As a result of initiatives taken in the

wake of the Interim Report, however, the Western Australian Alcohol and Drug Authority is establishing a number of sobering-up centres, the first of which opened in July 1990 in Perth.

21.1.26 Prior to statutory reform, the Western Australia Police Commissioner had directed in January 1988 that police were not to arrest for drunkenness where alternative arrangements could be made in relation to an intoxicated person. It is possible that this had the effect of reducing the number of police arrests of Aboriginal people, at least in some areas of the State, as indicated by the comparative study of 1987 and 1990 arrests in Kalgoorlie.⁵

Victoria

21.1.27 The Law Reform Commission reported on Public Drunkenness in June 1989. The Commission recommended decriminalisation through repeal of sections 13, 14 and 15 of the *Summary Offences Act 1966* (Vic). However, the Commission also considered that 'powers of apprehension, removal and detention are not justified by mere drunkenness in public'. Further:

*The power to apprehend, remove and detain is not appropriate where the person's behaviour is simply noisy, annoying or unsightly ('disorderly').*⁶

21.1.28 Hence the Commission recommended that the new custodial powers of police in relation to intoxicated persons should be limited to those cases in which the person is reasonably believed to be at a significant risk of being unable to take care of himself or herself or is behaving in a manner likely to cause injury to others or damage to property. These proposed provisions follow the spirit of the New South Wales and South Australian legislation rather than the more wide-ranging powers' allowed to police in the Northern Territory and Western Australia.

21.1.29 Legislation decriminalising public drunkenness is, at the time of writing, before the Victorian parliament.

Queensland

21.1.30 Being drunk in a public place remains an offence under s.81 of the *Liquor Act 1912*. The maximum penalty for drunkenness is \$20 or one month imprisonment in default. In a review of the *Liquor Act* presented to the State Government during 1990, the issue of decriminalisation of public drunkenness was largely ignored. In its only address to the problems involved, the review recommended the adoption in Queensland of Section 119 of the *Western Australia Liquor Licensing Act* prohibiting the consumption of liquor in any place without the consent of the occupier or the person having control of the place or premises.⁷ It is my view that such a move is likely to preserve, and in fact extend, the extensive powers of police in relation to liquor consumption by Aboriginal people.

21.1.31 In their responses to the Interim Report Recommendations, both the Queensland Police Department and the Department of the Attorney-General stressed the necessity for alternative facilities to be provided before decriminalisation is effected. It is understood that recent amendments to the *Bail Act* have facilitated the establishment and use of diversionary facilities for those persons arrested for drunkenness who are refused bail, though it is too early to assess the impact of this new provision.⁸

Tasmania

21.1.32 Unlike Queensland, being drunk in a public place of itself is not an

offence in Tasmania, but Section 4 of the *Police Offences Act 1935* empowers police *inter alia* to arrest a person in a public place who is 'drunk and incapable of taking care of himself', with a penalty for the offences of 'drunk and incapable' or 'drunk and disorderly' being a fine or up to one month's imprisonment.⁹ The former Tasmanian Police Commissioner has reported that the Police Department proposed some years ago to have the *Police Offences Act* amended to allow police to lodge drunken persons in detoxification facilities.¹⁰

OVERVIEW

21.1.33 The above review of the present legislative situation in the different jurisdictions indicates that there are currently three levels of intervention in relation to public drunkenness in Australia. The first is public drunkenness as an offence (Queensland and Tasmania); the second is the apprehension and detention of persons on the grounds of public drunkenness alone (Western Australia and the Northern Territory); and the third being the detention of persons in more qualified circumstances (that is where the person is incapable of taking proper care of himself or herself) (South Australia, New South Wales and the Australian Capital Territory).

21.1.34 It was recommended in the Interim Report that governments should legislate to abolish the offence of public drunkenness. That remains my view and the views of my fellow Commissioners. Since the publication of the Interim Report, two States, Western Australia and Victoria have moved to decriminalise drunkenness. Only Queensland and Tasmania retain public drunkenness as a criminal offence. Whilst the evidence before the Commission indicates that there have been an extensive number of custodies taking place in those jurisdictions where the offence of public drunkenness has been abolished (and I add, in those places where public drunkenness still remains an offence), it is still my view that the labelling of such behaviour as 'criminal' and dealing with it as part of the criminal justice process is unjustifiable. The law reform has meant that over the years many tens of thousands of people, including Aboriginal people, have been spared going to court on a charge of drunkenness, where they might have been convicted and fined or in some cases imprisoned. (Frequently, of course, people were fined but later imprisoned as a result of non-payment of the fine and the courts costs.) I think that these outcomes were in fact the main aim of the legislative reform, at least for most people who advocated the reform. However, to the extent that the law reform was an attempt to reduce the number of police interventions and detentions of intoxicated persons, the evidence suggests that this objective has not been achieved. In the sections which follow, I discuss some of the factors which affect or qualify the movement towards a reduction of police intervention in this area.

21.1.35 Finally, it is my view that legislation governing public drunkenness (in those places where it is not an offence) should require the apprehension and detention of a person only in those circumstances where the person is intoxicated to the extent that he/she is incapable of taking proper care of himself or herself, is behaving in a manner which is likely to cause harm to others or likely to cause damage to property. A reasonable belief that a person is intoxicated should not, of itself, be sufficient to warrant police intervention.

PROVIDING ADEQUATE ALTERNATIVES TO POLICE CELLS

21.1.36 Experience suggests that a counterpart of removing public drunkenness from the range of offences is the provision of adequate alternatives to police intervention and detention. However, although the legislation governing

public drunkenness provides in most places for the establishment of alternative facilities to police cells for the care of apprehended persons, the actual provision of these facilities (and in some cases the use of such facilities) has been tardy. In South Australia, for example, the great majority of intoxication detentions continued in police cells for a number of years following decriminalisation, largely because of the absence of alternative care facilities. As the South Australian Police Department noted in its submission to this Royal Commission:

The (Public Intoxication Act) legislation has been successful inasmuch as it has alleviated some of the burden previously placed upon the resources of the criminal justice system, e.g. reduction in number of arrests, court appearances, warrants. However, the first point of contact with the system for intoxicated persons remains the police and most still sober up in police cells. Thus decriminalising public drunkenness has not prevented these people from coming into contact with the criminal justice system and has not had any significant impact upon the time they initially spend in police custody.¹¹

21.1.37 A 1986 study by the Office of Crime Statistics in South Australia in fact noted a 46% increase in police apprehensions of intoxicated persons in the six months after decriminalisation compared to before. The study noted that, 'These increases particularly affected young people, Aboriginals and those living outside of metropolitan Adelaide'.¹² In more recent times, additional facilities have been established both in the metropolitan and some country areas. This has resulted in a drop in the number of persons being detained in police cells. Very high numbers of Aboriginal people, however, continue to be the subject of detention in police cells.

21.1.38 Some police and other government departments and agencies have opposed decriminalisation in the absence of provision of alternative custodial facilities. Considering the Interim Report's recommendation for the decriminalisation of drunkenness, the Queensland Police Service responded that there should be no such move unless proper facilities were made available, warning that the cost of such 'would have enormous financial consequences for the government and the department responsible'.¹³

21.1.39 The Police Federation of Australia and New Zealand in its submission to the Commission has suggested that police in New South Wales and other parts of Australia should not lose their power to detain intoxicated persons in police station cells, but acknowledged that 'modification of the power to limited "last resort" instances may work'. It was opposed to 'de-proclaiming' police cells unless appropriate alternative premises are made available.¹⁴

21.1.40 Yet decriminalisation should not imply that an institutional alternative (i.e. police cell or sobering-up centre) is always required for the management of intoxicated persons. In both the South Australian and New South Wales legislation (and the proposed Victorian legislation) other alternatives are provided for. In South Australia, discharge at the place of residence of the person or discharge into the care of the person's solicitor, relative or friend are options. Under the proposed Victorian legislation an additional option is available, which is simply the removal of the person from the public place. But, despite the availability of these alternatives, the statistical information available indicates that they are utilised in only a small number of cases. In South Australia in August 1987, 98% of detentions were still being placed in police cells.¹⁵ Whilst this number has increased in recent years,

the numbers are still relatively small. A similar pattern has emerged in other States. It must be added, however, that many submissions received from Aboriginal people have emphasised the undesirability of returning heavily intoxicated persons to their homes because of the family disruption likely to be caused. This is obviously a matter to which due consideration must be given.

21.1.41 While the impediments to greater use of non-custodial resources by police for intoxicated persons needs to be acknowledged, it might be asked whether police services have evaluated their own practices in relation to using the full range of options available under their respective legislative enactments. The information before me suggests that this is not being done.

21.1.42 It was recommended in the Interim Report that legislation which decriminalised drunkenness should place a statutory duty on police to utilise alternatives to detention of apprehended persons in police cells. New South Wales is the only jurisdiction which currently places a positive onus on police to utilise alternative facilities where such are available. It is my view that legislation in other jurisdictions should also reflect this standard. Obviously, the availability and accessibility of alternative facilities will be crucial in reducing the number of police cell detentions. In some places, the establishment of a sobering-up facility would not be justifiable in economic terms. In others, hours of operation may be restricted; not all could justify operating on a 24-hour basis, 7 days a week. Greater consideration of other care alternatives should be given in these circumstances. The inappropriateness of the use of police cells for the care of intoxicated persons must be positively accepted and addressed by both governments and police services. The quality of facilities and care available at some of the more recently constructed sobering-up shelters is of a high standard. I was particularly impressed by the shelter which operated at Alice Springs, which I personally visited during my inquiries in the Northern Territory.

21.1.43 Involvement of Aboriginal people and organisations in the management and day-to-day operation of these alternative care facilities should be sought and encouraged. As the community co-ordinator of one Aboriginal community in the Northern Territory commented with regard to the perceived benefits of giving that community greater involvement in the town's sobering-up shelter:

The Council is attempting to educate people as to the benefit of going to the Drying Out Centre rather than back to the town camps when intoxicated.

Since the majority of people requiring the services of the centre are Aboriginal the [Community] Council would like to take it over and run it. It is thought that this initiative would break down the apprehension that drinkers have of being taken to the Shelter. The Council in the interim is attempting to gain greater representation on the Board.¹⁶

21.1.44 It is my view that positive efforts must be made to move public drunkenness outside the realm of the criminal justice system. This should involve not only dissuading police from using police cells for the detention of intoxicated persons but also in developing civilian alternatives to police apprehensions of intoxicated persons. Regarding the latter, I mention that, in South Australia, the Aboriginal Sobriety Group (an Aboriginal community-controlled organisation) has been funded to provide a mobile assistance patrol for intoxicated persons in Adelaide. The patrol operates throughout the evening and early morning, seven days a week, in the city of Adelaide and outlying metropolitan areas, generally checking on the welfare of Aboriginal people and transferring them to the

appropriate care facilities, or to their homes, where the need arises. Apart from undertaking their own patrols, the mobile assistance unit responds to calls from police and staff of sobering-up shelters regarding Aboriginal persons in their care who may need attention. The success of the operation clearly lies in the dedication of its workers and in the co-operation of police and other agencies involved in the care of intoxicated persons.

21.1.45 A somewhat similar function is performed by the Julalikari Council night patrols (to be discussed in more detail in Chapter 29) at Tennant Creek in the Northern Territory who are able to pick up intoxicated persons and deliver them back to their camps or to the Tennant Creek Sobering-up Shelter.

21.1.46 The civilianisation of the procedures for dealing with intoxicated persons is, in my view, a very positive step. Clearly, however, such an arrangement would not be appropriate in all locations. As was noted in the *Interim Report*:

The difficulty is to find the people and set up an organisation which day and night and year after year will fulfil the role effectively. There must ultimately be a refuge or centre where intoxicated persons can be cared for. It is difficult to envisage any scheme which does not involve the police in a 'pick up' process because it is only the police who can and do consistently patrol our streets, attend disturbances and have legal authority. Such proposals certainly merit further attention but the present realities must be faced. The solution probably lies in a combination of police and other resources.¹⁷

21.1.47 Local communities should be encouraged to develop arrangements which are suitable to their particular circumstances.

21.1.48 Given that the police role in the apprehension of intoxicated persons is likely to continue, it is important that officers be thoroughly trained in the exercise of their powers of apprehension and in the use of diversionary facilities. As I have noted in Chapter 13, the excessive use of the protective custody powers by some officers is an issue of contention between police and Aboriginal people. The evidence before the Commission indicates that, even where alternative care facilities are available, they are not always utilised in practice by police. With regard to the new sobering-up shelter which was opened in Katherine in January 1990, the manager spoke of his experience regarding its initial under-utilisation by police in the conference held in Katherine on Community Relations in October 1990. In response to a question as to whether police gave the shelter staff the first option to receive or refuse a person in protective custody, he replied:

We do now, yes. When we first opened I never really addressed that problem because I thought the police would be happy to get them all OUT OF the cells anyway. So I thought they would. And I started picking up the fact that when we were open and not full there were people going to the police cells. So, I've had a talk to [the Station Sergeant] and its now police procedure that if we've still got beds available, any Section 128 comes to the shelter first and we make an appraisal of the person then.¹⁸

21.1.49 I was told that, at the time of the conference, 60% of detainees were released by police to the sobering-up centre, 97% of whom were Aboriginal people.¹⁹ In the year prior to the closure of the Darwin sobering-up shelter, an

average of only 32% of persons apprehended for protective custody were taken to the shelter. In my report of inquiry into the death of the man at the Royal Darwin Hospital, I found that the under-utilisation of the Darwin shelter by police was related to the fact that 'officers preferred to make the trip back to Berrimah [Police Station], no doubt for a variety of reasons to see friends, have a snack, catch up on paperwork, etc'. The under-utilisation of this facility would appear to be in part because of the absence of any system for monitoring the use of alternative facilities. It is my view that police should establish systems for monitoring the use by their officers of alternative facilities for the care of intoxicated persons to ensure that persons who would be more appropriately accommodated at such alternative facilities, are not being detained unnecessarily in police cells.

21.1.50 The effectiveness of any alternative system for apprehension and care of intoxicated persons will be dependent to a considerable degree on the relationship between police and those providing alternative care. It is important, therefore, for a positive and co-operative working relationship to be established between them.

21.1.51 I raise one further issue in relation to sobering-up shelters. Just as police officers must be alert to the dangers presented by heavily intoxicated persons in their care (an issue which I will deal with later in Chapter 24), so must the staff of sobering-up shelters. The same regime of personal observation and first-aid training is vital. The same caution must be exercised and medical attention must be sought in any situation of doubt. As an examination of the deaths investigated by the Commission has clearly highlighted, by undertaking the onerous task of caring for a category of people debilitated by alcohol and generally in a poor state of health, the staff of sobering-up shelters have assumed the responsibility of providing care in circumstances of high risk. All necessary assistance should be provided by way of resources and training to better enable shelter staff to adequately discharge their duties towards those in their care.

'PROTECTIVE CUSTODY' OR CRIME CONTROL?

21.1.52 I have noted earlier that one of the suggested rationales or functions of the policing of public drunkenness is the prevention of offences by intoxicated persons. The use of protective custody legislation in this way was revealed during evidence given before me at Alice Springs in August 1989. In the study conducted by Pamela Lyon for the Tangentyere Council in 1990 on the impact of alcohol abuse in Alice Springs, it was found that protective custody apprehensions had increased a reported 39.4% between 1987-88 and 1988-89. The evidence given before me confirms that this increase was not so much a result of increased drunkenness in the community as part of a deliberate policing strategy to control crime. Chief Superintendent Godwin of the Alice Springs Police Division gave evidence before the Commission over the change in policing strategies to 'more concentration on preventative policing':

Tippett: When you say that, what does preventative policing mean?

Godwin: Stopping crime if we can.

T: Yes, but you say there's more concentration of preventative policing. I take that to mean that there's more concentration on apprehending people who have not yet committed crimes.

G: You can't have one without the other.

T: Does that mean you are sending more patrols out on the road?

G: More concentrated patrols, yes. Dedicated patrols to

T: What's a more concentrated patrol?

G: A patrol who would be dedicated to apprehending 128s or people who are drunk.

T: Police are actively going out looking for people to apprehend in relation to...

G: Who are drunk.

T: So over the last year there's been actually a heavier police effort to place into custody people who are drunk?

G: If you want to put it that way. We say we're trying to reduce the amount of crime in Alice Springs.²⁰

21.1.53 As a result of this offensive, police claim that street crime, including assaults and stolen vehicles, was reduced significantly during the year. While not disputing the police claim, the Tangentyere Council in Alice Springs has noted that Alice Springs already accounted for the . highest rates of protective custody apprehension in the Territory.²¹

21.1.54 The use of protective custody legislation as part of a crime control .policing operation raises important questions of public policy. Is it appropriate and justifiable to use legislation which is predominantly directed towards the protection of intoxicated persons as part of a preventative policing strategy? One is given to wonder whether the non-Aboriginal community would tolerate the arrest of non-Aboriginal people thought to be drunk outside hotels on the basis of the risk of them driving while drunk.

21.1.55 One might also wonder whether the concentration of resources in this way (that is, in more intense policing of intoxicated persons) is perhaps misdirected. Many Aboriginal organisations point to what they see as the failure of public authorities over many years to address the impact of alcohol on Aboriginal people including the adequate provision of programs to deal with the harmful use of alcohol. The services provided in sobering-up shelters are ones of basic care. They provide a shower, a clean bed and a nourishing meal. Clothes are washed. Counselling regarding the use of alcohol is available at some shelters; referrals to detoxification and rehabilitation programs are made where such programs exist. While the shelters clearly provide a preferable setting for the immediate care of intoxicated people, they will make no appreciable impact on the root causes of the alcohol misuse unless their operation is integrated into more comprehensive programs. Staff of the Alice Springs shelter have voluntarily operated an outreach program for prevention of alcohol misuse. Part of the program involved a Commonwealth-funded course on hygiene and life skills run by the Institute for Aboriginal Development for these outreach clients: the Department of Education, Employment and Training ceased funding after December 1989.²² I am not aware of why funding was discontinued.

21.1.56 It is my view that there is a need for a more integrated approach to the control of alcohol misuse with greater concentration on its causes rather than on its symptoms. Any program which offers assistance in the resolution of this problem has not only the potential to reduce the appalling rate at which Aboriginal people are taken into protective custody but also to reduce the disproportionate number of Aboriginal people.

OTHER ASPECTS OF DECRIMINALISATION

Regional Inequalities

21.1.57 The evidence before the Commission demonstrates some gross disparities between the experience of people, especially Aboriginal people, in the metropolitan areas and those outside the metropolitan areas, in the application of laws relating to public drunkenness, particularly in relation to the period of detention of persons apprehended.

21.1.58 The evidence before me indicates that the period of detention of persons apprehended for public drunkenness in areas outside the metropolitan areas is much longer than for those detained within the metropolitan areas. For Aboriginal people, however, the problem is even more severe. This is demonstrated in Table 21.1 with regard to Queensland where August 1988 police custody data for Brisbane and Cairns are compared. It will be noted from that table that the average length of time that Aboriginal people spent in police custody for all offences in Cairns was 86 hours whereas in Brisbane, the average was only 47 hours. The difference is also very marked when drunkenness cases alone are considered. Within this offence category the average length of time in police custody for Aboriginal people was approximately 17 hours in Cairns compared with 7.6 hours in Brisbane. Corresponding patterns were seen with regard to non-Aboriginal people in police custody in those localities.

TABLE 21.1 LENGTH OF TIME IN POLICE CUSTODY, BRISBANE AND CAIRNS, AUGUST 1988

<i>Offence and Region</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>
	DRUNK	
Brisbane	7.6	7.0
Cairns	16.7	11.8
	OFFENCES OTHER THAN DRUNK	
Brisbane	69.2	48.3
Cairns	98.6	36.0
	ALL OFFENCES	
Brisbane	47.2	31.5
Cairns	86.0	56.3

This table includes only those cases which fell below the 90th percentile, i.e. in terms of the length of time in custody, the point below which 90% of the cases fell. This is to avoid the distortion which would be caused by including in the calculation of averages, 10% of cases which were held for the longest periods of time. (Source: *National Police Custody Survey*.)

2 1.1.59 Detailed analysis of detentions under the *Public Intoxication Act* in South Australia for 1988-89 suggests that there continue to be very significant metropolitan and rural differences in length of custody of Aboriginal people under the Act in that State. Those differences suggest similarity with the patterns in Queensland, namely similar detention periods for Aboriginal people and non-Aboriginal people in the metropolitan area and much longer periods for Aboriginal people than non-Aboriginal people in rural areas.²³ Put another way, the longer a person was in custody for intoxication in rural areas in South Australia, the more likely that person was to be Aboriginal.

21.1.60 Studies of the length of detention in Wilcannia²⁴ and Roebourne indicate the excessive detention periods of Aboriginal people in rural areas in other States. While the mean length of time in cells in Western Australia in the 1988 National Police Custody Survey was 9.9 hours for Aboriginal people (5.1 for non-Aboriginal people),²⁵ a study of arrest in Roebourne in 1983 showed that 90% of Aboriginal people (58% of non-Aboriginal people) spent longer than 12 hours in detention. The mean detention time for drunkenness for Aboriginal people in

Roebourne at that time was over 24 hours, compared to about 15 hours for non-Aboriginal people.²⁶ While there may well have been a change between 1983 and 1988, the excessively long detention periods indicated by the Roebourne evidence suggest again that Aboriginal people face notably different procedures in remote Australia.

2 1.1.61 It is not being suggested that a mandatory maximum number of hours for intoxication detainees is required: there may be important welfare reasons for not discharging detainees late at night. However, neither should welfare considerations or local police convenience be allowed to sustain demonstrable discrimination against Aboriginal people by reason of their residence in non-metropolitan areas.

21.1.62 The differences in the policing of drunkenness in metropolitan areas compared with other areas will need to be addressed in a more sustained way in the future if reductions not only in the frequency, but the length, of custody are to take place. Obviously, the greater availability and use of non-custodial alternatives to detention in police cells would impact on the period of time that intoxicated persons spent in police cells; however, in the absence of alternative facilities for intoxicated persons, police services should themselves be monitoring the length of custodies in areas outside major urban centres to ensure that detainees in these regions are not disadvantaged, directly or indirectly, by reason of their location or Aboriginality.

Protective Custody as an Indirect Means of Arrest

21.1.63 The police practice, in some locations, of serving warrants on people who have been apprehended for public drunkenness is a practice which has come under some criticism during the course of the Commission's hearings.

21.1.64 The Northern Territory Aboriginal Issues Unit (AIU) commented:

*In practice, unfortunately, a protective custody detention often turns into an arrest. This happens because the police use the opportunity of having a person in protective custody to carry out checks to see if they have outstanding warrants for arrest. If there are any outstanding warrants, the police serve these upon the detainees as they are released from protective custody.*²⁷

21.1.65 The report notes that this practice proceeds despite the existence of Section 130 of the *Police Administration Act 1979*. That section provides protection to those undergoing protective custody against other types of police intervention, such as questioning, finger-printing or charging with an offence. It is not clear how extensive this practice is. A review of the first year of operation of the Darwin shelter, however, noted that of those apprehended in Darwin who were kept in police cells rather than admitted to the shelter (49% of the 2,790 admissions in 1983-84), about 10% (i.e. about 130) were 'required to be taken to the police station for matters relating to criminal law (e.g. a warrant in existence).²⁸ At the time of his death, the man who died at Katherine was serving a period of detention under a warrant which had been executed immediately upon expiry of a period of protective custody. I was informed by the Katherine police during the hearing in that case that it is now the practice, at least in that location, to backdate the warrant to coincide with commencement of the period of protective custody.²⁹ It is my belief that that practice also applies in Alice Springs.

21.1.66 Given the very high rate of use of protective custodies against

Aboriginal people in the Northern Territory (comprising 80% to 90% of custodies in the period 1981 to 1987)³⁰ the clearing of the warrant books in this way possibly impacts more severely on Aboriginal offenders than on non-Aboriginal offenders who may have warrants outstanding. If so, then its contribution to the overall incarceration rate of Aboriginal people should be considered in any review of the use of protective custody legislation in the Northern Territory and elsewhere. An immediate alleviation of the situation might be provided by a government amnesty on long outstanding warrants for non-serious offences, an issue which I discuss in the following chapter (Chapter 22). Indeed, I think there is good argument in support of the proposition that warrant searches should not be conducted on persons who have been detained under protective custody legislation.

Financial Implications of Decriminalisation

21.1.67 A different issue affecting the role of decriminalisation in the detention of Aboriginal people in police cells relates to the financial costs of providing alternative facilities.

21.1.68 In Victoria, the Law Reform Commission considered the cost implications of decriminalisation in its Report on Public Drunkenness. While noting the cost of police interventions and court time taken up by drunkenness arrests under the Summary Offences Act, the Commission noted that substantial reductions in costs would not necessarily flow from decriminalisation. Police time would still be involved. On the basis of comparative costing of the Adelaide-based Whitmore Square facility operated by the Salvation Army, the Commission calculated a possible cost to revenue in Victoria of \$1.6m for accommodation of all 24,000 people arrested in 1987-88. Purpose built accommodation would add to this.³¹

21.1.69 To the extent that funding and revenue difficulties impede the objective of reducing police cell detentions of intoxicated people, a large proportion of whom in all jurisdictions have been Aboriginal people, I urge that it be a matter of priority to develop a funding policy for providing alternative facilities. It is not the function of the Commission to comment on revenue matters. I merely report that many Aboriginal submissions have urged that some part of revenue raised from the sale of liquor should be directed towards meeting the costs of dealing with problems arising from liquor.

21.1.70 I am sensitive of the importance of issues of costs. I would raise, however, the following point. In many parts of the country the arrest or detention of Aboriginal people for being drunk and their detention in cells is a constant irritation to Aboriginal people (and I believe to many or most police officers) and is a daily exacerbation of police and Aboriginal relations. I think that putting to an end, or greatly diminishing this factor would be a powerful impetus to improved relations, a matter which would have significant implications for costs.

Re-criminalisation and Alternative Charging

21.1.71 In spite of the move towards decriminalisation of public drunkenness in Australia, the continuing high rate of detentions of Aboriginal people suggests something short of success in achieving reduced police custodies. The possibility exists that decriminalisation results in fact in the search for alternative means of criminalising public drinking, either through the operation of laws which restrict or prohibit public drinking in specified areas, or through the use of alternative charges such as disorderly behaviour and other 'street offences'.

21.1.72 In a number of jurisdictions it has become clear that decriminalisation may be accompanied or followed by laws and/or regulations which effectively re-criminalise public drinking or drunkenness. Such measures have included the

following:

- the use or enhancement of local government by-laws to prohibit alcohol consumption in public places and empower police interventions accordingly;
- the declaration of 'dry areas', where the availability of alcohol is prohibited or strictly controlled; and
- the declaration of restricted areas where consumption of alcohol is prohibited in public.

21.1.73 In Australia, there have long been municipal level controls over the use of alcohol in parks, though the use of these by police has been less common than their use of the State-wide laws pertaining to drunkenness. 'Dry area' declarations and 'restrictions' are, however, more contemporary policy responses to particular demands, which come from both Aboriginal and non-Aboriginal communities. The range of policy devices is less under consideration here than their operation with respect to producing detentions of Aboriginal people, particularly where these operate in a discriminating way or can be shown to be harmful to Aboriginal communities. What is at issue is that, whatever the location or motivation of these forms of regulatory control, one of their consequences is the policing and detention of Aboriginal people.

21.1.74 'Apart from the impact of new laws regulating the consumption of alcohol in certain areas, the practice of charging intoxicated persons with other 'public order' offences such as disorderly conduct, offensive language etc. has been an alternative mechanism for, in effect, re-criminalising public drunkenness. In Western Australia, for example, section 119 of the *Liquor Licensing Act 1988* prohibits drinking in parks and on streets. Since the recent decriminalisation of public drunkenness in that State, the incidence of park and street drinking arrests has been increasing, whilst at the same time charges of disorderly conduct are on the rise. Commissioner Dodson has expressed his concerns about these developments in his report to me: 'Park and street drinking may well replace the offence of "drunk" as the single most significant contribution to Aboriginal prisoner statistics in the coming years'.³²

21.1.75 The extent to which this practice operates in other jurisdictions in which drunkenness has been decriminalised is difficult to gauge, but it is a matter of importance that police services should address this issue and establish appropriate monitoring mechanisms to ensure that persons who might otherwise have been apprehended for intoxication are not instead being arrested and charged unnecessarily with other offences.

21.1.76 Any discussion of the current forms of regulation of public drunkenness or alcohol consumption must recognise that these measures have in some cases been sought by Aboriginal communities themselves. In other cases, however, the effective re-criminalisation of public drunkenness has taken place in a context which continues to construe Aboriginal people as a threat to the sensibilities of the local non-Aboriginal communities. This is an issue which cannot be dismissed lightly. Aboriginal people and non-Aboriginals alike are entitled to the observance of certain standards of behaviour in places frequented by the public (Aboriginal and non-Aboriginal). What is entirely unacceptable is that decisions should be made in accordance with non-Aboriginal perceptions over the heads of Aboriginal people and without reference to their perceptions. This is an area for discussion and negotiation conducted in good faith to seek solutions which are acceptable to both sides and conducted as between equals.

Monitoring the Effects of Decriminalisation

21.1.77 In view of the problem posed by various forms of re-criminalisation which may produce greater numbers of Aboriginal custodies, an important issue

for governments to address should be the monitoring of these developments. It is evident from a number of jurisdictions that such monitoring has been taking place. The various reports of government agencies and of Aboriginal community organisations which have been cited in the discussion above indicate the serious attention which has been paid to the question of the policing and regulation of Aboriginal drinking.

21.1.78 There is a need, however, for public policy consideration of the forms and effects of regulation through monitoring and interdepartmental consultation and review. In Western Australia, a Sobering-Up Centre Research Advisory Group has been established within the Drug and Alcohol Authority in the wake of that State's decriminalisation legislation. The group has identified a number of measurable objectives of both decriminalisation legislation and the sobering-up centres. The objectives include, *inter alia*, reducing police time devoted to public drunkenness and decreasing the numbers in police lockups for public drunkenness. The group has also defined a number of indices of 'system goals', including the phenomenon of offence net-widening (the use of alternative public order charges, for example) and examining 'the attitudes of Aboriginal communities to decriminalisation and sobering-up centres'

21.1.79 The need for such monitoring and evaluation is already evidence in the proliferation of different modes of managing public drunkenness. The conflicting rationales of dry area proclamations and protective custody legislation have been rightly identified by the South Australian Police Department which submitted:

Quite clearly there is a need for some clarification of the appropriate action to be taken where intoxicated persons are found in 'dry areas'. For instance, in as much as other criminal behaviours take precedence over P.I.A. considerations, should it be the case that drinking in a 'dry area', thereby creating a criminal offence and ensuring custody in police cells, overrides the P.I.A. legislation, whereby the individual might ... possibly have been conveyed to a non-police sobering-up facility.

If 'dry areas' are to continue to be used and grow in number, as seems to be the case, and if the objectives of the P.I.A. legislation are to be met, then issues such as these need to be addressed. It is suggested that this is not a matter simply for consideration by the police department, but must be addressed by all those concerned with criminal justice.³⁴

21.1.80 It is essential that the effects of decriminalisation of public drunkenness and the new forms of regulation of public drinking be carefully and thoroughly monitored to ensure that they are not being applied in a discriminatory way against Aboriginal people and in fact acting to increase the rate of the detention of Aboriginal people.

Recommendation 79:

That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.

Recommendation 80:

That the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and

maintain non-custodial facilities for the care and treatment of intoxicated persons.

Recommendation 81:

That legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.

Recommendation 82:

That governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences.

Recommendation 83:

That:

- a. The Northern Territory Government consider giving a public indication that it will review the two kilometre law at the end of a period of one year in the expectation that all relevant organisations, both Aboriginal and non-Aboriginal, will negotiate as to appropriate local agreements relating to the consumption of alcohol in public that will meet the reasonable expectations of both Aboriginal and non-Aboriginal people associated with particular localities; and***
 - b. Other Governments give consideration to taking similar action in respect of laws operating within their jurisdictions designed to deal with the public consumption of alcohol***
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Recommendation 84:

That issues related to public drinking should be the subject of negotiation between police, local government bodies and representative Aboriginal organisations, including Aboriginal Legal Services, with a view to producing a generally acceptable plan.

Recommendation 85:

That:

- a. Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;***
- b. The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and***
- c. The results of such monitoring of the implementation***

of the decriminalisation of drunkenness should be made public.

Recommendation 86:

That:

- a. The use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge; and*
 - b. Police Services should examine and monitor the use of offensive language charges.*
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2 1.2 POLICE POLICIES

2 1.2.1 In this section I shall examine in greater detail a number of issues which affect the capacity of the police in Australia to achieve a reduction in the number of persons taken into police custody. One response might be that police have only a limited opportunity to reduce custodies because they are essentially a reactive agency responding to crime and behaviours which are caused by factors outside their own control. While the limits are recognised here, the evidence before the Commission as well as research on policing in Australia in recent years suggests that there are significant factors within police control or responsibility which bear on the intensity and mode of police response.

21.2.2 An important dimension of this issue is the susceptibility of policing to become more intense in relation to Aboriginal people as a result of local law and order campaigns. Other issues include the allocation of police resources and the possible incentives, including financial incentives, to detention in some police procedures and practices. An additional issue is the mechanisms by which police monitor and supervise the use of the power of arrest and detention to ensure that these powers are not used needlessly.

21.2.3 These various factors may be regarded under the general heading of the policing constraints on the objective of reducing the numbers of arrest and detentions in police custody. They are discussed here under the following headings:

- the politics of policing
- institutional constraints on reducing arrests;
- arrest as a last resort;
- the allocation of police resources.

THE POLITICS OF POLICING

2 1.2.4 Discussion elsewhere in this report outlines the historical role of the police in the dispossession and management of Aboriginal people. This role has included the facilitation of the removal of Aboriginal people from their original lands. It has also involved the development of mechanisms and norms of constant surveillance of Aboriginal people, especially where they reside in or on the margins of non-Aboriginal society.

2 1.2.5 These historical factors create a situation today where policing of Aboriginal people is a highly charged responsibility, replete with political and cultural meanings which affect the police role. Police themselves are the primary determinants of their actions, with their high degree of discretion in relation to both individual actions and policing policies at different levels of the organisation. While police services in Australia have been highly centralised organisations, there are many opportunities for different priorities to determine local level policing. Moreover, some aspects of central administration facilitate policing actions which

have targeted, directly or indirectly, Aboriginal people.

21.2.6 In a number of cases which have been brought to the attention of the Commission it is evident that local political pressures have influenced policing practices which have resulted in increased numbers of Aboriginal people being taken into custody. In some cases it is clear that the increased number of custodies have worsened what was already an excessive arrest rate judged by the norms which prevail in non-Aboriginal Australia. It is disturbing that these examples have occurred in some cases during the period of the Royal Commission.

21.2.7 One illustration is the law and order campaigns by the non-Aboriginal community which took place in north-western New South Wales in 1985 and 1987 to which I referred in Chapter 12. Whatever the reason behind these law and order campaigns in particular localities, a number of studies have shown that excessively high arrest and detention rates occurred in the 'Aboriginal towns' of western New South Wales during this period. This occurred despite the decriminalisation ethos evident in the law reforms of the early 1980s, when the old *Summary Offences Act* was repealed and replaced by a number of more specific public order statutes, including the *Intoxicated Persons Act*.

21.2.8 According to one submission, a combination of political pressures at both State and local levels resulted in substantial increases in police numbers in some western New South Wales towns during this period.³⁵ However, the increase in the rate of custodies is thought not just to be a consequence of increased police numbers. In Wilcannia, for example, where the Western Aboriginal Legal Service has documented the highest rates of detention for Aboriginal people in the State, a police campaign in 1987 resulted in a great increase in detentions of Aboriginal people. The police action resulted in part from a Commissioner's directive to police late in 1987 to enforce particular provisions of the *Offences in Public Places Act 1979*. Additionally, a positive policing program introduced by the local sergeant at Wilcannia between July 1987 and January 1988 resulted in more people being arrested for offensive behaviour, malicious damage and assault than had previously been the case.

21.2.9 Many other accounts of the effects of law and order policies on the arrest rates of Aboriginal people in western New South Wales and elsewhere have confirmed the responsiveness of police to local demands of the non-Aboriginal community to 'clean up the town'. Police have not always been innocent bystanders in these circumstances. While there are some who have resisted the call for more arrests, there are others, in service and retired, who have taken an active part in such campaigns. At times, administration has taken steps which objectively has increased tension; for example, the use of the Tactical Response Group of the police in New South Wales.

21.2.10 Inevitably, the police, in contexts of substantial conflict between the Aboriginal and non-Aboriginal community, are going to be caught between a number of different political demands. But the police are also actors themselves. Their actions in situations of conflict are the result of choices which may continue conflict rather than contribute to resolving it or vice versa. Where Aboriginal communities have sufficient local strength (as, for example, in Echuca, or in Tennant Creek) they have shown that alternative modes of policing can be quickly and effectively implemented, and substantially affect the rate at which Aboriginal people are detained in custody if police reactions are similarly positive. Police and other government authorities, including especially local government authorities, have a responsibility to facilitate the access of Aboriginal communities to decision making which affects policing priorities and local public order regulation. Where they do not, perhaps it is time for more determined action by other government

agencies to balance the political disadvantage which many Aboriginal communities experience.

INSTITUTIONAL CONSTRAINTS ON REDUCING ARRESTS

21.2.11 I have suggested in the previous section that one of the factors that operates to determine levels of arrest is political pressures (which may operate at a local, regional or State level) put upon police officers, but also that the police are themselves actors both at senior administrative levels and at local levels. The bureaucratic nature of policing--the fact that working police officers are not, in spite of some legal doctrines, independent agents enjoying original powers--means that many of the factors determining arrest and detention are related to higher level policies. The fact is, however, that there are limits upon the capacity of more senior officers who are responsible for directives to reduce detention in a way that they might have in mind. There is an interesting example of this disclosed in the evidence relating to the death of Craig Karpany.

21.2.12 Following trouble associated with drinking on the Glenelg (Adelaide) foreshore over one summer, a 'dry area' was declared in the area the following year. Consumption of alcohol in the zone was prohibited. To enforce the declaration, police were organised in 'Operation Clean-Up' with the objective, 'to prevent and detect behavioural offences in Glenelg/Brighton with emphasis on the tourist and recreational areas therein'. The tactics developed in the first year (1987-88) included media advertising of the dry area, a cautioning of offenders in the two months up to December, and report/arrest thereafter, with this direction: 'Members are to use tact and common sense and be mindful that they may exercise their judgement and caution offenders in appropriate cases'.³⁶

21.2.13 Although this special operation was organised in the context of a dry area declaration, the number of interventions on account of infringement of the relevant provision 'consume in prohibited area' in 1988-89 was only a portion of the police work involved. In the five months, November 1988 to March 1989, sixty-two arrests were made, only three of them for consume in a prohibited area. Of the 251 reports made, 143 were for 'consume'. Declaration of the dry area in fact led to a saturation policing which invoked the wide range of police powers in relation to behavioural offences.

21.2.14 Craig Karpany and a friend were at the Glenelg foreshore within the area where consumption of alcohol was prohibited. Craig had a bottle of beer in his possession. This was observed by two police officers who were patrolling the area. The officers approached the two friends: it was not a hostile encounter. Craig was told that he would be reported for the offence of consuming alcohol in a prohibited area. The two officers then returned to the nearby Glenelg Police Station and ran a warrant check on both Craig and his friend. As a result, they returned to the foreshore and arrested the friend on an outstanding warrant. This led to the friend running away, which itself prompted some interactions between the police officers and Craig. The final upshot was that Craig was arrested on a charge of hindering police. The Coroner found that the arrest (although quite lawful) was unnecessary in all the circumstances, and I agreed with him. After various unfortunate incidents, Craig was placed in a cell at the nearest 24-hour police station, some kilometres away, and hanged himself within about a half hour. The high level direction strongly suggested tact and common sense in what was an operation directed against public drinking and attendant behavioural problems in an area which on a summer holiday was densely occupied. As indicated, there were practically no arrests in the period mentioned for 'consume' liquor and sixty-two for other offences. In the particular case, general police procedures led the officers to run a warrant check on persons, one of whom was not drinking, did not have liquor, was

not at the time misbehaving in any way and who was drawn to police attention only because he was in the company of Craig who also was not misbehaving but who had a bottle of beer in hand.

21.2.15 Another constraint of an institutional nature which has the potential to increase rates of arrest and detention, despite a desire by senior officers to reduce those rates, arises by way of incentives to police officers at either a promotional or financial level. Evidence before the Commission indicates that in some jurisdictions the standard of efficiency of individual officers or squads is measured by that person's or group's arrest rate. Should this criteria be built into promotion or career paths in any way, then it is clear that other measures designed to reduce arrest may face considerable impediments. Regarding financial incentives, police in at least two jurisdictions, Queensland and Western Australia, are entitled to reimbursement of meal allowances for meals provided to prisoners. Poor accounting controls leave open the possibility that police in remote areas can benefit considerably from accumulated meal allowances. Similarly, in Western Australia, an allowance paid to a woman for searching a female prisoner is frequently paid to a police officer's wife in small country stations. Each of these potential financial benefits from the detention of prisoners can be regarded as countervailing the attempts of any police administration to encourage management of incidents with procedures other than arrest.³⁷

21.2.16 It is difficult to draw any firm conclusion about the effect of such allowances on the detention rates of Aboriginal people. Given, however, their already high incarceration rates, especially in Western Australia, such allowances can hardly be regarded as disincentives. It is absolutely essential that police services review current procedures to ensure that allowances paid to officers do not operate as an incentive to increase the rate of arrest

ARREST AS A LAST RESORT

21.2.17 A different type of challenge to reform of police practices is posed by the extensive use of the arrest power against Aboriginal people. A number of options are, of course, available to police in proceeding against a person suspected of, or detected, committing an offence. Among these are informal warnings, formal cautioning, reporting and summoning, although the availability and operation of each of these differs from one jurisdiction to another. Even after arrest, the possibility exists of police supervisors exercising, at least in some jurisdictions, a power to discharge detainees and return them to the place of arrest.

21.2.18 Police rules and training typically advise police officers against too ready a use of the arrest power. The Western Australia Police Commissioner, for example, repeated in July 1989 his 1985 Instruction (re-published in 1988) on the necessity of using the arrest power with caution:

*Arrests are not to be made purely as a means of inflicting a penalty on offenders, or because it is an easier method of process. Depriving people of their liberty is an action to be given careful consideration, as it can have serious repercussions on the police image if it is done without due discretion.*³⁸

21.2.19 While this instruction seems to place undue emphasis on the enhancement of the police image rather than addressing the damage done by excessive detentions, it is worthy of comment that the Western Australian Police Commissioner has indicated a number of policy initiatives which aim to increase the use of alternative mechanisms of intervention such as the use of the summons procedure.

21.2.20 The Commissioner's submission to the Commission notes, for example, that there is a judicial mandate to 'un-arrest' a person against whom police have decided not to proceed.³⁹ Such a procedure is given statutory form in South Australia in the *Summary Offences Act 1953* (s.78(5)). This power, of course, does not address the penalising character of arrest, since it protects the lawfulness of the arrest. It is precisely the fact that arrest is itself a penalty, and that it may subsequently lead to harm to the detainee, as in so many of the cases examined by the Commission, that needs emphasis in police training and procedure.⁴⁰

21.2.21 Consequently, it is pleasing that the Western Australian Police Commissioner acknowledges the importance of addressing the issue at a more administrative level, by way of incentives tending to the use of arrest as a last resort. Referring to the current revision of promotional opportunities in the State's police service, the Police Commissioner suggests:

It may be that there is scope within the merit principle and the reward concept of promotion, to enhance the use of the summons option, by acknowledging as departmental policy, the quality of decision making in this regard, at operational level.

Procedure to encourage the use of summons as an option over arrest will be utilised when the current building extensions to East Perth lockup are complete. Provision will be made for an Admissions Officer to:

(i) check the correctness and legality of charges;

(ii) consider the need for arrests as opposed to a summons or caution;

(iii) assess the medical needs of detainees.

If viable, an extension of these arrangements will be considered for other major lockups in the State.⁴¹

21.2.22 I think that these suggested changes are good. Consideration could perhaps be given to extending the arrangements not only to other major lockups, but in a modified form, to smaller lockups.

21.2.23 This attention paid to the type of supervisory and possible career-oriented reforms in relation to the use of arrest and summons has not been evident in the responses of some other police services to this Commission. In South Australia, for example, the use of the discretion to arrest was extensively reviewed in the hearings into the death of Craig Karpany. Assistant Commissioner Lockhead reported that departmental policy 'is clear that arrest is used as a last resort only'. However, the department was not able to provide any evidence of a statistical monitoring of the use of arrest. Statistics kept 'do not distinguish between reports and arrests'. In response to a question whether there was 'any other way in which the Department monitors the exercise of arrest powers', the Assistant Commissioner responded only that 'Supervisors have a responsibility to monitor arrest in accordance with General Order 3065/10-14'.⁴²

21.2.24 South Australian General Order 3065 in fact provides for intensive supervisory oversight of the use of arrest in relation to individual cases (including provision for immediate release---Section 78(5) of the *Summary Offences Act* of those against whom the evidence is insufficient to support a charge). Paragraph 13.4, for example, applies to cases in which the supervising officer ('the member in charge of a police station') considers the matter could have been more

appropriately dealt with by summons. In such a case, the officer will admit the prisoner to bail promptly; instruct the arresting member to submit a report outlining the reasons for arrest and the general circumstances of the incident to the commissioned officer in charge of the division in which the arrest occurred, and complete an Arrest Release Form in duplicate.

21.2.25 The Arrest Release Form (the original of which goes to the Internal Investigation Branch, the duplicate to the commissioned officer in charge of the arresting officer's area for the latter's personal file) should operate as a system of monitoring of the wrong use of the arrest power. It is not known how frequently these parts of the General Order have been invoked.

21.2.26 In my report of inquiry into the death of Craig Karpany, I emphasised the instance of the role of supervising officers in relation to arrests:

At the group sitting with senior members of the Police Force I expressed my view that a change in 'police culture' is required in order to influence officers who are making arrests to use their power to do so with more caution. I also suggested that provision for the supervision of arrests by senior officers would lead to younger officers being more aware of the benefits of reporting over arresting, in that it entailed them in less administrative work.

In thinking over matters since the hearing, I am more convinced of the point I then made. A young Constable is likely to be more influenced by the Station Sergeant congratulating him on not proceeding by way of arrest than by way he was taught at the Academy. Similarly, a young Constable is likely to be strongly influenced against not arresting if he is condemned by his Sergeant for so doing.

It is likely that some defendants charged by summons will not appear. It is important that officers not be criticised in those circumstances for not arresting. Such slip-ups are bound to arise in any human activity; the fact of the matter is that when an arrest is made, the defendant will normally get bail, either police bail or from the court, and not everybody answers their bail. Whether the procedure is by way of summons or arrest, some defendants will not appear.

What is required, I think, is that the atmosphere inside the police force be such that not arresting (other than where that is essential) is regarded as good intelligent policing; that a tough policy of arresting whenever you can is not regarded as good policing.⁴³

21.2.27 There is another aspect of the procedure for the summoning of offenders in South Australia which is worthy of comment. If an officer is of the view that proceeding by way of summons rather than arrest for an offence is more appropriate, he or she must record the name and address of the person and submit a 'report' in relation to the offence to the supervising officer for checking. Once checked, the report is then forwarded for adjudication by the prosecutions section of the department which determines whether or not there is sufficient evidence to base the charge and issue a summons (see Police General Order

3075). Thus, there are two relatively independent levels of review following an officer's decision to issue a report. If at either of these levels it is determined that the issuing of a summons was inappropriate, the report can be withdrawn and not further acted upon, or perhaps form the basis for an informal cautioning of the offender concerned. I think that this process of review by more 'neutral' arbiters is desirable. I am unsure whether the same procedure operates in other jurisdictions. To the extent that it does not, I would commend it to them.

21.2.28 Other administrative and judicial commentary has drawn attention to the excessive use of the arrest power by police. In its report for 1989, the now superseded Queensland Police Complaints Tribunal denounced the arbitrary exercise of the power of arrest without warrant in the light of many instances reviewed by it in which 'the power of arrest has been exercised mechanically, arbitrarily, without cause, or as a summary sanction'. Evidence from 'a very responsible and experienced member of the force' had been that arrest rather than summons was often used 'merely because it is more convenient to arrest'. Further, the tribunal warned of the dangers posed by the possible incentives to the use of arrest posed by assessments of an officer's efficiency on the basis of arrests made.⁴⁴

21.2.29 While these comments bear on the general use of the discretionary power to arrest without warrant, their pertinence to the high numbers of Aboriginal detentions is obvious. The case histories of those whose deaths have been investigated by this Commission indicate the frequency of the use of arrest power. Although the relative use of arrest and summons cannot be readily calculated for Aboriginal people, in its study of the Wilcannia court over six months from November 1987 to May 1988, the Western Aboriginal Legal Service found only eight appearances on summons, against 110 arrests, including thirty-four children.⁴⁵

21.2.30 In spite of judicial exhortation and police department rules and training, there is an urgent need to ensure that summons procedures and other means of addressing offending, short of 'arrest, become more extensively used by police. Where practical matters, such as the amount of paperwork involved in a policing intervention, may affect the use of non-custodial options by police, consideration should be given to changing the balance in favour of the non-custodial procedure.

THE ALLOCATION OF POLICE RESOURCES

21.2.31 Police resources may be used in ways which are likely to increase the rate of Aboriginal detentions. The earlier discussion on the politics of policing has cited instances where non-Aboriginal political forces and institutions have demanded the use of more police force against perceived Aboriginal offenders. These demands can also take place on a State political level.

21.2.32 To what extent do increased numbers of police affect the rate of Aboriginal arrests and detentions? As with other factors in policing, this is only one of a number of determinants of arrest rates. However, there have been notable instances of the apparent effect of increasing police numbers.

21.2.33 In a 1989 review of the impact of new public order legislation in New South Wales, the New South Wales Bureau of Crime Statistics and Research concluded that increased detentions primarily for offensive behaviour (over a six month period in 1988-89 compared with a similar period in 1987-88) were not explained by the introduction of the *Summary Offences Act 1988* (NSW) alone, since there had been some increase which preceded its proclamation.⁴⁶ The study concluded that a complex of circumstances surrounding the Act, rather than the legislation itself, 'may have played a key part in producing the changes', which

included a 293% increase in reports of offensive behaviour, and a similar increase in the number of persons arrested for this offence. Factors explaining the increase (and acknowledged by the New South Wales Police Department's own statistical report) appeared to include a 21% increase in the ranks of constable in the New South Wales Police between 1986 and 1989.

21.2.34 In examining the impact of the legislation in the towns of Bourke, Brewarrina and Walgett, towns with significant Aboriginal populations, the study also noted that there was a 282% increase in these towns of the number of arrests arising from incidents in street locations. There was also a significant increase in the number of arrests for offensive behaviour arising out of police questioning on another matter or on account of drunkenness (decriminalised in New South Wales in 1984).

21.2.35 The very substantial increase in police numbers has been noted by other studies as particularly affecting the western districts of New South Wales with substantial Aboriginal populations. In some cases, those towns were the subject of local campaigns for an increased police presence for at least a decade before: Bourke obtained a 24-hour police station and doubled its authorised police strength numbers between 1976 and 1986,⁴⁷ Wilcannia (which had a population of 1,048 persons at 1986 census) increased its police numbers from four in 1981 to a projected ten in 1988. According to one submission, 'one of the criteria for extra strength would take in the number of charges laid at respective stations'.⁴⁸ The devotion of policing resources in this way can only amplify rather than reduce the incidence of police custodies, especially in a context which involves Commissioner circulars to enforce the street offences legislation⁴⁹ and local government pressure to do the same (see Section 21.2 above).

21.2.36 In Western Australia, there has been an unceasing growth in arrests of Aboriginal people in the last twenty years. Comparison of arrest rates in different towns in Western Australia suggests that the towns with high Aboriginal populations have very considerable numbers of police. Typically, the highest arrest rates among a group of towns identified in the *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* occurred in towns with high Aboriginal populations, which also have very high numbers of police. The highest proportion was in Wiluna, a town with a 1986 census population of 284 (two-thirds Aboriginal people) served by four police officers, a ratio of one officer to seventy-. While there are difficulties with calculating the appropriate ratio of police to population because of differences in definition of geographical area between the police departments and other agencies, the Western Australian evidence seems to suggest clearly the extent to which 'Aboriginal' areas are policed.

21.2.37 Regardless of the possibility that staffing ratios may vary over time, there are a number of factors in staffing calculation in police administration which may result in higher concentrations of police in some Aboriginal areas. 'Work load' and 'work load trends' and 'Population types, e.g. Aboriginal, tourist' are among the factors identified by the Western Australian Police Commissioner as contributing to the assessment of staffing needs.⁵¹

21.2.38 Although there are obvious limits on the extent to which available police resources might be devoted to a particular area of population, the role of factors such as 'Aboriginality' of an area and 'work trends' might be considered to amplify in the longer term the rate of surveillance resulting in police charges. Thus, in Western Australia, one researcher, Broadhurst, has shown that during a period of 50% increase in the number of police in the Broome district between 1973 and 1982, there was a doubling of the rate of police charges in that region. Much of the increased offending reported during this time is related by Broadhurst to the

particular impact of economic development and increasing conflict over land use in the Kimberleys.⁵² The expansion of police capacity, oriented primarily to a pro-active intervention through arrests and charges for offences, amplified considerably the numbers of Aboriginal people coming in contact with the criminal justice system during this period of social conflict.

21.2.39 An alternative perspective on the allocation of police resources is to look at those resources devoted to policing initiatives which are preventive in object. Such measures include police liaison work, the resourcing of training programs and the development of police aide schemes.

21.2.40 I am, of course, aware that police commissioners have a myriad of calls on their budgets and I do not know what the proportion of their budgets are spent on what might be described as preventive or community policing programs, although I have observed at first hand that is a very significant program in the Northern Territory. As mentioned elsewhere in this report, the Northern Territory police school-based program received favourable mention in the report of the Northern Territory AIU.

21.2.41 Another matter relative to the deployment of resources is Aboriginal people's perceptions of the lack of responsiveness to certain of their policing needs. On the one hand, Aboriginal communities and families witness the perfunctory incarceration of their relatives for minor offences involving public drinking. On the other hand, where police aid is needed it is claimed, on some occasions, to be unavailable, or else local police are perceived as indifferent. These issues develop in two particular ways, one being the isolation of some Aboriginal communities, the other being the vulnerability of women and children to domestic violence.

21.2.42 In the Northern Territory, the AIU was told of the demands by Aboriginal people in some remote areas for more police to be available on a permanent basis. Other communities, reliant for the most part on traditional social order mechanisms and rituals, 'want a police presence in their communities if only for the duration of a particular crisis'.⁵³

21.2.43 Reporting the results of consultations in Western Australia on police practices and police and Aboriginal relations, the Western Australian Equal Opportunity Commission noted in June 1990 that a number of sizeable communities in the Kimberleys are without a police presence, and police response at times when they may be needed takes some hours from the nearest stations.⁵⁴

21.2.44 In a number of inquiries which have been undertaken very recently, the appalling levels of domestic violence against Aboriginal women and children have been recorded. These issues are discussed elsewhere in this report. However, it should be noted in the context of the concerns of this chapter that there is a very widespread perception by Aboriginal women of the indifference of police to acts of violence against them. Domestic violence, rape and even murder have been cited as failing to attract the due attention of police and the criminal justice system.⁵⁵

21.2.45 This may seem to be completely at odds with the earlier suggestion of over-policing, but there may not in fact be any contradiction. It may well be the case, and indeed in respect of the complaints that I have received in the Northern Territory, South Australia and Roebourne in Western Australia, it is apparent that the complaint is of over-policing in locations where there is a mixed Aboriginal and non-Aboriginal population at the points, as it were, where the cultures intercept. I have the impression that the complaints about under-policing relate to the remote communities where the population is overwhelmingly Aboriginal, at least in general. There is, however, a very special problem in relation to the Queensland communities where the complaint, at least in my understanding, is not a complaint

as to the under-deployment of personnel but as to the under-deployment of resources to train the community police officers. This is a matter which Commissioner Wyvill has demonstrated in his reports relating to the deaths on these communities as being a most urgent and pressing problem.

21.2.46 I mention these matters of allocation of resources as being matters which directly affect the level of Aboriginal detentions for good or bad. I and my fellow Commissioners are, of course, aware that police services are constantly reviewing their available resources and determining priorities in policing. The material before the Commission suggests that some Aboriginal people's needs are not being met in some areas. In particular, greater support for community policing initiatives, problems with over policing and inadequate policing have been raised by Aboriginal communities and individuals. It is important, therefore, that in reviewing resources police services should, in consultation with individual Aboriginal communities, closely examine these concerns and attempt to develop policing responses which are acceptable to both groups.

Recommendation 87:

That:

- a. All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders;***
- b. Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice;***
- c. Administrators of Police Services should take a more active role in ensuring police compliance with directives, guidelines and rules aimed at reducing unnecessary custodies and should review practices and procedures relevant to the use of arrest or process by summons and in particular should take account of the following matters:***

-
- i. all possible steps should be taken to ensure that allowances paid to police officers do not operate as an incentive to increase the number of arrests;***
 - ii. a statistical data base should be established for monitoring the use of summons and arrest procedures on a Statewide basis noting the utilisation of such procedures, in particular divisions and stations;***
 - iii. the role of supervisors should be examined and, where necessary, strengthened to provide for the overseeing of the appropriateness of arrest practices by police officers;***
 - iv. efficiency and promotion criteria should be reviewed to ensure that advantage does not accrue to individuals or to police stations as a result of the frequency of making charges or arrests; and***
 - v. procedures should be reviewed to ensure that work processes (particularly relating to paper work) are not encouraging arrest rather than the adoption of other options such as proceeding by summons or caution; and***

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- d. Governments, in conjunction with Police Services, should***

consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution.

Recommendation 88:

That Police Services in their ongoing review of the allocation of resources should closely examine, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. In the course of that process of review, they should, in negotiation with appropriate Aboriginal organisations and people, consider whether:

- a. There is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town;*
 - b. The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities; and*
 - c. There is sufficient emphasis on crime prevention and liaison work and training directed to such work.*
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2 1.3 ALTERNATIVES TO ARREST

21.3.1 In this section I will discuss some of the means by which police interventions might be avoided or where unavoidable, might be dealt with by resolution short of arrest or detention in custody. Such means include cautioning programs, the use of summons rather than attest (dealt with earlier), and the potential for community based diversionary programs and facilities to reduce the rate of custody of Aboriginal people.

COMMUNITY-BASED PROGRAMS FOR REDUCING CUSTODIES

21.3.2 While jurisdiction-wide levels of detention of Aboriginal people have continued at excessively high levels throughout the Commission there has been encouraging evidence of innovative programs to address the problem in a number of regions around Australia. On occasion, this appears to have occurred through police initiatives. Important changes in policing, however, have been cited in areas where Aboriginal communities have sought to establish diversionary processes on their own account. These may involve the community establishing its own policing mechanisms, or negotiating with police and other criminal justice personnel on the appropriate management of offenders or intoxicated persons. These initiatives have been reported in quite different regions in Australia.

21.3.3 One example of such an initiative is the Julalikari Council at Tennant Creek in the Northern Territory (to be discussed in more detail in Chapter 29). The Council organises night patrols of the ten Aboriginal town camps in the Tennant Creek area and liaises with the police when they carry out those patrols. The Councillors organising these voluntary patrols are seeking to provide an important structure of self-policing, seeking police help on the terms and in relation to the priorities set by the Aboriginal people themselves:

Camp residents do not call police themselves. They call the Council to attend a dispute and if residents feel that police are required, the Councillors call on their behalf. This means that heavy-handed police surveillance is

minimised, and that police attending complaints are met by Councillors who explain the problem. This avoids misunderstanding by police.⁵⁶

21.3.4 Furthermore, if there are confrontations in the camps during the patrols, the Councillors hold meetings in the camps the following day to attempt to mediate the dispute.

21.3.5 Such mechanisms might be well adapted to development in other camps and communities elsewhere, especially as a means of dealing with the commonly expressed desire of women and older people about the lack of policing support for their protection against alcohol-inspired abuse. Clearly part of the strength of such a self-policing mechanism is that it is not isolated from the community's everyday concerns. The policing role is developed in the context of a range of concerns and responsibilities for housing, regulation of grog (the Council applied to the Liquor Commission for declaration of a restricted area at the camps), control of domestic violence and so on. The successful experience of these patrols has led to their establishment in other Aboriginal communities in the Tennant Creek region.

21.3.6 In other parts of Australia, Aboriginal people live in communities where such a degree of autonomous control may not be possible, but other forms of community organisation facilitate innovative approaches to policing problems. In some areas local Aboriginal people have organised effective diversion through forms of liaison with local police. One such example is the Community Justice Panels (CJPs) operating in Victoria:

The basic concept was of a panel of Aboriginal people who were on roster and would be called on by the police when an Aboriginal was arrested or in trouble. The panel member would come to the police station and might be able to resolve the matter without a charge being laid, for example by taking a drunken person home or to hospital, or by taking a young person home or to a supportive environment.⁵⁷

21.3.7 In those areas where CJPs are in operation (there are currently fourteen panels operating throughout the State), there have been substantial reductions in the numbers of Aboriginal persons being detained in custody. In Echuca, for example, the Commission has been told that before the CJP system was operating, there were between 400 and 500 instances of Aboriginal people being detained each year and that since its inception there have been no Aboriginal people detained for any reason whatsoever. Importantly, there are large numbers of juveniles (reportedly 70% of Aboriginal appearances in the local court) who are avoiding being detained in police cells at all. The CJPs have also taken an active role in making suggestions as to sentencing. I discuss the CJPs in more detail in Chapter 29.

21.3.8 Other forms of liaison exist in different regions. The strengths of the two' which have been discussed here, however, are that they draw on Aboriginal community resources rather than depend on police initiative. Obviously they cannot work in the absence of police co-operation, which I might add, has been regarded highly by the Aboriginal people involved in these enterprises.

21.3.9 The potential for such initiatives to reduce the rate of arrest and detention of Aboriginal people is considerable and should receive earnest support.

CAUTIONING PROGRAMS

21.3.10 In Section 21.2, I have discussed the powers of police to arrest and

summons offenders. There are, however, other forms of policing intervention which have been developed which seek to avoid the processing of offenders through the court system.

21.3.11 A common and important procedure for dealing especially with juvenile offenders is the police caution. I have discussed cautioning procedures in relation to Aboriginal juvenile offenders in Chapters 14 and 30. The power of police to formally caution adults, however, is available only in a few jurisdictions and typically only in relation to a limited number of offences. In South Australia, for example, the formal caution is only available in relation to motor vehicle and traffic offences. The Police General Order governing the cautioning of offenders states that:

it is important that members of the public are not unduly harassed by being reported for trivial matters for which they could have been cautioned.⁵⁸

21.3.12 The Order then lists a series of offences in relation to which cautions 'should' be applied. These include, exceeding speed limits in certain circumstances, disobeying traffic signs and offences pertaining to the vehicle itself. Officers are required to record in their patrol logs the names and addresses of all persons cautioned.

21.3.13 The power to caution has also been extended to other offences in combination with specific operational policing strategies such as the one above referred to which operated in the Glenelg Beach area. In Victoria, I understand that the power to formally caution offenders has recently been made available in relation to shoplifting offences.

21.3.14 It is my view that consideration should be given to the widening of powers of formal caution by individual officers. There are no doubt a range of minor offences in relation to which the power to caution would be well suited. As I will discuss in Chapter 30, the use of cautioning procedures has been adopted in many jurisdictions in relation to juvenile offenders as a means of diverting them from the court system. It is utilised in Queensland in relation to first offenders, and sometimes second offenders who admit their guilt. Plainly, such a power would not be suitable to all offences: the precise offences in respect of which a caution might be given could be defined by reference to sections in Acts which create particular offences. Additionally, however, while I think it important that the option to caution be available to the officer on the street, I also think that there would be merit in a more formal and higher level procedure whereby some prosecution reviewing authority would have the power to issue a caution to offenders. Consideration could be given to empowering this authority to issue a caution conditionally upon:

- an acknowledgment of guilt by the offender, and
- compliance with some simple requirement such as attending a lecture or seminar relative to motor vehicle driving skills or upon some other subject relevant to the offence.

21.3.15 While this issue has not been the subject of discussion or submissions, I think that it is one which could be looked at with advantage. I make, therefore, only the most general recommendation.

21.4 BAIL

21.4.1 In all jurisdictions, an arrested person has the right to be released from custody on bail either at the hands of the police or of the courts on the condition that he/she appear at a later time before the court. Frequently, at least in the past, the person was required to lodge a monetary amount which would be forfeited if he or she did not appear at court at the appointed time. Increasing, the requirement of

a cash sum has become less frequent. The release on bail can also be subject to a number of conditions such as specifying the place of residence for the period of bail or requiring regular reporting at a police station. While the following comments concentrate on police bail, most are equally pertinent to court bail.

21.4.2 The relevance of the application of police bail to the detention of Aboriginal people has been established in the National Police Custody Survey in August 1988 and in other research in Australia.⁵⁹ The lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles.

21.4.3 While acknowledging that there have been during the last decade or so significant reforms in the law, the issue needs to be addressed as a matter of priority in a number of jurisdictions. As this chapter has stressed throughout, the mere attaining of legal reform is of little import if policing procedures and norms cannot address the spirit of reform in relation to all defendants.

21.4.4 The administration of police bail takes place under the statutory guidance of the Bail Acts in various jurisdictions (in Tasmania under the Justices Act). The police procedures are set out under the guidelines, or general orders or police rules. For the great majority of offences for which Aboriginal people have been detained, early release on bail should be accessible. In fact, however, it has become clear that this cannot be presumed.

21.4.5 In the light of evidence before the Commission it is evident that there is a large number of reasons why Aboriginal people might not benefit from early release on bail:

- inability to raise bail moneys;
- no fixed address, required to provide a guarantee of a future court appearance;
- police bail only available at a watch-house, rather than at a local police station or at the point of arrest;
- failure of police supervisors and police procedures (e.g. the organisation of charging procedures, including paperwork) to ensure the earliest possible administration of bail;
- cumbersome, bureaucratic procedures in supervision of bail;
- inadequate police resources, especially in rural areas, resulting in lack of provision for early processing of bail;
- inflexibility or inappropriate nature of bail system to the conditions of life of Aboriginal people.

21.4.6 Clearly a number of these factors are interrelated. The challenge is to design a police procedure which encompasses the duty of police to make provision for the release on bail of all those whose offence permits it. Some indications of the difficulties posed by bail for Aboriginal detainees follow.

MONETARY BAIL

21.4.7 While statutory provisions underlie the administration of bail, the evidence is considerable that police discretion at all levels is very wide in relation to its application. Contrasting examples of procedure and direction from Queensland and Western Australia confirm the point.

21.4.8 In Queensland, Police General Instructions (9.123) provide for the release on bail of persons charged with drunkenness and other simple offences. Without being prescriptive, the rules set out norms for the amount of bail money to be expected on this charge, varying according to the number of previous similar charges. Yet police practice varies enormously in the State. At the Brisbane City

Watch-house, defendants are frequently released on bail of only ten cents, although the Police Rules nominate two dollars as the amount for a first offence rising to six dollars for three or more. In the North Queensland town of Coen, on the other hand, bail amounts of at least ten dollars were noted in the records of the Coen Watch-house.⁶⁰

21.4.9 In Western Australia, on the other hand, prior to the decriminalisation of drunkenness, the Police Commissioner instructed his officers that no monetary bail was to be collected from those charged with drunkenness.⁶¹ The ease with which a simple impediment to release could be administratively addressed by the police authorities is striking. Moreover, more than two years prior to the decriminalisation of drunkenness being proclaimed, police in Western Australia were advised not to detain Aboriginal people for intoxication where alternative facilities were available.⁶²

2 1.4.10 In Victoria, bail for simple offences is most often set on one's 'own undertaking'. However in New South Wales, where monetary bail is usually not set for most minor offences, concern has been expressed at the police practice of imposing bail conditions which are most unlikely to be kept. Examples were given to the Commission of conditions such as prohibition on entering the home town of the arrested person; daily reporting for summary offences; and prohibition on the consumption of alcohol and being within a designated distance of licensed premises. When such conditions are breached, the likelihood of the person returning to custody is increased. Even if such a result is not immediate, a progression to more stringent conditions for future release on bail becomes inevitable, with the ultimate conclusion being refusal of bail on the basis of prior failure to abide by conditions of release.

STREAMLINING BAIL PROCEDURES

21.4.11 While some aspects of police administration may achieve consistency and fairness through strict record keeping, it has been noted by some police officers that some forms of bail procedure are cumbersome in their demand for paperwork. Hence, even though the Western Australian *Bail Act* facilitated the police bail process, police have estimated that completion of paperwork on a bail release application can take up to an hour and a half, when interspersed with other duties.⁶³

2 1.4.12 One consequence may be that police prefer to use s. 18 of the *Bail Act*, applying to a limited number of simple offences, dispensing with bail but requiring a cash surety (no more than the penalty prescribed for the offence), which avoids the 'completion of numerous forms' but nevertheless may penalise those without cash resources. In reviewing the *Bail Act* in Western Australia, the Doig Panel of Review reported to the Attorney-General in May 1990 that the police considered there should be discretion to waive the deposit of cash. It is notable that the Panel appears to have considered sceptically the police request for this discretion as it took the view that 'too many people were arrested for relatively minor offences and therefore there was scope to partly address this issue by proceeding by way of summons in more cases'. However, it did recommend an expansion of the number of offences under which police could proceed under section 18.⁶⁴

21.4.13 The need for a speedy administration of the bail release process should be paramount in the design of procedure and record keeping. A corollary of these comments is that the duties of police in relation to bail should be emphasised by training and procedure. A particularly valuable point, as it seems to me, was made by Counsel for the family in the formal conference session that I had with senior South Australian police officers as part of the inquiry into the death of Craig

Karpany. This young man hanged himself in his cell very shortly after being charged. The arresting police were agreeable to his having bail. But the form of the charge book was such that it suggested as routine the accepting of the charge and recording it, the taking of property and the later consideration of bail. The taking of property would obviously suggest to the young man that he was going to be locked up. Counsel suggested that they should be reversed. The senior officers reacted very positively. The South Australia Police Department has undertaken to consider changing the form of charge and property books to highlight the earliest possible consideration of bail. Unnecessary detention in the cells might be avoided by an earlier consideration of bail.

ON-THE-SPOT BAIL

21.4.14 On arrest for minor offences, the purpose of arrest may well have been achieved by the temporary removal of a detainee from a location of offending. I have been advised that the Commissioner of Police in South Australia has endorsed a proposal to enable police officers arresting an offender to administer bail at or near the location of arrest. Currently, under *the Summary Offences Act* (s.78(1)), a person apprehended without a warrant must be delivered 'forthwith' into the custody of the officer in charge of the nearest police station having facilities which are 'continuously available for the care and custody of the person apprehended'. In practical terms, this often means that the arrested person is taken to a location some distance from the point of arrest. In very remote areas, this legislative requirement could have quite oppressive consequences for both police and offenders. For example, if a person was apprehended in a remote community some distance from a police station, the person would have to be transferred, to that police station where his/her charges would be processed and consideration given to release on bail by the officer in charge. If the person is released on bail, there is no obligation on police to return that person to the place of arrest. The effect of the proposal currently under consideration would be to empower the arresting officer to administer bail without having to convey the arrested person to a charging station. It is my view that this is a valuable initiative and one which should be pursued.

ABORIGINAL DISADVANTAGE IN MEETING BAIL CRITERIA

21.4.15 Many of the restrictions on access to police bail of Aboriginal detainees have to do with their failure to meet the criteria for release. Prior failures to appear at court, lack of a fixed residential address, lack of employment and other such indicators of possible non-attendance at court have been regarded as contributing significantly to Aboriginal disadvantage in the bail process.

21.4.16 Two comments should be made in relation to these observations. The first is that changes in law and policing practice are clearly capable of achieving very significant change over a short period of time in the release on bail of Aboriginal detainees. Comparing custodies in Kalgoorlie in 1987 and 1990, the Criminology Research Unit reports that there was an increase from 13% to 55% in the proportion of Aboriginal people bailed. There was still a statistically significant difference in the likelihood of release on bail of Aboriginal people and non-Aboriginals, but the scale of the difference had decreased.

21.4.17 Second, it might be suggested that the remaining difference evident in the Kalgoorlie case needs to be addressed through measures which specifically recognise Aboriginal social and cultural difference. In particular, it has been suggested in various parts of Australia that the issue of the mobility of Aboriginal defendants be recognised through provision for an undertaking by an Aboriginal elder or other community member on behalf of a detainee.

21.4.18 In its submission to the Commission, the Queensland Attorney-General's Department acknowledged the inequitable outcomes of current bail procedures:

*Queensland bail laws under the Bail Act are strict in order to enforce attendance in Court (which is desirable in the interests of the administration of justice) but may not be designed to cater adequately for people who are not trying to escape justice but through mental or physical disability, life style, communication difficulties or lack of education are incapable of reliably getting themselves to court at an appointed place or time. Courts take a stern view of people who fail to appear in Court without a valid excuse, but a valid excuse tends to be determined consciously by reference to normal standards. In reality many disadvantaged people before the Courts are not capable of conforming to such standards and, arguably, may be unfairly penalised if this results in them failing to appear in Court. In some cases, in the north, a difficulty involved is the distance required to be travelled to appear in the superior Courts in Cairns.*⁶⁵

21.4.19 The department suggests that some administrative remedies might be available to address these problems; for example, by circuit courts closer to the Aboriginal communities or by better provision of transport to bring a defendant to court from their place of residence.

21.4.20 In Western Australia Commissioner Dodson observed:

*In relation to bail, Aboriginal people observed themselves to suffer obstruction by police; delays; the idiosyncrasies of the Magistrates; the problem of prior convictions; and the incapacity to raise sureties.*⁶⁶

21.4.21 In addition, on the basis of information placed before him, he found 'that Aboriginal people are still being denied bail because of the problems of language and understanding'.⁶⁷ Such a situation demands the provision of interpreters whenever the need arises.

21.4.22 Other remedies to the disadvantages outlined may involve a greater empowerment of Aboriginal people and communities in relation to the administration of justice procedures. Such a mechanism is suggested by the Queensland Department of Attorney-General in allowing persons other than police officers (such as Aboriginal elders, for example) to supervise bail conditions.

BAIL 'ENTITLEMENT'

21.4.23 A person's entitlement to bail is expressed under the various bail Acts in differing terms, but in all cases giving police a wide discretion as to the granting of bail: for example in Victoria, a person 'shall be granted bail' (s.4 *Bail Act 1977*) and in New South Wales, a person is 'entitled to be granted bail' (s.8 *Bail Act 1978*), in each case of course subject to certain forms of offence exclusion and so on. But in Western Australia bail entitlement is qualified by the provision that a person is entitled to be 'considered' (s.5 *Bail Act 1982*), while in South Australia a person is 'eligible for release on bail' (s.4 *Bail Act 1985*) although s. 10 of the Act provides that the bail authority should release the person on bail unless, having regard to the prescribed grounds, the authority considers otherwise.

21.4.24 It is uncertain to what extent the differences in statutory provision creates different outcomes. The August 1988 National Police Custody Survey reported Western Australia and South Australia as having much higher bail release rates than Victoria and New South Wales: however, it was suggested that this could be explained by the high level of police custodies in these States. It is my view that, where police are involved in bail decisions it would be preferable that a presumption of a right to bail be created. Additionally, a duty should be placed on police to both promptly advise the arrested person of his/her right to apply for bail and the means by which this can be achieved and to take all necessary steps to facilitate the person's early release. This would be subject of course to the appropriate exclusions as the case may be. Bail is an important area of police discretion: it is thus desirable that both the legislation and police procedures governing the granting of bail be structured to facilitate its main aim, being the early release of a person who is not yet tried or convicted of an offence.

21.4.25 I mention one further matter relating to the granting of bail which was raised by Commissioner Wootten in his report of inquiry into the death of Mark Revell. Under the *Baa Act* (NSW), the police have no power themselves to review a bail decision. Thus, once a decision refusing bail is made by an officer, that decision cannot be overturned, except by a justice. Commissioner Wootten noted a practice which had developed amongst police officers to defer consideration of bail for persons who were affected by alcohol or other drug to a substantial degree until the person was sufficiently sober to be released. It appears, however, that such deferral has no basis in law and is a practice which is potentially open to abuse. I do not know if this is a problem in other jurisdictions: however, it is important that it be addressed such as by giving the officer who made a decision refusing bail (or some other officer) the power to subsequently review that decision.

21.4.26 There are particular considerations regarding juveniles and bail which have previously been discussed in Chapter 30.

NON-ATTENDANCE IN ACCORDANCE WITH BAIL

21.4.27 A breach of bail in the form of non-attendance at court as required by the bail agreement can be a not uncommon cause of Aboriginal people being detained in custody. Courts are empowered to issue warrants for arrest in such circumstances, There are no doubt cases where that course is well justified. However, the submissions from the Queensland Attorney-General's Department which I earlier referred to well makes the point that sometimes Aboriginal people do not attend court, not out of total disregard for the obligation to attend but by reason of physical disability, communication difficulties, life style, or lack of education which makes it difficult for them reliably to be at court on time. One other factor, which in some areas can create a great dilemma for Aboriginal defendants, is a strongly felt obligation associated with the death of a family member not contemplated when the bail agreement was entered into. A solicitor with the Katherine Region Aboriginal Legal Aid Service informed me that, generally speaking, it was not difficult to obtain a simple adjournment of proceedings in circumstances where clients from outlying communities failed to attend court where some message had been received relating to the non-attendance or where counsel could, out of his/her own knowledge of the circumstances, suggest some reasonable explanation. In these cases the service would undertake to see that the defendant was aware of the new court date. It was no doubt expected to do its best to secure the person's attendance. This attitude on the part of the Northern Territory magistrates is to be applauded and may be a useful experience to be noted in other jurisdictions.

Recommendation 89:

That, the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice. Furthermore the Commission recommends that the factors highlighted in this report as relevant to the granting of bail be closely considered by police administrators.

Recommendation 90:

That in jurisdictions where this is not already the position:

- a. ***Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;***
 - b. ***An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and***
 - c. ***There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.***
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Recommendation 91:

That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:

- a. ***to enable the same or another police officer to review a refusal of bail by a police officer;***
 - b. ***to-revise any criteria which inappropriately restrict the granting of bail to Aboriginal people; and***
 - c. ***to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station.***
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Chapter 22 IMPRISONMENT AS A LAST RESORT

Chapter 22 examines the question of the extraordinarily high imprisonment rate of Aboriginal people and the ways in which the court process and particularly the sentencing process may contribute to this state of affairs. After considering the statistics available on the rates of imprisonment of Aboriginal people, I then consider the way in which a person's prior history of contact with the criminal justice system can adversely affect that person's chances of receiving a non-custodial sentence. In the next main section of the chapter I explore certain aspects of the court process which may disadvantage Aboriginal people and discuss ways in which these processes can be modified to reduce the anxieties felt by many Aboriginal people about the court system and safeguard their rights. Community based justice initiatives and Aboriginal Legal Services are discussed in this context. I then consider the various non-custodial sentencing options which are currently available such as community service orders and home detention schemes and the important role that community-based options can play in reducing the level of imprisonment for Aboriginal people. Finally, attention is given to the issue of fines and fine default, and the way in which this substantially contributes to the over-representation of Aboriginal people in this country's correctional institutions. I conclude that, while there have been many positive initiatives in the various jurisdictions, these have primarily been in a piecemeal fashion and that greater efforts are required to monitor and evaluate new developments in order for the benefits to be felt on a national basis.

2 2.1 INTRODUCTION

22.1.1 Of the 99 deaths of Aboriginal people investigated by this Commission 33 of those deaths occurred in prison and in another 10 cases deaths occurred in a police cell which had been designated as a prison for the purpose of the person serving a term of imprisonment. Of the deaths which occurred in prison, over half were due to natural causes. During the same period of 1 January 1980 to 31 May 1989 only one-third of deaths among non-Aboriginal prisoners (82 cases) were due to natural causes. The number of deaths of Aboriginal people which were due to self-inflicted injuries whilst in prison (7 cases) comprised 21% of all Aboriginal deaths in prisons and this may be compared with the situation of non-Aboriginal prisoners for the same period. For the latter group there were 121 such self-inflicted deaths comprising 48% of deaths of non-Aboriginal prisoners during

the relevant period.¹

22.1.2 It is clear from my investigations and those of other Commissioners (see Chapters 2 and 23) that Aboriginal prisoners are particularly prone to death from natural causes in prisons owing to the health problems which Aboriginal people experience in the broader community. The significant risk of deaths by natural causes whilst in prison occurs notwithstanding the fact that Aboriginal people generally are serving shorter sentences of imprisonment than non-Aboriginal people.² It also remains a significant risk notwithstanding the tragic irony that evidence suggests the risk of death from such illnesses--and from alcohol-related violence or motor vehicle accidents is greater outside of custody. Research conducted by the Criminology Research Unit cautions against making direct comparisons between the rate of death of Aboriginal prisoners and those on non-custodial orders but, nonetheless, shows that the death rate of those Aboriginal people on non-custodial orders is approximately twice that of Aboriginal prisoners.³

22.1.3 As will be seen from the following section (Section 22.2) the imprisonment rate of Aboriginal people is extraordinarily high throughout Australia, and that fact alone significantly increases the probability of there being further deaths in custody. This picture of the disproportionate rate of imprisonment was one of the factors which influenced Commissioner J. H. Muirhead, QC to recommend in his *Interim Report* (at Chapter 4) that all governments commit themselves to the objective that imprisonment be seen as a last resort.

22.1.4 The reduction in the rate of imprisonment can be achieved at many levels. As noted in Chapter 21 of this report, there are a variety of legislative and procedural reforms which can be undertaken with the result that persons who may have otherwise been sentenced to a term of imprisonment avoid the sentencing option by being diverted from the court process. But once the person has come before a court the considerations which arise will be different. At this point we need to consider the extent to which the sentencing process itself militates against the principle of sentencing as a last resort.

22.1.5 To what extent, if at all, are Aboriginal people peculiarly disadvantaged in the sentencing process? As will be seen in Section 22.3 those Aboriginal people who died in prison, for the most part, had many prior convictions at the time of their last sentence. Prior convictions are an important factor in determining the nature and length of sentence which a person may receive from the court. This will be particularly so if the prior convictions are for similar offences to that for which the person is appearing before the court. Does that fact of itself lead to discrimination in the sentencing process? Given the extraordinary disadvantages which Aboriginal people face in their dealings with non-Aboriginal society, in their opportunity to pursue employment in the economic options available and, in particular, in the fact that their lives are lived very much in public view and with constant police surveillance, is it not inevitable that they will present before the courts with prior convictions? Does the sentencing process reflect an awareness that the fact of prior convictions must be offset against those other factors?

22.1.6 As will be seen in Chapter 13 the nature of the policing of Aboriginal communities is such that there tends to be a high concentration of police officers and a high degree of policing in areas where Aboriginal people live. As a consequence, given the tensions which exist between Aboriginal people and police in many parts of Australia, there is a high probability--reflected as a fact by relevant statistics--that Aboriginal people would be disproportionately arrested and brought before the court.

22.1.7 A recent study of the juvenile justice system in South Australia by Gale,

Bailey-Harris and Wundersitz⁴ pointed clearly to the influence on sentencing which prior convictions had for Aboriginal people and the unfairness which that can entail. Their research demonstrated that early decisions about whether an Aboriginal child should be

- cautioned;
- referred to a Children's Aid Panel or to court;
- arrested or charged by summons,

were all demonstrably exercised more frequently to the disadvantage of Aboriginal people than to non-Aboriginal people. These disadvantages directly increased the probability of a child obtaining a conviction and, hence, being at greater risk of receiving detention orders. I have already discussed these findings in Chapter 14 on young Aboriginal people. They are findings that have obvious significance for the entry of juveniles into the adult criminal justice system.

22.1.8 The Northern Territory Aboriginal Issues Unit (AIU) reported to me that Aboriginal people in the Territory found the reliance on prior convictions an objectionable aspect Of the Australian legal system. The

Under Aboriginal law, once an offender is punished, the matter is finished, and there is no conception in Aboriginal law of that person having a 'record'. However, under Australian law, an offender is sentenced and undergoes some form of custodial or other punishment. If that person offends again, or repeatedly, the previous convictions and sentences, will be raised in each new case as 'the record' or 'priors'. This information bears on the new sentence required and it is clearly understood that Australian punishment becomes more severe with more 'priors'. Aboriginal people find this refusal of Australian law to regard a sentence completed as 'finished business' incomprehensible. This is a clear conflict between Aboriginal law and Australian law.⁵

22.1.9 From time to time in different jurisdictions in Australia there has been public discussion about the question of whether, in the interests of rehabilitation, there should be an opportunity for an offender 'to wipe the slate clean' by having prior convictions expunged from police records. This discussion very often centres around the interests of persons who had received convictions as juveniles, but the debate has at times extended more widely to encompass most people who, as adults, have avoided offending for a number of years but whose prospects of employment are reduced by the fact of having to disclose past convictions. As the whole of this report will demonstrate, there are a wide range of social and historical factors which explain to a very great degree the involvement both of Aboriginal juveniles and adults in the criminal justice system. For these reasons it would be appropriate for a proper examination to be conducted into the question of whether measures should be put in place to have prior convictions expunged from the records of Aboriginal people in certain circumstances. It was not possible for me during the course of this inquiry to examine this question in detail, and, of course, any proposal in this regard would have to consider the rights and interests of non-Aboriginal people. Whilst non-Aboriginal people may not have experienced the same historical and social factors which I have mentioned, a proposal for reform in this area which related solely to Aboriginal people may well be regarded as discriminatory and may even be impossible to implement.

22.1.10 When presenting themselves for sentencing, are the court procedures such that Aboriginal people are generally disadvantaged in their ability and

opportunity to present a case against their imprisonment? In Section 22.4 I will consider factors in the court process which may be relevant in this regard.

22.1.11 When, finally, all procedures which may divert an Aboriginal person away from the sentencing process have been exhausted and the person faces a judge, magistrate or justice of the peace for sentencing, the most critical factor in the sentencing process will be the range of options available to the sentencer. In recent years that range of options has been greatly expanded by a series of legislative initiatives which recognise the principle of imprisonment as a last resort and provide further alternatives to imprisonment. It is in this area of reform that the most significant reduction in the rate of Aboriginal imprisonment may occur and in Section 22.5 I will examine these initiatives in some detail. In Chapter 30 I examine the diversionary and sentencing options pertaining to Aboriginal youth.

22.1.12 As will emerge throughout this chapter there are demonstrably valuable reforms which can occur at all stages of the judicial process and which can significantly reduce the rate of Aboriginal imprisonment, providing that the options which are made available to provide alternatives to imprisonment are in fact employed to that end by the sentencing authorities. All of these reforms are entirely consistent with the other objectives of the criminal justice system the punishment of wrongdoers and the protection of the public. Yet the reforms are being introduced in a piecemeal fashion across Australia and some States have, as yet, failed to adopt reforms which have proven elsewhere to be beneficial. To some extent this piecemeal approach is inevitable in a Federation such as ours where almost total responsibility for criminal justice lies with the individual States and Territories. Many of the legislative reforms are in the very early stages of implementation. Developments in this area should be carefully monitored and assessed by correctional and other authorities in all jurisdictions. Whilst careful evaluation is appropriate the extraordinary level of over-representation of Aboriginal people in custody calls for decisive and urgent action and where there is evidence that initiatives adopted elsewhere have merit then, in my opinion, the evaluation process should not be unduly prolonged. As will be demonstrated in this chapter very many of the initiatives can be adopted without significant impact on financial or other resources.

22.1.13 There is one important note of caution which I should raise before considering in detail the processes which may be adopted to reduce the level of Aboriginal over-representation in prisons. All of those processes, if adopted, will have a significant impact on Aboriginal imprisonment rates, but there is one critical demographic factor which will impinge on these efforts. The Aboriginal population is a very youthful one, much more so than the non-Aboriginal population, and the demographic trends are such that proportionately more Aboriginal people than non-Aboriginal people will be represented in those age categories which comprise the majority of people imprisoned.

22.1.14 In a research paper prepared for the Royal Commission by Dr Alan Gray and Mr H. Tesfaghiorghis of the National Centre for Epidemiology and Population Health titled 'Social Indicators for the Aboriginal Population of Australia' the researchers say the following:

It is in the years of young and middle adulthood that Aboriginal population growth is now concentrated, with the consequence that it is issues which affect these age groups which become of increasing policy importance. In these age groups, there are issues of employment, housing and health, and of particular importance to the Royal Commission into Aboriginal Deaths in Custody, disproportionate representation of Aborigines among

people in custody of police and prisons. Suppose, for example, that young Aboriginal adults continue to be imprisoned at rates similar to those prevailing now'-because the Aboriginal population is growing much more quickly than the general population at young adult ages, there is a prospect that Aborigines will constitute even larger proportions of people in custody in the immediate future.⁶

Recommendation 92:

That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.

Recommendation 93:

That governments should consider whether legislation should provide, in the interests of rehabilitation, that criminal records be expunged to remove references to past convictions after a lapse of time since last conviction and particularly whether convictions as a juvenile should not be expunged after, say, two years of non-conviction as an adult.

2 2.2 STATISTICS ON SENTENCING

22.2.1 There are no statistics on the sentencing of offenders which distinguish between Aboriginal people and non-Aboriginal people on a national basis and which would have enabled us to compare the sentences imposed by the courts in different States and Territories. I am of the view that this is quite unsatisfactory and that greater efforts must be made by the relevant authorities to redress this situation. Such statistical information as we have been able to collect on sentencing has come from correctional authorities, and this, while better than nothing, is not entirely satisfactory. It tells us nothing about the large numbers of people who are dealt with by the courts but who are not sentenced to prison, or any of the non-custodial options.

22.2.2 It is particularly in the category of shorter sentences that the disproportionate rate of imprisonment is most pronounced. In Western Australia, by way of illustration, the Department of Corrective Services has reported that 55.2% of all prisoners sentenced to terms of imprisonment of up to one year in 1988-89 were Aboriginal people.⁷

22.2.3 As indicated in earlier chapters and also in a number of papers prepared by the Criminology Research Unit of the Royal Commission, Aboriginal people are grossly over-represented in all Australian jurisdictions at all stages of the criminal justice process. In general it has been found that the level of Aboriginal over-representation is higher for persons received into prison than it is for persons actually in prison at any particular time.⁸ A small survey of sentenced prisoners entering prison during April 1989 in all Australian jurisdictions produced data, shown in Table 22.1 below, which indicated that the number of Aboriginal prisoners received was 20.4% of the total. This table also shows that Aboriginal receptions comprised 68.1% of the total in the Northern Territory and 56.4% of the total in Western Australia.

TABLE 22.1: SENTENCED PRISONERS RECEIVED, BY ABORIGINALITY AND JURISDICTION, APRIL 1989

<i>Jurisdiction</i>	<i>Aboriginal</i>	<i>Non-</i>	<i>Not Stated</i>	<i>Total</i>	<i>Per cent</i>
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		<i>Aboriginal</i>			<i>Aboriginal</i>	
NSW(b)	44	416	73	533	9.6	
Vic	11	216	-	227	4.8	
Qld	55	327	-	382	14.4	
WA	123	95	-	218	56.4	
SA	46	162	1	209	22.1	
Tas	11	74	-	85	12.9	
NT	47	22	-	69	68.1	
Aust	337	1312	74	1 723	20.4	

(a) Percentage of those persons for whom Aboriginality was stated in the data collection

(b) Including prisoners sentenced in the ACT

22.2.4 These figures can be used to calculate the Aboriginal and non-Aboriginal rates of receptions into prison for each jurisdiction and for Australia as a whole (that is, receptions per 100,000 Aboriginal and non-Aboriginal prisoners aged 17 years or more as shown in the 1986 census of population and housing). From these rates the levels of Aboriginal over-representation may be calculated and these are shown in Table 22.2.

22.2.5 From this table it can be seen that the national over-representation rate for Aboriginal adult prison receptions was 23.4. In other words, an Aboriginal adult was over 23 times more likely than a non-Aboriginal adult to be sentenced to prison during that time. It can also be seen from this table that the over-representation level for Western Australia was at the remarkably high figure of

TABLE 22.2: ABORIGINAL AND NON-ABORIGINAL ADULT PRISON RECEPTION RATES, BY JURISDICTION, APRIL 1989

<i>Jurisdiction</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Over-representation</i>
New South Wales	137.9	10.6	13.1
Victoria	153.7	7.3	20.9
Queensland	165.3	17.8	9.3
Western Australia	587.6	9.5	61.6
South Australia	572.9	16.3	35.2
Tasmania	315.5	23.9	13.2
Northern Territory	245.9	25.1	9.8
Australia	270.5	11.6	23.4

22.2.6 The proportions of prisoners who are identified as Aboriginal at a single point in time are generally lower than the proportions of prison receptions so identified, because on average Aboriginal offenders are sentenced to shorter periods than are non-Aboriginal offenders. Nevertheless, the data from censuses have been shown to be relatively stable over many years, and they are also useful as they reflect the reality of who is in prison at a particular time. The national prison census of 30 June 1989, for example, showed that on that date there were 12,964 persons in gazetted prisons throughout Australia, of whom 1,825 were identified as Aboriginal or Torres Strait Islander, and for a further 172 prisoners Aboriginality was not stated. Thus, for Australia as a whole, 14.3% of the total number of prisoners for whom Aboriginality was stated were identified as Aboriginal on that date. The basic facts for each jurisdiction are shown in Table 22.3.

TABLE 22.3: PRISONERS IN CUSTODY, BY ABORIGINALITY AND JURISDICTION, 30 JUNE 1989

<i>Jurisdiction</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not Stated</i>	<i>Total Aboriginal</i>	<i>Per cent</i>
NSW(b)	415	4 861	7	5 283	7.9
Vic	86	2 156	14	2 256	3.8
Qld	412	1 855	122	2 386	18.2
WA	558	010	-	1 568	35.6
SA	102	761	8	871	11.8
Tas	9	215	21	245	4.0
NT	243	109	-	352	69.0

Aust	1 825	10 967	172	12 964	14.3
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(a) Percentage of those prisoners for whom Aboriginality was stated in the census.

(b) Including ACT

22.2.7 Using these figures, together with the adult Aboriginal and non-Aboriginal population figures in the same way as above, the Aboriginal and non-Aboriginal adult imprisonment rates as well as the level of Aboriginal over-representation for each jurisdiction can be calculated. The results of these calculations are shown in Table 22.4, from which it can be seen that for Australia as a whole an Aboriginal adult is over fifteen times more likely to be in prison than is a non-Aboriginal adult. The levels of over-representation for the individual jurisdictions can also be seen with Western Australia being the highest and Tasmania being the lowest.

**TABLE 22.4: ABORIGINAL AND NON-ABORIGINAL ADULT(a)
IMPRISONMENT RATES AND LEVEL OF OVER-REPRESENTATION, BY
JURISDICTION, 30 JUNE 1989**

<i>Jurisdiction</i>	<i>Aboriginal</i>	<i>Non- Aboriginal</i>	<i>Level of over- representation</i>
NSW(b)	1 300.4	118.1	11.0
Victoria	1 201.3	73.2	16.4
Queensland	1 238.4	100.8	12.3
Western Australia	2 665.6	101.5	26.3
South Australia	1 270.4	76.5	16.6
Tasmania	258.2	69.3	3.7
Northern Territory	1 271.5	124.5	10.2
Australia	1 464.9	97.2	15.1

(a) Prisoners per 100,000 of the relevant adult population (17 years and above) at 1986 Census of Population and Housing

(b) Including ACT

22.3 RECIDIVISM AND PRIOR ARREST

22.3.1 Of the 33 cases of Aboriginal deaths in prisons only 7 were imprisoned for the first time when death occurred. A portrait of the 33 people who died in prison would be typical of the general picture for Aboriginal prisoners in that it would show a substantial history for all of them of prior arrests, convictions, and, in most cases, sentences of imprisonment. Aboriginal people in prison invariably presented to the courts with prior convictions and with a history of apparent recidivism; in other words, they presented themselves to the sentencing judge or magistrate as people who had committed further offences notwithstanding such leniency as may have been extended to them on prior occasions.

22.3.2 As this report demonstrates, Aboriginal people are grossly over-represented in the prison population in Australia. Changing that situation will require initiatives at many levels, the most important of which will be measures to improve the social and economic situation of Aboriginal people. Unfortunately, changes in the underlying social and economic areas have come too late or too slowly to prevent many Aboriginal people from being caught up in the criminal justice system. For these people what is of immediate concern is that policies and programs are applied which might direct them away from that system wherever possible; or if not, might provide alternatives to imprisonment. The most significant change will occur when sentencers are convinced that non-custodial sentences are, generally speaking, the sentencing option most likely to allow rehabilitation of offenders. Coupled with such a decision by the sentencers there must also be a change in the community attitudes so that the public recognise that their best interests are served by the courts adopting sentencing options. The options that should be considered are those which encourage the rehabilitation of offenders without overlooking the appropriate needs of the broader community for protection and for the punishment of offenders. One factor which has a critical bearing on the

extent to which sentencers and the public are willing to adopt or endorse non-custodial options relates to recidivism.

22.3.3 Recidivism relates to the repetition of offending, but for research purposes it is generally defined as return to prison. A person who comes before the court with a history of prior convictions reflects the past failures of the system to provide rehabilitation and deterrence and presents a particular problem to the sentencer. Where on any previous occasion a court has sentenced the offender to imprisonment, so much the less is the prospect of the offender receiving a non-custodial sentence on a later occasion. If the offender again appears charged with a similar offence to that for which he/she was previously imprisoned, so much the greater are the prospects of further imprisonment. Such an offender is caught in a vicious cycle. The more times imprisoned the less are the prospects of rehabilitation, the greater the prospects of re-offending. For a person with limited education, few employment prospects and little income the prospects of re-offending are great. If that person is also highly visible to police so that in the event of offending the prospect of arrest is also great then the vicious circle is likely to be quickly completed. For many Aboriginal people this vicious circle is the reality of their lives. Where alcohol dependence is also a factor then so much faster is the circle completed and the process repeated.

22.3.4 Aboriginal recidivism is a matter of serious concern. Statistics with respect to recidivism among the Australian prison population are inadequate, but statistics that do exist present a grim picture.

22.3.5 Substantial studies have been made in Western Australia over a five-year period and have led to a report in 1984 by Dr Rod Broadhurst and others, which established that the probability of ultimate recidivism for Aboriginal males was 80% with a median time before failure of approximately 11 months after last release from imprisonment. This is compared with the non-Aboriginal probability of failure for a male being 49% with a median time of 19 months. For Aboriginal females the rate was 75% compared with 25% for non-Aboriginal females.⁹

22.3.6 Recently the authors of the original study updated it to examine the recidivism of prisoners released for the first time from prisons between 30 June 1975 and 30 June 1987. For Aboriginal males the recidivism rate had marginally dropped to 76%; for non-Aboriginal males it had dropped to 45%. The rate for Aboriginal females had reduced to 69%. The non-Aboriginal female rates had increased to 36%.¹⁰

22.3.7 These very high recidivism rates for Aboriginal people in Western Australia could well be repeated if similar studies were conducted in other States. Some evidence received by Commissioners has certainly suggested that this would be the case.¹¹ On the other hand, the Secretary of the Department of Correctional Services in the Northern Territory claims that recidivism rates over a four-year period, 1 July 1985 to 30 June 1989, were only 25%.¹² Whilst the Northern Territory study did not differentiate between Aboriginal people and non-Aboriginal people, given that approximately 70% of the Northern Territory prison population at any time is Aboriginal, it must follow, if the claims are accurate, that the Northern Territory Aboriginal recidivism rate is much lower than that in Western Australia. The Northern Territory study was based on a computer tracking of 3,371 individual sentenced prisoners or persons serving fine default imprisonment over the four-year period. The conclusion reached was that over the four years 75% of those persons were imprisoned once only, thus leading to the statement that the recidivism rate was 25%. I do not pretend to know how reliable this method may be as an assessment of recidivism. There are clearly some major limitations in this study (for example, those imprisoned in the last of the four years

have, at most, been tracked for 12 months). Once again, one is left regretting that the statistical information is so limited in Australia as to preclude the making of confident assumptions.

22.3.8 Whatever may be the respective recidivism rates throughout Australia, it is clear that if recidivism is to be avoided then the factors which lead to the high rates must all be addressed. Among such factors identified in the 1990 study by Dr Broadhurst and his colleagues were these:

- Age: younger prisoners had a very much higher probability of re-offending than older prisoners.
- Schooling: for Aboriginal students, unlike the situation for non-Aboriginal students, greater exposure to schooling did not correspond to lower rates of recidivism.
- Employment: prisoners who had a job at the time of arrest or who found work immediately after release from prison had lower probabilities of failure than the unemployed.
- Marital status: single prisoners or those living in *de facto* relationships or who were separated had higher risks of failure
- Sentence type: prisoners released unconditionally had higher recidivism rates than those released on parole.
- Escapes: prisoners who escaped had higher recidivism rates than others.
- Finances: prisoners with more than \$200 on release had improved prospects both in terms of ultimate probability and as to the time before failure.
- Special leave: prisoners who had received special leave had lower rates of recidivism.

22.3.9 The factor of age is particularly important. The recidivism rate for Aboriginal juveniles is alarming. These are the next generation of potential deaths in custody, and in no area is it more important to devise and implement effective strategies to prevent imprisonment than it is with respect to Aboriginal children and youths. The question of programs for Aboriginal children and youth and the rates at which they are over-represented in the criminal justice system, and in institutions, is dealt with in Chapter 14.

22.3.10 There is a popular view that Aboriginal people are imprisoned for minor offences only. This impression, gained possibly from the fact that Aboriginal prisoners tend to be serving lesser sentences than those generally served by non-Aboriginal prisoners, does not reflect the reality. It should be stressed that Aboriginal people come before the courts overwhelmingly for minor offences in so far as the great majority of appearances before courts occur before the lower courts and relate to minor offences arising from public drunkenness. For the great majority of those matters Aboriginal people, in common with non-Aboriginal people, are not imprisoned. Whilst there are some differences in the nature and extent of offences for which Aboriginal people are imprisoned compared with non-Aboriginal people, it is clear that Aboriginal people, to a significant degree, are imprisoned for serious offences. The Queensland Corrective Services Commission (QCSC) has calculated, for example, that at 30 June 1989, 47.5% of Aboriginal and Torres Strait Island prisoners were serving sentences for serious offences of violence and a further 8.5% were imprisoned for robbery offences, including armed robbery.¹³ This question is dealt with in more detail in Chapter 8.

22.3.11 There are, however, categories of offences which have a quite unnecessary effect on recidivism. For example, there is a very high incidence of imprisonment in the Northern Territory for motor vehicle offences. Whilst some of these undoubtedly relate to serious misbehaviour, the genesis of many such convictions will be the fact that the person never obtained a driving licence and upon conviction for that offence was disqualified from driving for a period and then

committed the offence of driving while disqualified. Commissioner Dodson has told me that in Western Australia the Police Commissioner has a right to object to a person who having previously been disqualified applied to gain or regain a driving licence. It seems to me that it must be possible to devise programs which would reduce, at the outset, the incidence of people failing to obtain a driving licence. Given the very serious extent of road traffic deaths and injuries on outback roads a program of driver education (whether administered in or out of prison) would also be a very sensible community investment.

Recommendation 94:

That:

- a. Sentencing and correctional authorities should accept that community service may be performed in many ways by an offender placed on a Community Service Order; and***
 - b. Consistent with the object of ensuring that offenders do not re-offend, approval should be given, where appropriate, for offenders to perform Community Service work by pursuing personal development courses which might provide the offender with skills, knowledge, interests, treatment or counselling likely to reduce the risk of re-offending.***
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Recommendation 95:

That in jurisdictions where motor vehicle offences are a significant cause of Aboriginal imprisonment the factors relevant to such incidence be identified, and, in conjunction with Aboriginal community organisations, programs be designed to reduce that incidence of offending.

2 2.4 THE COURT PROCESS

ABORIGINAL PEOPLE AND THE COURT SYSTEM

22.4.1 The AIU in Western Australia presented a stark picture of Aboriginal perceptions of the judicial system:

Most participants agreed that, except for the Aboriginal Legal Service, the only Aboriginal participation in the courts was as defendants. Aboriginal people were not sufficiently represented as employees and thus had limited professional contact within the judicial system. They saw the system as corrupt and reflecting the racist attitudes of society and subsequently as an agent of oppression. Aboriginal people invariably were scapegoated. They attracted heavier penalties and this taught young Aboriginal defendants to respond to society in a hostile manner.¹⁴

22.4.2 Consultations by all Commissioners disclosed that throughout Australia there was a common thread of Aboriginal opinion which demonstrated the negative human experience which is the reality behind the statistics of Aboriginal over-representation in the criminal justice system. As will be seen later, it is not statistically correct to say, on a national basis, that adult Aboriginal people receive harsher sentences than non-Aboriginal people, and yet that is the common understanding among Aboriginal people. Both as to determination of guilt or

innocence and as to penalty, Aboriginal people overwhelmingly regard the system as loaded against them and as either ignorant of or dismissive of their culture.

22.4.3 Many judges and magistrates would accept that there is a basis for the negative perception which Aboriginal people hold about the court process. In many instances judges and magistrates have made special efforts to overcome what they recognise to be their lack of knowledge about Aboriginal culture and the social rules which govern Aboriginal society. Whilst some magistrates have indicated to the Commission that they would be quite willing to participate in a formal program relating to these topics, there is positive resistance in some quarters to the very notion that judicial officers should receive formal training of this kind. For example, the Crown Law Department in Western Australia, responding to a question from Commissioner O'Dea about whether such training programs had been considered, responded:

*Magistrates are qualified, highly skilled professional judicial officers who deal with people at all levels and from all walks of life. Formal cultural awareness training has not been considered.*¹⁵

22.4.4 A similar but more positive response was made by the Court Services Department in South Australia which advised:

*The Department provides funding for conference and educational purposes for the Judiciary, in particular for programs conducted by the Australian Institute of Judicial Administration. The Department has no control over the Judiciary and is not in a position to compel attendance nor to direct the Judiciary in terms of continuing education, social awareness and other issues. These matters are best addressed with the Judiciary and it is strongly recommended that the AIJA is an appropriate medium. It could offer a unique opportunity to 'reach' the Judiciary, lawyers, academics and administrators at all levels throughout Australia.*¹⁶

22.4.5 Commissioner Dodson reported to me discussions he held with magistrates, one of whom said of Aboriginal people appearing before

*If they' re sort of not appearing to pay attention to what you're saying, I might say: "Well, look at me when I'm talking to you", or something like that to try and get home to them what you' re saying because I always try and explain to them why I do things.*¹⁷

22.4.6 In that instance the magistrate plainly believed that what he was doing was helpful in breaking down the mystique of the court process, and yet to demand of an Aboriginal person that he look the magistrate in the eye would for many people be not only intimidating but be culturally inappropriate. It is just such small incidents which accumulate and convince Aboriginal people that the court process is both hostile to and dismissive of their interests and culture.

22.4.7 In New South Wales the magistrate who regularly sits on the North West Circuit makes it a point to meet with Aboriginal people in the locations where they gather together. Victorian representatives of the Aboriginal Legal Service have been invited, on a regular basis, to attend the magistrates conferences to discuss issues of significance to Aboriginal people appearing before the courts. These sorts of initiatives are to be welcomed.

22.4.8 Criticisms from Aboriginal people about the lack of awareness of or

sensitivity to Aboriginal culture are made more frequently about justices of the peace and less about magistrates. The superior courts tend to be regarded as more attuned to Aboriginal needs. However, whilst it is recognised that the superior courts have provided many important safeguards for Aboriginal interests and show a greater willingness to take into account Aboriginal justice processes there is not a uniformity of such sensitivity. As one witness told Commissioner Dodson, it is still 'a bit of a lucky dip as to which judge sits in Court'.¹⁸

22.4.9 In his report to me Commissioner Dodson placed particular emphasis on the role of justices of the peace in Western Australia. In his extensive consultations he found clear evidence that the lack of any training as to Aboriginal culture was a factor in Aboriginal attitudes to the courts. Some justices with whom he consulted referred to Aboriginal people as 'natives' or 'coloureds',¹⁹ and there was evidence of a very simplistic understanding of Aboriginal society. One justice in a country town said of Aboriginal involvement with the legal system: 'There is no real racial problem. It's a matter of the bludger versus the one who is the producer'

22.4.10 However, whilst the lack of understanding of Aboriginal culture is a factor likely of itself to diminish the ability of justices to make proper sentencing decisions, equally alarming was an apparent lack of awareness or willingness to apply non-custodial sentencing options in circumstances where they appeared appropriate. Indeed, one justice told Commissioner Dodson:

*I don't think I've ever given anybody a community service order---I don' t think I ever would... the idea of a community service is probably a good thing but the operation of it is not so good.*²¹

22.4.11 I also note that in some cases the intention of the sentencer to utilise non-custodial options is thwarted by the absence of practical opportunities for the order to be implemented. For example, in its submission to the Commission the Court Services Department of South Australia noted that in some areas of South Australia community service orders are made by the courts but there is no work available to carry them out.²² I do not consider that the absence of formal work should prevent the usage of such orders. As has been demonstrated in many places, the Aboriginal community will readily offer suggestions for community service which might be performed. In Tennant Creek, for example, in October 1989 the community recommended to the magistrate that offenders who brought liquor into the camps which were 'dry' areas should be ordered to perform community work in cleaning up the camp area.²³

22.4.12 I do not suggest that all justices of the peace are ignorant of, or decline to apply, the non-custodial options which are available to them. The training program for new justices does include discussion on such matters. This training program was an initiative which resulted from a survey conducted by the Western Australian Law Reform Commission relating to Courts of Petty Sessions. As that report demonstrated, when published in 1986, there was significant evidence to suggest that justices were prone to order imprisonment at a rate and in circumstances different to that of magistrates.²⁴ I am not aware whether as a result of the new training course the results disclosed in that survey continue to be reflected in the statistics relating to the sentencing patterns of justices and magistrates.

22.4.13 The Australian Law Reform Commission in 1986 recommended that justices should be withdrawn from all criminal cases at least in areas of high Aboriginal population.²⁵ This recommendation was not adopted by the Western Australian Government. Commissioner Dodson has advised me that in his opinion

justices should not continue to sit in any court proceedings,²⁶ a view which has been propounded by many people over the years and one which has much to commend it. This is a matter which needs, once again, to be seriously reconsidered by the government and the improved statistics on sentencing patterns require careful analysis to determine whether the failure to fully utilise non-custodial sentencing options, which I identify in this chapter, can be attributed to the role of justices.

22.4.14 The question of the removal of justices of the peace from the hearing of cases introduces one other significant issue. In South Australia, Western Australia, Queensland and the Northern Territory Aboriginal justices of the peace have been appointed. The AIU in the Northern Territory has commented upon the approval within the Aboriginal community of the appointment of respected elders as justices to sit on the Bench.²⁷ The Issues Unit argued that Aboriginal people should be appointed as magistrates, and not only as justices, but noted that for many Aboriginal people the role of past justices of high standing led to them being regarded as being magistrates so far as the community was concerned. The question of the appointment of Aboriginal people as 'Special Justices' on the Pitjantjatjara Lands in South Australia is currently under active consideration, but information to date suggests that there are mixed opinions within the Aboriginal community as to the desirability of such a move.²⁸

22.4.15 If the full range of sentencing options are to be considered, so that imprisonment truly is the option of last resort, it is essential that all sentencing authorities are made fully familiar with the legislation and also with the administrative arrangements which apply to persons placed on community-based orders. In Queensland a Community Corrections Policy and Procedures manual has been published for distribution to the judiciary and to magistrates, among others. I am aware also that in the Northern Territory the Department of Correctional Services endeavours to keep magistrates and judges fully informed as to the statistics relating to programs, and in other places Offices of Crime Statistics provide comprehensive information to the courts on such matters.

22.4.16 The Victorian Sentencing Committee made recommendations, soon to become law, for the establishment of a Judicial Studies Board which will have the task of developing sentencing guidelines for the courts. This approach clearly recognises that under-usage of non-custodial options can not be overcome by simply leaving the matter to the discretion of the sentencers---some legislative direction or encouragement is required. There is some evidence to suggest that such explicit guidance does increase the usage of non-custodian options.²⁹

22.4.17 In Queensland, also, the QCSC has embarked on a comprehensive campaign to educate the public about the severity of non-custodian orders and the benefits for all of increased usage of such orders. A Court Advisory Service has been established in Brisbane which sees officers of the Department attending courts as a matter of course to advise the magistrates, judges, lawyers and offenders about the non-custodial options available. This positive program has, I understand, been valuable in increasing usage of such orders. It is essential if non-custodial sentencing options are to be utilised to the maximum extent possible that judges and magistrates are fully familiar with the range and effectiveness of the available range of options.

22.4.18 Aboriginal people throughout Australia have expressed the desire for much greater involvement in the court process, especially in the sentencing process. In the view of the communities, they best know the impact of criminal behaviour on each community and have a keen appreciation of the needs of the individual offenders.

22.4.19 I will deal with the question of the recognition of customary law in Chapter 29, but I note here that there is a growing recognition of the need to involve Aboriginal people at all levels of the court and criminal law processes, not as defendants but as people who have a major say in the disposition of cases which come before the courts.

22.4.20 There have been many ad hoc arrangements over the years where magistrates and justices have consulted with communities before sentencing. I was particularly impressed by the discussions held between the Magistrate, Mr Barritt, the Julalikari Council, the Aboriginal Town Camps Organisation, and the Aboriginal community at Tennant Creek which were recorded and made available to me. In those meetings the magistrate gained an appreciation of what the community thought of the sentencing process and how they believed offenders could be discouraged from offending without penalising innocent members of the family of the offender. As the transcript of the meeting demonstrates the discussions were extremely frank and forthright. Members of the community were invited to give their comments as to the sentences which the magistrate had administered to offenders in the past, and where they expressed disagreement about sentences the magistrate invited suggestions from the community about the type of sentences which they thought 'appropriate. As one would expect, there was not a single community view expressed, but many different opinions were put forward. The discussion seemed to me likely to have been valuable for Mr Barritt in gaining an appreciation of the views of the local community and as to the impact of sentences on members of the community. I am sure the discussion would also have served to highlight, for Mr Barritt, the role of the magistrate in attempting to balance the many different considerations (including differences of opinion within the Aboriginal community) which must occur when a magistrate considers what sentence to impose in any given case. The meeting ended with Mr Barritt expressing his willingness to attend a meeting at any time that the community asked to see him again. Mr Barritt said that he would always ensure that when attending Tennant Creek on Circuit he would set aside time for such meetings. Consultative processes such as this appear to me to be extremely valuable.

22.4.21 The courts must be rigorous in ensuring that all processes which increase the fear or intimidation which many Aboriginal people experience in the court system should be modified wherever possible to reduce those anxieties. Interpreters must be provided to Aboriginal defendants whenever necessary. There is a popular misconception that if Aboriginal people appear to understand conversational English they do not need interpreters. The tension engendered by court proceedings, the style and formality of language used by lawyers often means that much of what occurs is foreign to the defendant. One speaker in the Northern Territory put it this way:

And some of the things I believe when white people deal with Aboriginal people they use unreal force and very high language that Aboriginal people can't understand [sic]. They over-power Aboriginal people with their language. They don't understand Aboriginal culture and language. It's like travelling through Europe.³⁰

22.4.22 In South Australia legislation enshrines the right of an accused to have access to an interpreter.³¹ There are practical problems in providing trained interpreters in remote communities, but the legislative requirement is an important one. In Western Australia the *Evidence Amendment Act 1986*, S.14 gives an entitlement to a witness to give evidence through an interpreter. That, of course, does not impose any obligation on the State to provide an interpreter, and, in any event, as Commissioner Dodson's enquiries revealed, the section was often not

enforced by justices and magistrates³² because they considered that by strenuous efforts on their own part they would ensure that the defendants understood. Commissioner Dodson reported that there was a generally held view among justices that what were required were 'communicators' rather than interpreters. Communicators, perhaps from the local community, might themselves, of course, have difficulty with court room English.

22.4.23 I stress that reducing the intimidating atmosphere of courts is not only necessary to reduce the perception of racism and injustice, which many Aboriginal people feel characterises the court process, but is also essential if the courts are to gain an accurate appreciation of the issues which are relevant to questions of guilt or innocence and to sentencing.

22.4.24 It is not just those sitting on the Bench who are critical in this process. All court staff can play a role in removing the sense of injustice and racism which can permeate the court process.

22.4.25 Counsel Assisting me gave one illustration from his own experience. Whilst standing in the waiting room of a suburban court in Adelaide he observed several Aboriginal people quietly waiting for the case for one of them to be called. As their case was called and they rose from their seats to enter the court room a court official walked to where they had been sitting and, in their view, sprayed the area with an aerosol freshener. When challenged about this by Counsel the official remarked that she always sprayed the waiting room because people were smelly. She denied that her actions were racist or offensive.

22.4.26 Court departments have recognised the value of employing Aboriginal court staff, but there seems to be a timidity in some quarters about tackling this issue. The Crown Law Department in Western Australia, for example, said this:

*The Crown Law Department accepts that a larger number of Aboriginal employees could be advantageous, especially when having to deal with Aboriginal people. However when selecting applicants for employment the principles of EEO [Equal Employment Opportunity] and merit are applied and the applicant best meeting the criteria is selected. The Crown Law Department does not tend to receive [many] employment applications from Aboriginal people however there are currently a number of Aboriginal persons employed by the Department.*³³

22.4.27 It would be ironic if equal employment opportunity principles were to be applied in such a way as to disadvantage Aboriginal applicants for employment in such departments. Given the small number of Aboriginal people currently employed by court departments, there seems to me to be a real need for some positive discrimination to be adopted in order to ensure that Aboriginal people are appropriately represented on the staff of court departments. I note that positive employment strategies in South Australia and the Northern Territory have been employed throughout the public service to very good effect. Aboriginal staff will only be found if a much more positive and determined effort is made to recruit them.

Recommendation 96:

That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such

programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.

Recommendation 97:

That in devising and implementing courses referred to in Recommendation 96 the responsible authorities should ensure that consultation takes place with appropriate Aboriginal organisations, including, but not limited to, Aboriginal Legal Services.

Recommendation 98:

Those jurisdictions which have not already done so should phase out the use of Justices of the Peace for the determination of charges or for the imposition of penalties for offences.

Recommendation 99:

That legislation in all jurisdictions should provide that where an Aboriginal defendant appears before a court and there is doubt as to whether the person has the ability to fully understand proceedings in the English language and is fully able to express himself or herself in the English language, the court be obliged to satisfy itself that the person has that ability. Where there is doubt or reservations as to these matters proceedings should not continue until a competent interpreter is provided to the person without cost to that person.

Recommendation 100:

That governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts.

Recommendation 101:

That authorities concerned with the administration of non-custodial sentencing orders take responsibility for advising sentencing authorities as to the scope and effectiveness of such programs.

Recommendation 102:

That, in the first instance, proceedings for a breach of a non-custodial order should ordinarily be commenced by summons or attendance notice and not by arrest of the offender.

Recommendation 103:

That in jurisdictions where a community service order may be imposed for fine default, the dollar value of a day's service should be greater than and certainly not less than, the dollar value of a day served in prison.

COMMUNITY JUSTICE INITIATIVES

22.4.28 In this chapter I shall consider the trend towards community-based sentencing options and the growing recognition that the prison system has failed to meet the needs of both the Aboriginal and non-Aboriginal communities to provide long-term protection through the rehabilitation of offenders. Whilst there is an acceptance in principle throughout the criminal justice and corrections systems that Aboriginal involvement in policy development in these processes must be encouraged, efforts to fully involve Aboriginal people have been piecemeal and haphazard. There is a need to consider much more broadly based reform.

22.4.29 The court process in Australia has, from time to time, accommodated some participation of Aboriginal people, usually in informal consultative processes relating to sentencing, at times by the appointment of Aboriginal people as justices of the peace. As earlier noted, these processes have invariably been welcomed by Aboriginal people but have rarely been more than modest, experimental exercises usually of short duration and rarely with any legislative foundation.

22.4.30 Australia can learn much from the experience of indigenous people in Canada and the United States of America where mechanisms for indigenous peoples' delivery of justice to their own people have received support from government over many years.

22.4.31 The experience of alternative mechanisms for the delivery of justice has been reviewed in a helpful submission to the Commission by the National Aboriginal and Islander Legal Services Secretariat (NAILSS).³⁴ The submission examines the role of Tribal Courts in the USA and the Canadian system which, whilst having no Tribal Courts, employs native justices of the peace in the process of justice. The NAILSS review of these systems concludes that the American system has proven itself to be more flexible than that in Canada and more responsive to the needs of indigenous people. I am not, however, convinced that so far as the court process is concerned the experience of Canada or the USA provides a solution for the Australian situation.

22.4.32 NAILSS notes that when considering Aboriginal participation in the criminal justice process there are two distinct approaches: the 'integrationist' approach which involves greater employment of Aboriginal people in the delivery of services designed by governments, and the 'accommodation' approach which involves the delivery of those services by agencies controlled by Aboriginal people themselves. It notes that the accommodation approach has been accepted in the delivery of health and education services but not in court services.

22.4.33 As I understand their submission, NAILSS does not argue that there must be a total commitment to one or other approach. A critical review of a decade (1972-1983) of Canadian experience of the criminal justice system and indigenous peoples, conducted by the Prairie Justice Research Centre at the University of Regina and published in 1985, concluded that the best approach for the future would involve:

- the cross-cultural education of non-indigenous decision makers;
- the indigenisation of decision-making roles, that is, the recommitment of indigenous police prosecutors, defence lawyers, go-between adjudicators and workers in the correctional system;
- public legal education to remove indigenous people's ignorance of their rights and duties and the provision of legal representation or indigenous court workers.

22.4.34 In its submission NAILSS adopts this approach but notes some particular issues which will arise in Australia. NAILSS endorses the need for cross-cultural education, and, whilst accepting the value of Aboriginal justices of

the peace, comments:

*The problem with the indigenisation of government services including the criminal justice system, is that indigenous peoples continue to be subordinate and peripheral to policy-making and decision-making processes. Indigenous staff also often suffer from painful conflicts of interest being accountable to their people in a personal sense, but usually powerless within the structures of their profession to respond to community expectations.*³⁵

22.4.35 NAILSS regards indigenisation as preferable to there being an absence of indigenous staff but that it is still 'a small and inadequate step'. NAILSS. argues for greater involvement of Aboriginal people in community justice programs but says that such programs must have properly planned strategies, adequate financial support and an absence of bureaucratic restriction.

22.4.36 NAILSS also calls for much greater willingness on the part of governments to provide options which empower local communities to determine their own needs for justice. It sees a place for communities making and enforcing by-laws but stresses that it should be for the communities to determine the best options. 'If Aboriginal courts are the process decided upon then they should have the full range of sentencing options which would allow diversion from the formal justice system and imprisonment.

22.4.37 Australian experimentation with alternative court processes, as noted earlier, has been limited. In the Northern Territory the Yirrkala Community Law Council served as a model which gained favour with the Australian Law Reform Commission in its Customary Law Report in 1986, but the scheme was never recognised by legislation. The Department has advised me that the Community Justice Program does work effectively at Yirrkala, although it depends on two particular tribal elders to be the conduit of community opinions to the court and does not appear to have any more formalised process to ensure that community opinions are broadly canvassed. I am not suggesting that those two leaders do not accurately reflect community opinion, but there does seem to me to be a danger that a scheme could collapse if one or two individuals carry the entire responsibility for participation on behalf of the community. At various places in the Territory schemes have failed or have operated haphazardly when they have not been more broadly based within the community. Apparent early success can give rise to unfounded optimism. Occasionally schemes commence well but the early enthusiasm appears to dissipate. The Community Justice Program in Groote Eylandt in the Northern Territory was one such scheme. The Secretary of the Department of Correctional Services having been advised that the scheme was no longer operating effectively took steps, as a result of hearings of the Commission in the Northern Territory, to have his officers consult with the community in order to revitalise the program. It is this sort of constant review and back-up which is required if the schemes are to be successful.³⁶

22.4.38 In Queensland, Aboriginal community courts had legislative foundation and in some places functioned with some success in conjunction with community police and Aboriginal justices of the peace, enforcing community by-laws. Those courts were empowered to imprison but more commonly awarded fines or community service orders. This process, however, has been criticised as being an 'alien' and 'second-class institution' of justice. The Aboriginal Co-ordinating Council has submitted that major changes should occur in order to allow greater autonomy to those courts and to the communities.³⁷

22.4.39 In Western Australia the system of justice, using Aboriginal people as justices of the peace, did not contemplate a separate court process. Justices of the peace sat with magistrates, but overall the scheme has not proved effective in giving communities greater control over the court process.³⁸

22.4.40 Whilst there is value in further examining processes whereby Aboriginal people may constitute courts and create laws applicable to their own communities, there is clearly much greater investigation which needs to be done, and I am in no position to make a general recommendation for the creation of any particular system. NAILSS itself clearly recognises that different solutions may be preferable in different communities.

22.4.41 There are, however, two areas where community involvement and/or control can clearly be identified as having undisputed value. These are Community Justice Panels (CJPs) and community involvement in management of non-custodial (and perhaps even custodial) sentencing schemes.

22.4.42 NAILSS supports the concept of CJPs (which it termed Community Justice Committees) which could advise the courts on appropriate sentences and may take control and responsibility over the supervision of offenders and the treatment of victims. In Victoria CJPs have been established with early indications that they will be very successful. I deal briefly with CJPs in this chapter--they are discussed in more detail in Chapter 29.

22.4.43 The CJP in Victoria is administered by the Victorian Aboriginal Legal Service, which initiated the scheme, and has been described by the Legal Service as 'proving to be a great success'.³⁹ The CJP involves the Aboriginal community at a number of different stages in processes relating to policing and justice. At one level the CJP serves as a means to divert people from the court process all together. At another level it provides advice on sentencing to the courts and, furthermore, can then play a role in the management of non-custodial sentencing orders which assures both the effectiveness and appropriateness of the orders and provides the greatest prospects of such orders serving processes of rehabilitation.

22.4.44 The CJP involves co-operation between police, courts, departments of corrections and community services, and the Aboriginal community. Whilst serving clearly identifiable objectives relating to the criminal justice system, the scheme also has great significance for improving community relations generally.

22.4.45 In the first year after the scheme commenced in Echuca in Victoria no Aboriginal had received a custodial sentence. The CJP had been operating an employment program into which offenders could be directed on community service orders. One side benefit has been improved relations between police and Aboriginal people, which the Victorian Legal Service says has led to 'breaking down barriers'.⁴⁰

22.4.46 The Victorian scheme has succeeded, the Victorian Aboriginal Legal Service (ALS) reports, because of the State-wide funding which was provided by the State Government; thus indicating that volunteer services rarely succeed in the long term because dedicated workers must inevitably drop out of such schemes in order to maintain employment elsewhere.

22.4.47 The involvement of the community in overseeing community service orders and supervising probation and parole is a means of ensuring that community-based options will not only be employed by the courts but will also have a chance of long-term rehabilitation of offenders. Experience in Canada has shown how valuable such schemes can be where indigenous organisations have contracted on a fee-for-service basis to manage community based corrections programs.⁴¹

22.4.48 Such programs have started to be considered in Australia. The QCSC is already contracting with one Aboriginal organisation to provide such services in Brisbane. The innovative programs seen overseas, that is, half-way houses, rehabilitation and training programs, all fit well into the Australian CJP concept.

22.4.49 At Mildura, in Victoria, a proposal for a Life Skills Rehabilitation Centre is receiving positive support from police and magistrates. It is an Aboriginal initiative which I will later describe in more detail in this chapter.

22.4.50 I have very recently received a submission (dated 14 February 1991) from Ms Brenda Smith, Executive Director of Community Corrections in the New South Wales Department of Corrective Services which reports on the results of a working party which was formed as a result of the concerns of the Royal Commission to develop policies relating to Aboriginal offenders. The draft policy deals with a wide range of issues and proposes programs to provide information to the courts as to non-custodial options, and to more actively involve the Aboriginal community in the preparation of background reports. The draft policy also deals with the design and monitoring of non-custodial orders, the recruitment of Aboriginal staff (a target of 2% of all permanent positions by 1991 being set), the employment of liaison officers and the introduction of cultural awareness training for staff. Most importantly, the draft policy deals with the creation of CJPs in New South Wales. I particularly note and commend the wisdom of the report in stressing that the decision to establish CJPs must be left to the Aboriginal community.

22.4.51 Experience both in remote communities and other areas indicates that considerable advantage has come from having mechanisms whereby Aboriginal communities or particularly concerned Aboriginal people can assist courts by suggesting appropriate approaches to sentencing. On remote communities this has often taken the form of elders expressing views to the court; away from remote communities, Community Justice Panels as in Victoria, are an example of the same process and with advantage for community relations' in general and sentencing authorities in particular. The Justice Panels are discussed extensively in Chapter 29. Their functions are wider than supplying information to courts as to sentencing but they play an important role in this respect.

Recommendation 104:

That in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities and, further, that subject to preserving the civil and legal rights of offenders and victims such consultation should in appropriate circumstances relate to sentences in individual cases.

ABORIGINAL LEGAL SERVICES

22.4.52 The most important safeguard to the rights of Aboriginal people, especially in ensuring reduction in the numbers of Aboriginal people convicted and sentenced to imprisonment, is the provision of competent legal representation. In Australia the provision of such assistance has been primarily provided through the network of Aboriginal Legal Aid Services (ALS). These organisations are Aboriginal controlled and community based, and they have been at the forefront of the advancement of the legal rights of Aboriginal people for two decades; the first service having started in Redfern, New South Wales in 1970.

22.4.53 There are nineteen separate ALS located in capital cities and regional

centres throughout Australia. Aboriginal people may also receive legal assistance from the State Legal Aid Commissions, which are also funded in part by the Commonwealth. In 1989-90 an estimated 2,000 grants of legal assistance were made by such Commissions to Aboriginal people.⁴² Some assistance may also be provided by Community Legal Centres which are community-based, non-Aboriginal organisations.

22.4.54 In 1989-90 Commonwealth funding of \$16,060,837 represented a reduction in real terms of 3.2% from the previous year's funding. Overall there had been an increase to funding in real terms of 34.7% over the period 1981-82 to 1989-90 which must be contrasted with the increased real terms funding to Legal Aid Commissions of 69.9% and to Community Legal Centres of 243.4% over the same period.⁴³

22.4.55 The Office of Legal Aid Administration was unable to advise the Commission whether the respective funding levels of Legal Aid Commissions and ALS permitted a comparative level of legal service to be provided to Aboriginal people. The Office advised that it did not have adequate details of the services available to Aboriginal people through ALS to enable such a comparison to be made.

22.4.56 The ALS provide an important service to Aboriginal people, and their employment of field officers, legal staff and their Aboriginal Committees should ensure that not only do Aboriginal people receive competent legal assistance but that their interests, both broadly and narrowly defined, are advanced in all areas concerning the legal rights of Aboriginal people. This is a role which they have vigorously pursued. A tribute to their role comes from a source likely, at times, to be at odds with one of the Services. The Queensland Corrective Services Commission said this in its submission to the Commission:

We have found the Aboriginal Legal Service throughout Queensland to be a consistent and stalwart advocate for Aborigines in custody. The Services have not always been accurate in their accusations, are often not sophisticated negotiators and they tend to take an adversarial role. Nevertheless, the Services have widespread coverage, organisational and capacity, (sic) commitment and access to professional advice. The Services have had an extremely effective welfare, counselling and support role outside the strictly legal advocacy role. There does not seem to be any other equally organised social welfare organisation that can substitute for this Service. They have been available in times of trouble and in much of this Commission's interaction with Aboriginal' s [sic] in trouble and in need of support the Aboriginal Legal Service has been involved. On our experience, we would make a very strong recommendation to the Royal Commission for support and a significant increase in resources to be given to the Aboriginal Legal Service to expand their social welfare capacity.⁴⁴

22.4.57 However, the Services have not been without their problems and their critics. As at October 1990 two of the major Services in Brisbane and Sydney were experiencing funding difficulties which led to arrangements being made with Legal Aid Commissions to provide assistance to Aboriginal clients who otherwise would have been serviced by the ALS.⁴⁵ Similar situations have arisen in many, if not

most, of the Services over the years.

22.4.58 The AIU in Western Australia reported receiving complaints about poor communications between communities and the ALS management and a failure to play a more active role in providing legal education to communities.⁴⁶ Commissioner Dodson also reported to me of similar complaints. In many instances the complaints related to a lack of access to lawyers, a problem made difficult by budget factors and the size of the State. But other concerns related to the lack of local or regional participation and control in the operations of the ALS.⁴⁷

22.4.59 Commissioner Dodson commissioned a survey on the operations of the ALS which examined the conduct of cases involving 446 clients in ALS offices at Derby, Broome, Carnarvon, Kalgoorlie and Perth in April 1990. One matter which emerged was that not one of those clients gained an acquittal on charges faced. Another remarkable finding was that in April 1990 fines imposed in those places amounted to over \$63,000. Extrapolated to the State generally, Commissioner Dodson estimated that Aboriginal people might pay up to \$3m in fines in a year. The ALS budget is approximately \$2m.

22.4.60 The AIU report from the Northern Territory identified the need for anthropologists to be employed by ALS so that conciliation between Aboriginal people in conflict could be facilitated and also to ensure that appropriately informed information on the customary law background of cases could be put before courts.⁴⁸ The Central Australian Aboriginal Legal Aid Service supported the suggestion as to the employment of anthropologists.

22.4.61 In a report titled 'Aboriginal Women and Violence' written in 1990 by Audrey Bolger for the Criminology Research Council and the Northern Territory Commissioner of Police, the role of the ALS was regarded as being critical, often in a negative way, in protecting the rights of Aboriginal women. The author noted that the ALS was established primarily to ensure that Aboriginal people gained legal representation before the courts. The aim of the lawyers, in the adversarial system, is to keep their clients out of prison or to have sentences reduced.

22.4.62 This function remains the primary focus of ALS activity. The clients are predominantly men and Ms Bolger sees a conflict of interest in a role which has the ALS so frequently representing the interests of an Aboriginal man when his spouse, as victim and witness, does not gain such specialist attention. Ms Bolger notes that efforts to balance the situation by the employment of female lawyers have failed to address this problem since the female lawyers are simply subsumed into the role of themselves representing male clients.

22.4.63 Solutions to this problem are not easily found. Suggestions have been made for the creation of a women's ALS to represent women victims, either under the umbrella of existing legal aid services or as an entirely separate body. There may well be ethical and professional problems in providing advice to both victim and accused through the one legal service, but the more important question is to ensure that Aboriginal women's rights are protected, and there is good reason to doubt whether the Aboriginal Legal Aid Service structure is presently doing so.

22.4.64 Ms Bolger comments on the fact that in some instances lawyers acting on behalf of Aboriginal accused men either submit or call witnesses to allege that violence against women is condoned under traditional law. She suggests that the male bias on this issue is not balanced by processes which allow the views of Aboriginal women to be heard in the court, and, as a result, the courts are sometimes being misled as to the principles of tribal law which do or do not apply.

22.4.65 Notwithstanding these and similar complaints made in other States about some of the ALS, there is no doubt that these services are vital and must be

maintained as independent bodies. These bodies must be adequately funded to perform the necessary functions of not only providing legal advice and representation but also to provide community legal education and to argue the case for law reform on behalf of Aboriginal people.

22.4.66 In a submission to me Aboriginal and Torres Strait Islander Commission (ATSIC) states that limitation of funding for ALS does not allow a quality of advice and representation to be given to clients comparable to that offered by mainstream legal aid commissions. ATSIC notes that pressure on State and Territory legal aid agencies is reduced by the fact that ALS provide such a substantial service to people who otherwise would be likely to seek assistance and would be eligible to such from mainstream legal aid agencies. ATSIC submits that for this reason State' and Territory Governments should also provide some funding to the ALS, thus increasing the resources available to the ALS.

22.4.67 Whilst the budget for each ALS must be approved by ATSIC, neither the Commonwealth nor ATSIC have set priorities for the delivery of legal services through the ALS. ATSIC submits that: 'The formulation and implementation of policy, objectives and priorities is the prerogative of Aboriginal Legal Services'.

22.4.68 Whether this laudable commitment to self-determination will remain the case may be uncertain. ATSIC in its submission added:

ATSIC has recently reconsidered whether there needs to be guidelines and merits tests following a review report of the Aboriginal Legal Service in Redfern and difficulties being encountered by a number of legal services which have effected service delivery. The extent to which ATSIC will specify guidelines or objectives or require Aboriginal Legal Services to set priorities is a matter for determination.⁴⁹

22.4.69 In my opinion it is important that the ALS are allowed autonomy by ATSIC in the devising of policies and in setting priorities. The council of each ALS is the group most likely to know what is needed by the relevant communities which they serve. At the same time, if self-determination is to be a reality the legal services must genuinely reflect and represent the cross-section of opinion held on law and justice issues within the Aboriginal community. The setting of priorities and the devising of policies should be part and parcel of the planning of any ALS. Unfortunately, all too often, the pressure of work immediately at hand has meant that planning has been less a feature of ALS than should be the case. It is very regrettable, for example, that after twenty years of existence there is still no adequate training program for field officers universally applied in ALS offices, although efforts are made in some places to provide training.

22.4.70 The question of the potential for conflict in interest between protecting the rights of men and also the rights of women is one aspect of a larger problem which confronts the Council and staff of ALS on a regular basis. Frequently the interests of an accused person to defend and defeat charges laid against him or her are in direct conflict with the opinions of a significant section of the Aboriginal community. It is not uncommon for the community through its elected Council, or in informal ways, to advise the lawyer representing the accused person that the community objects to the offender pleading not guilty or else to indicate that the offender should be penalised much more severely than the court may think appropriate.

22.4.71 In such circumstances the lawyer or field officer faces a dilemma: as the community through its Council will regard the Legal Service and its lawyers as representing and acting on behalf of the community; the accused expects that his

or her interests will be protected even if they conflict with those of the community. This dilemma is particularly significant when addressing the question of the over-representation of Aboriginal people in custody or in prison.

22.4.72 Much of the discussion about the over-representation factor assumes that greater Aboriginal community involvement in the law and its processes is essential. This involvement is considered to be an appropriate recognition of the principles of self-determination and self-management. It is based on the belief that behaviour which leads to detentions and imprisonment should be viewed from the cultural and social perspective of Aboriginal people rather than solely from the perspective of non-Aboriginal society.

22.4.73 It is therefore fundamental that the voice of the community should be heard by the courts and by the legislators. However, the ALS may not always be the appropriate body to present that community opinion, especially where there is a conflict of interest between the rights of individual accused people and the community.

22.4.74 On the Pitjantjatjara Lands a process has been established to deal with potential conflicts of interest in the court process. The individual is represented by a lawyer from the ALS, but the community is separately represented by its own lawyer to put before the courts, when invited to do so, the community perspective. This process requires that the presiding magistrate be sensitive to the interests of the accused, but, at the same time, recognises, in a practical way, the need for community participation in the system of justice.

22.4.75 Resource limitation might not make the Pitjantjatjara approach one which many other remote-communities could adopt, nor might it be necessarily appropriate in other places. Each ALS will need to consider strategies for dealing with these issues if they have not already done so. It may be that other Aboriginal organisations will need to play a part in the process.

Recommendation 105:

That in providing funding to Aboriginal Legal Services governments should recognise that Aboriginal Legal Services have a wider role to perform than their immediate task of ensuring the representation and provision of legal advice to Aboriginal persons. The role of the Aboriginal Legal Services includes investigation and research into areas of law reform in both criminal and civil fields which relate to the involvement of Aboriginal people in the system of justice in Australia. In fulfilling this role Aboriginal Legal Services require access to, and the opportunity to conduct, research.

Recommendation 106:

That Aboriginal Legal Services recognise the need for maintaining close contact with the Aboriginal communities which they serve. It should be recognised that where charges are laid against individuals there may be a conflict of interests between the rights of the individual and the interests of the Aboriginal community as perceived by that community; in such cases arrangements may need to be made to ensure that both interests are separately represented and presented to the court. Funding authorities should recognise that such conflicts of interest may require separate legal representation for the individual and the community.

Recommendation 107:

That in order that Aboriginal Legal Services may maintain close contact with, and efficiently serve Aboriginal communities, weight should be attached to community wishes for autonomous regional services or for the regional location of solicitors and field officers.

Recommendation 108:

That it be recognised by Aboriginal Legal Services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings.

SAFEGUARDS FOR RIGHTS OF ACCUSED

22.4.76 As noted earlier the provision of legal assistance is important in ensuring that Aboriginal people gain justice before the courts. It is also important that legislative and procedural steps which unfairly increase the prospects of Aboriginal people being convicted or imprisoned and which discriminate in that regard must be identified and remedied.

22.4.77 An important development in the Northern Territory was the pronouncement on the processes of interrogation of Aboriginal people made by the justices of the Supreme Court. The so-called Anunga Rules provide that police interviews will not be accepted into evidence in circumstances where it is shown that particular language and cultural factors have either not been taken into account or have been disregarded by interrogating police officers. The courts in the Northern Territory had found many cases where Aboriginal people had confessed to crimes which they did not commit; a situation which I have no doubt would have also arisen in many States, especially in the interrogation of Aboriginal people for whom standard English was not their first language.

22.4.78 I heard a considerable amount of evidence on issues relating to the investigation of offences and the interrogation of Aboriginal suspects during the course of my investigations into the Ti Tree case in the Northern Territory. The issues raised there are important but are not central to my inquiry. Accordingly, I do not propose to detail my findings on such matters as video taping of interviews, the rights of 'prisoners' friends' to be present at interviews and similar matters. Suffice to say that numerous enquiries have established the need for appropriate safeguards to be imbedded into the system of police investigations of crime to ensure that the particular interests of Aboriginal people are protected. It goes without saying that if one category of those making up the disproportionate numbers of Aboriginal people in custody are people who have been falsely arrested or convicted then clearly such a situation must be prevented, and safeguards such as those discussed above are important elements in ensuring that result.

2 2.5 ALTERNATIVES TO IMPRISONMENT

THE TREND TO COMMUNITY-BASED OPTIONS

22.5.1 Correctional administrators have shown a keen awareness of the need to address the disproportionate rate at which Aboriginal people are imprisoned and to encourage governments to initiate programs which provide the courts with non-custodial sentencing options. In the 1989-90 Annual Report of the Queensland Corrective Services Commission the Director-General, Mr Keith Hamburger, stressed the social cost, both to the Aboriginal and non-Aboriginal communities, of

the waste of lives and talent resulting from this rate of imprisonment He identified the issue as a social crisis which reflected the social and economic disadvantages which Aboriginal people experienced in the general community. The disproportionate rate of Aboriginal imprisonment (he noted that 20% of the Queensland prison population are Aboriginal people and Islanders, although comprising only 2.6% of the total State population) not only had a social cost but an extraordinary economic cost as well Mr Hamburger said that reducing Aboriginal prison numbers to those proportionate to their numbers in the community would save up to \$20m in one year alone.⁵⁰

22.5.2 In its forthright and perceptive submission to the Commission the QCSC noted that there was clear evidence that imprisonment is seen neither as a deterrent nor a punishment for many Aboriginal youths. The QCSC stressed that the 'awful history of social disruption and fragmentation of the Aboriginal community' which had resulted from the impact of non-Aboriginal society had to be recognised by the Australian community, and that support must be given to Aboriginal communities to address the social and economic issues which they face. The submission notes:

The system of corrective services operated in this State and elsewhere in Australia is just inappropriate for the needs for these communities and for these people.⁵¹

22.5.3 The QCSC argues that the criminal justice system needs to find a way to come to terms with Aboriginal society and its traditional laws. It notes that with respect to offenders:

Their communities want a say in their punishment and their return to their communities after the sentence. There seems to be no reason why Aboriginal communities cannot have a much greater say in the administration of justice. Why cannot they be involved in courts and policing? Why cannot they administer Aboriginal community prisons and community corrections ?⁵²

22.5.4 The QCSC submitted that opportunities do exist for all prisoners, apart from prisoners on maximum security classification (10.2% of Aboriginal prisoners), to be released on some form of community supervision, especially towards the end of a sentence.

22.5.5 As part of its commitment to ensuring Aboriginal involvement in policy direction in the corrections system the QCSC has appointed Aboriginal members to the Queensland Community Corrections Board and to the Regional Community Corrections Boards. At a local level Aboriginal involvement is actively encouraged in decisions about such matters as Community Service Orders and Community Corrections Centres. Aboriginal advisers and liaison officers have been appointed in communities to help manage offenders released on community corrections orders.

22.5.6 An interesting initiative which is planned at the moment is the establishment of Community Corrections Centres which could provide a range of corrective options, including community detention, and which the QCSC envisages may be managed or owned by the communities. The communities would then contract on a fee-for-service basis. The Brisbane Tribal Council is about to enter a contract with the QCSC to operate a Community Corrections Centre in that city, and similar proposals are in hand for Yarrabah, Palm Island and Woorabinda.

22.5.7 The QCSC set a target for employment of Aboriginal staff early in the

life of this Royal Commission. The QCSC target was 113% employment in all areas. Overall the current figure is only 4.2%, but significant employment is evident in community corrections (17.1%) and in central office staffing (5.4%).

22.5.8 All of these developments reflect a genuine and encouraging recognition of the need to rethink our whole approach towards corrections and the criminal justice system. The submission from the QCSC shows a profound appreciation of the factors which lead to the high rates of imprisonment, the extent to which social problems directly result from non-Aboriginal society's impact and the need to maximise self-determination and self-management processes so as to support Aboriginal people's initiatives to deal with their own problems. I am impressed by the submission and commend the QCSC for the wisdom and breadth of its approach.

22.5.9 Notwithstanding the recognition of the value of community-based options, the early figures in Queensland do not suggest any substantial reduction in the rate of imprisonment of Aboriginal people as a result of the adoption of such options. The QCSC statistics as at June 1990 reveal a reduction in prisoner numbers of approximately 5%. This is attributed partly to a decrease in the numbers of offenders being imprisoned for fine default resulting from changes to the Fine Option Scheme in the *Corrective Services Act 1988*. The changes allow an offender to apply for a Fine Option Order at any time prior to default rather than on the occasion of first appearance. The limited reduction in the numbers imprisoned as a result of the application of such options may tend to suggest that community based sentencing options are being used as alternatives to fines or discharges rather than as an alternative to imprisonment. If this is so then it would be an unfortunate application of the options being provided to magistrates and judges. Nonetheless there is some encouraging information which suggests that there may be a growing awareness in the value of community based correctional options.

22.5.10 In a recent paper to the Australian Institute of Criminology Conference in Hobart in March 1990, Mr Ross Evans of the QCSC pointed to the substantial increase in the case load for probation and parole officers relating to orders for probation, parole, community service and fine option orders. As Mr Evans pointed out, between 1978 and 1988 there has been a steady increase each year in the prison population; but since 1988 this constant increase has halted and a reversal of the trend is now evident. The prison population in custodial correctional centres has now returned to the lowest level since January 1987.⁵³

22.5.11 In the Northern Territory the Department of Correctional Services has also recognised the need to substantially address the disproportionate rate of Aboriginal imprisonment which sees in excess of 70% of all prisoners in the prison population being Aboriginal. The appointment of Aboriginal Community Corrections Officers has been a significant development in recognition of the problem. Numerous non-custodial options have been introduced in the Northern Territory which are said to have already had a significant impact on the custodial figures. Mr Doug Owston, Secretary of the Department of Correctional Services, has estimated that in the two-year period from January 1987 to December 1989 there was a 25% decrease in prisoner numbers brought about by community based sentencing alternatives which were developed and introduced to reduce short term and unnecessary fine default imprisonment.⁵⁴

22.5.12 In New South Wales the adoption of non-custodial sanctions has arguably not led to any reduction in the numbers of persons, both Aboriginal and non-Aboriginal, imprisoned. Dr Don Weatherburn, Director of the New South Wales Bureau of Crime Statistics and Research, has stated that the evidence suggests that non-custodial sanctions in practice have been used not as

alternatives to custody but as alternatives to sanctions such as fines.⁵⁵ Dr Weatherburn has argued that one reason for the under-utilisation of non-custodial options is the reluctance of those imposing sentences to offer a non-custodial penalty to a person who has previously received non-custodial penalties or has been imprisoned. He identifies 'considerable reluctance to impose a less severe penalty for a repetition of the same general kind of offence'. He suggests, therefore, that 'the pool of those able to be diverted into non-custodial penalties from custodial penalties consists of a fairly small group'.⁵⁶

22.5.13 In Western Australia NAILSS in its submission⁵⁷ comments on what it describes as 'a disturbing feature'; namely, the apparent under-use of non-custodial orders for Aboriginal persons. This is notwithstanding the fact that, according to NAILSS, Aboriginal people invariably comprise more than 50% of sentenced prisoners in that State. Figures taken from the Annual Report of the Western Australian Department show that as at 30 June 1987 only 15.9% of those on Community Service Orders (CSO) were Aboriginal people and only 12.7% of those on probation orders were Aboriginal people.

Recommendation 109:

That State and Territory Governments examine the range of non-custodial sentencing options available in each jurisdiction with a view to ensuring that an appropriate range of such options is available.

Recommendation 110:

That in view of the wide variety of pre-release and post-release support schemes conducted by Corrective Services authorities and other agencies and organisations in various parts of the country it is the view of the Commission that a national study designed to ascertain the best features of existing schemes with a view to ensuring their widespread application is highly desirable. In such a study it is most important that consultation take place with relevant Aboriginal organisations.

Recommendation 111:

That in reviewing options for non-custodial sentences governments should consult with Aboriginal communities and groups, especially with representatives of Aboriginal Legal Services and with Aboriginal employees with relevant experience in government departments.

Recommendation 112:

That adequate resources be made available to provide support by way of personnel and infrastructure so as to ensure that non-custodial sentencing options which are made available by legislation are capable of implementation in practice. It is particularly important that such support be provided in rural and remote areas of significant Aboriginal population.

Recommendation 113:

That where non-custodial sentencing orders provide for a community work or development program as a condition of the order the authorities responsible for the program should ensure that the local Aboriginal community participates, if its members so choose, in the

planning and implementation of the program. Further, that Aboriginal community organisations be encouraged to become participating agencies in such programs.

Recommendation 114:

Wherever possible, departments and agencies responsible for non-custodial sentencing programs for Aboriginal persons should employ and train Aboriginal people to take particular responsibility for the implementation of such programs and should employ and train Aboriginal people to assist to educate and inform the community as to the range and implementation of non-custodial sentencing options.

Recommendation 115:

That for the purpose of assessing the efficacy of sentencing options and for devising strategies for the rehabilitation of offenders it is important that governments ensure that statistical and other information is recorded to enable an understanding of Aboriginal rates of recidivism and the effectiveness of various non-custodial sentencing orders and parole.

COMMUNITY SERVICE ORDERS

22.5.14 In Western Australia the CSO scheme commenced on 1 February 1977. These are court-ordered sanctions and their application to Aboriginal people is shown in Table 22.5 produced by the Department of Corrective Service (DCS).

TABLE 22.5: COMMUNITY SERVICE ORDERS COMMENCED IN WESTERN AUSTRALIA

Year	Male		Female		Total
	Aboriginal	Other	Aboriginal	Other	
1985/86	104	986	28	132	1 197
1986/87	211	1 229	42	280	1 762
1987/88	260	1 244	57	253	1 814
1988/89	271	1 182	61	308	1 822
1989/90	266	1 121	69	315	1 771
Total	1112	5 762	257	1 288	8 366

22.5.15 A breakdown of CSO completions and breaches by gender and Aboriginality is available for CSOs issued between 1 July 1987 and 30 June 1989.

TABLE 22.6: BREACHES OF COMMUNITY SERVICE ORDERS FOR PERIOD 1 JULY 1987 AND 30 JUNE 1989, WESTERN AUSTRALIA

	Male		Female		Total
	Aboriginal	Other	Aboriginal	Other	
Issued	531	2 426	118	561	3 636
Breached	122	383	30	6	598
Percentage Breached	23 %	16%	25%	11%	16%

22.5.16 As can be seen, usage by Aboriginal people has been limited. Over the five years 1985-1990, 21.7% of CSOs were undertaken by Aboriginal men and women. In 1989-90 the percentage had risen to 23.3%, but since Aboriginal people comprised 51.2% of the intake of sentenced prisoners received in prisons in 1988-89⁵⁸ (or 35.6% of the prison 'stock' on 30 June 1989)⁵⁹ it can be seen that there is a probable and, if so, significant under-utilisation of the CSO option.

22.5.17 The DCS Western Australia is aware of the under-utilisation of the option of community service. In its submission to the Commission the Department stated that the particular need to reduce the imprisonment rate of residents in the

Kimberley region was to be met by the employment of two Aboriginal Community Corrections Officers in a program commenced after consultation with the Aboriginal community and in conjunction with the Aboriginal Affairs Planning Authority. The Department says of this program that: 'Its major thrust is to utilise the co-operation of elders and community councils to better effect the supervision of Aboriginal offenders within their own community'

22.5.18 In his report to me Commissioner Dodson has advised that most of the Aboriginal community organisations in the Kimberley area are now gazetted as places to which offenders may be sent to work for the purpose of their CSO.⁶¹ Commissioner Dodson has also noted, however, the relatively limited use of such orders for Aboriginal people in other areas throughout the State, and I join with him in his support of plans by the Department to recruit Aboriginal correctional supervisors to be employed throughout the State. As he points out there is a reluctance of Aboriginal people in remote regions to take on the role of supervisors and in reporting breaches of CSOs; they feel, not unreasonably, that this should be the function of locally resident officers of the Department.⁶²

22.5.19 One aspect of the scheme for CSOs in Western Australia provides an interesting insight into schemes applicable elsewhere. Breach of a CSO in Western Australia does not automatically result in imprisonment. Until recently breach of CSOs in both the Northern Territory and South Australia have, effectively, resulted in automatic imprisonment. In South Australia legislation has recently been introduced to ensure that in the event of a breach of a CSO, whether an order imposed by the court at the time of sentencing or whether imposed as a Fine Default Order, are to be considered by a court and the sentencer has the option of granting a further CSO. In other words, once the legislation is passed a person who breaches a CSO will not automatically be facing a term of imprisonment for that breach. In the Northern Territory imprisonment for breach of the order is effectively the only option.

TABLE 22.7: DISPOSITION OF CASES FOR BREACH OF COMMUNITY SERVICE ORDERS MADE BETWEEN 1 JULY 1987 AND 30 JUNE 1989, WESTERN AUSTRALIA

Outcomes	Male		Female		Total
	Aboriginal	Other	Aboriginal	Other	
Prison sentence	14	14	1	6	35
CSO extended	2	5	2	1	10
New prob. & CSO	1	6	-	1	8
New prob. order	-	-	-	2	2
New CSO	3	5	-	1	9
Fine; continue prob.	6	9	-1	1	17
Continue prob.	3	3	-	-	6
Fine	38	114	6	15	173
Good behav. bond	-	-	-	1	1
Dismissed	1	4	-	2	7
Total	68	160	10	30	268
Outstanding	54	223	20	33	330

22.5.20 An examination of the disposition of cases where breach has been established in Western Australia shows that the magistrates, in a very significant number of cases, apply their discretion so as not to imprison the offender for breach of their CSO. Of 268 cases for breaches of orders made between 1 July 1987 and 30 June 1989, which had been processed at the time of its submission to the Commission, the DCS reported the results to have been as shown in Table 22.7 (previous). This raises the question of whether the mandatory imprisonment requirement for breach is appropriate in those other jurisdictions. The argument advanced to me for such a requirement is that for the CSO program to be seen by the courts to be a realistic alternative to imprisonment and not a 'soft option', it must be clear that persons under the orders will be forced to comply with the terms

of the order. It is argued that if mandatory imprisonment is not provided for breaches then both offenders and the courts will soon treat the CSO program with disdain. The fact that the courts in Western Australia have decided not to imprison such a significant number of persons (only 19.2% of the 68 Aboriginal male and female persons dealt with for breach were imprisoned as a result and only 10.5% of non-Aboriginal people were imprisoned) who had breached orders suggests to me that there is a very real danger of 'net widening' if the mandatory imprisonment provision pertains. In both the Northern Territory and South Australia breaches of court-ordered CSOs must be taken before the court. If the breach is proven then imprisonment for 7 days is mandatory. The very fact that there is such a certainty of imprisonment can itself inhibit magistrates from ordering a CSO in circumstances where it would otherwise have been appropriate. One magistrate who attended a conference which I convened in Darwin said this:

[B]ut really you' re fining people and knowing full well on the communities that [sic] the most sensible thing and the most probable thing they're going to do is cut it out by way of community service, but if you were to impose a community service order first up, it means that if a person breaches it they automatically go to gaol, and that really it's an option which should only come in further along in the sentencing process for more serious offences or people who've---recidivists [sic].⁶³

22.5.21 Where CSOs are imposed by correctional services officers (as is the case in the Northern Territory) or by clerks of court (as is the case in South Australia) as a free default option, breach of the order results not in imprisonment but in the issue of a warrant of commitment which may, of course, result in imprisonment if the fine remains unpaid. Breaches of orders in these circumstances are not considered by a judicial officer--a situation which I do not consider desirable but one which may be administratively necessary given the very great number of cases which would have to be returned to the courts, possibly unnecessarily if the fine was then paid.

22.5.22 In South Australia, prior to the passage of the *Criminal Law Sentencing Act 1988*, CSOs were able to be made a condition of bond but could not be ordered separately as a sentence. The Act, S.18, now provides that where a penalty of a fine and/or imprisonment is available for any offence the court may instead order a CSO. Such an order may also still be made a condition of a bond. The offences for which the courts are empowered to make a CSO are not limited by the legislation.

22.5.23 *The Criminal Law Sentencing Act* came into force in South Australia on 1 January 1989. In the twelve months following there was extensive use made of CSOs as a separate order, as an order combined with a probation order (dual orders) and as a fine default option. The statistics are set out in Table 22.8.

**TABLE 22.8: NUMBER AND TYPE OF SUPERVISION ORDERS COMMENCED
1 JANUARY - 31 DECEMBER 1989, SOUTH AUSTRALIA**

Type of Case	Male	Female	All Persons	
			Number	Percentage
Bail	162	26	188	3.3
Probation	535	213	748	13.0
Dual	265	47	312	5.4
Community Service Order	1 671	275	1 946	33.8
CSO as Fine Option	1 543	418	1 961	34.1
Parole	433	27	460	8.0

Home Detention	130	6	136	2.4
Total	4 739	1 012	5 751	100.0

22.5.24 Although I do not have figures which show the number of Aboriginal persons who were placed under CSOs in 1989, some indication of the probable extent to which Aboriginal people benefited may be seen from figures supplied to the Commission for 1986-87 (and related figures collected by the Criminology Research Unit of the Commission as at 30 June 1987).⁶⁴ The figures from DCS are shown in Table 22.9.⁶⁵

TABLE 22.9: BREACH OF COMMUNITY SERVICE ORDERS 1986/87, SOUTH AUSTRALIA

	<i>C S O Commenced</i>	<i>Number Breached</i>	<i>Percentage Breached</i>
Aboriginal	115	26	22.6
Non-Aboriginal	953	216	22.7
Unknown	31	10	32.3
Total	1 099	252	

22.5.25 In addition to the 26 orders breached, a further 19 cases involved a breach but the matters had not yet come before the courts. On these statistics Aboriginal people comprised 10.4% of persons granted such orders. This closely correlates to the findings of the Criminology Research Unit which showed that the 73 CSOs which were in operation and which involved Aboriginal people at 30 June 1987 comprised 12% of CSO orders made to all persons.

22.5.26 Whether the figure for 1986-87 is taken at 10% or 12%, Aboriginal participation, whilst greater than the percentage of Aboriginal people in the general population, is less than the percentage of Aboriginal people in prison (16.8% at census day 30 June 1987;⁶⁶ the intake figure would be considerably higher during 1988-89 Aboriginal people comprised 21% of all inmates taken into prison).⁶⁷

22.5.27 The Executive Director of the Department of Correctional Services, Mr M. J. Dawes, advised me that the most successful use of CSOs occurred where specific Aboriginal programs were operated, that is where 'the group are all Aboriginal and, where possible, the work is with and for the Aboriginal community. These programs operate at Yalata, Ceduna, Koonibba, Port Augusta and Port Adelaide'.⁶⁸

22.5.28 Notwithstanding those comments of Mr Dawes, it must be acknowledged that not all people on Aboriginal communities necessarily regard work orders under CSO as a desirable thing. In some instances Aboriginal people in the Northern Territory complained that by requiring people to work as punishment the value of work as a desirable undertaking for youth was devalued. Commissioner Dodson reported to me that in some communities in Western Australia which administered a Community Development and Employment Program (CDEP) scheme there was some confusion between the allocation of the work of an individual either as relating to CDEP (for which he was paid) or CSO (for which he was not).⁶⁹

22.5.29 As Commissioner Dodson also reported to me, the itinerant lifestyle of many Aboriginal people made compliance with CSOs difficult at times.⁷⁰ Nonetheless, it is clear that if corrections staff especially Aboriginal staff--are available to assist and monitor the progress of people on CSOs, then there is great scope for CSOs not only being employed to reduce the rate of imprisonment but to do so in a way which benefits their community and publicly serves to demonstrate that the offender is being punished for his/her offences.

22.5.30 There is clearly scope, throughout Australia, for much greater use to be made of CSOs. As will be seen in the tables below, extracted from Research Paper 19 of the Criminology Research Unit, the extent of usage of CSOs and other

community-based orders varies greatly throughout Australia. But, with the exception of the Northern Territory, there is a pronounced under-usage of such orders (and even in the Northern Territory where the census count at 30 June 1987 showed 71.5% of prisoners were Aboriginal there remains less usage of CSOs and other orders when contrasted with numbers in the prison population).

TABLE 22.10: PERSONS SERVING ORDERS BY TYPE OF ORDER AND ABORIGINALITY, NEW SOUTH WALES, 30 JUNE 1987

<i>Order type</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not stated</i>	<i>All persons</i>	<i>Per cent Aboriginal (a)</i>
Pre-sentence supervision	16	126	29	1 711	1.3
Probation, supervised	568	6 946	1 574	9 088	7.6
Community service	112	1 443	369	1 924	7.2
Aftercare probation	86	865	154	1 105	9.0
Parole/licence	84	1 507	290	1 881	5.3

(a) Excludes cases where Aboriginality is not stated.

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 8.1%.

TABLE 22.11: PERSONS SERVING ORDERS BY THE TYPE OF ORDER AND ABORIGINALITY, VICTORIA, 30 JUNE 1987

<i>Order type</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not stated</i>	<i>Total</i>	<i>Per cent Aboriginal</i>
Fine option order	1	105	10	116	0.9
Probation, supervised	44	2 052	363	2 459	2.1
Community service	46	1 625	217	1 888	2.8
Attendance order	11	356	53	420	3.0
Pre release order	2	142	32	176	1.4
Parole/licence	12	758	153	0923	1.6

(a) Excludes cases where Aboriginality is not stated.

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 2.7%.

TABLE 22.12: PERSONS SERVING ORDERS, BY TYPE OF ORDER AND ABORIGINALITY, QUEENSLAND, 30 JUNE 1987

<i>Order type</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not stated</i>	<i>Total</i>	<i>Per cent Aboriginal</i>
Fine option order	50	872	24	946	5.4
Probation, supervised recognizance	273	3 822	96	191	6.7
Community service order	123	997	26	1 146	11.0
Aftercare probation	65	582	24	671	10.0
Parole/licence	12	399	21	432	2.9

(a) Excludes cases where Aboriginality is not stated.

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 15.1%.

TABLE 22.13: PERSONS SERVING ORDERS, BY THE TYPE OF ORDER AND ABORIGINALITY, WESTERN, AUSTRALIA, 30 JUNE 1987

<i>Order type</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not stated</i>	<i>Total</i>	<i>Per cent Aboriginal</i>
Probation, supervised recognizance	261	1 792	-	2 053	12.7
Community service	133	702	-	835	15.9
Parole/licence	156	657	-	813	19.2

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 30.9%.

TABLE 22.14: PERSONS SERVING ORDERS BY THE TYPE OF ORDER AND ABORIGINALITY, SOUTH AUSTRALIA, 30 JUNE 19 8 7

<i>Order type</i>	<i>Aboriginal</i>	<i>Non-Aboriginal</i>	<i>Not stated</i>	<i>Total</i>	<i>Per cent Aboriginal</i>
Pre-sentence supervision	2	5	-	7	28.6
Probation, supervised	81	1 342	106	529	5.7
Community service	73	537	18	628	12.0

Parole/licence	59	537	33	629	9.9
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(a) Excludes cases where Aboriginality is not stated.

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 16.8%.

TABLE 22.15: PERSONS SERVING ORDERS BY THE TYPE OF ORDER AND ABORIGINALITY, TASMANIA, 30 JUNE 1987

Order type	Aboriginal	Non-Aboriginal	Not stated	Total	Per cent Aboriginal (a)
Probation, supervised recognisance	71	923	278	1 272	7.1
Community service	14	266	113	393	5.0
Aftercare probation	2	49	5	56	3.9
Parole/licence	4	43	12	59	8.5

(a) Excludes cases where Aboriginality is not stated.

The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 2.5%.

TABLE 22.16: PERSONS SERVING ORDERS BY THE TYPE OF ORDER AND ABORIGINALITY, NORTHERN TERRITORY, 30 JUNE 1987

Order type	Aboriginal	Non-Aboriginal	Not stated	Total	Per cent Aboriginal
Fine option	48	126	-	174	27.6
Probation, supervised	201	186	2	389	51.9
Community service	100	63	-	163	61.4
Aftercare probation	53	34	-	87	63.1
Parole/licence	61	54	1	116	53.0

(a) Excludes cases where Aboriginality is not stated. The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 71.5%.

TABLE 22.17: PERSONS SERVING ORDERS BY THE TYPE OF ORDER AND ABORIGINALITY, AUSTRALIA, 30 JUNE 1987

Order type	Aboriginal	Non-Aboriginal	Not stated	Total	Per cent Aboriginal (a)
Pre-sentence supervision	18	152	29	199	10.6
Fine option	99	1 103	34	1 236	8.2
Probation, supervised	1 499	17 241	2426	21 166	8.0
Community service	602	5 714	753	7 069	9.5
Attendance centre order	11	356	53	420	3.0
Aftercare probation	206	1 539	183	1 928	11.8
Pre release order	2	142	32	176	1.4
Parole/licence	388	4 007	512	4 907	8.8

(a) Excludes cases where Aboriginality is not stated. The percentage of the prison population at census date 30 June 1987 who were Aboriginal was 14.6%.

22.5.31 As the AIU reported to me, Aboriginal opinions in the Northern Territory were very favourable towards use of community-based sentencing options, especially CSOs. People recognised and applauded the fact that these schemes kept people out of prison and at the same time provided the opportunity for rehabilitation through the job skills which could be learned:

For some CSO participants, especially the large proportion who were unemployed, not only did the scheme keep them out of trouble, but it could lead to job skills and employment, even to a return to education. This is a reflection of the increased self-esteem that work gives people, and is obviously a major step in defeating the poverty and despair in which so much of Aboriginal crime has its roots.⁷¹

22.5.32 The Northern Territory AIU reported conflicting opinions about whether there was an element of 'shaming' involved in having to work on a CSO and whether or not that, if it occurred, was a desirable effect. It seemed that community

and individual perceptions of the CSO schemes largely depended on whether the work performed was seen to be useful to the community and was not too demeaning to the individual. Submissions made by AIUs noted that in some instances the work which was performed under CSOs was regarded both by the offenders and by the community as having no social benefit for either the individual or the community. It is certainly desirable, wherever possible, that the work allocated does not fall into that category. There was a strong opinion that with more funding and training programs CSOs could, like CDEP schemes, provide longer term skills and address more substantial needs within communities than tends to be the case at the moment. The work performed under CSOs is reviewed by committees which include representatives of Aboriginal communities and organisations, and very many Aboriginal organisations take persons on CSOs.

22.5.33 As noted earlier, there is some divergence of views as to the appropriateness of young people being made to work on CSOs. As former magistrate, Richard Coates, told me,ⁿ the Daly River community wrote to the magistrates advising that 'they didn't want the Courts imposing CSOs on young people because they were trying to encourage them that work was good and that people should get a job and it is a responsible thing to do'. In that instance, after discussion with the magistrates the community proposed, and the courts agreed, to require people on CSOs to work in a particular outstation. This met the community's objection as it separated CSO work from other work activities. On the whole, however, Aboriginal people have not made similar objections to the scheme.

22.5.34 In New South Wales, as the tables above demonstrate, there could be greater use of CSOs for Aboriginal people. Dr Don Weatherburn has attributed the generally low usage of either CSOs or periodic detention (that is, weekend or other limited imprisonment) as arising from the perception of sentencing authorities that these options are of lesser severity than imprisonment, and that persons who are considered not deserving of a bond or free because of their prior record are regarded as being not deserving of any other non-custodial option.ⁿ

22.5.35 As Dr Weatherburn pointed out, the success of and employment of CSOs requires that work opportunities exist with relevant organisations and that there is the administrative support available to ensure supervision of the scheme at the community where the offender lives.

22.5.36 There is a need to expand the New South Wales scheme to country areas where there is a substantial Aboriginal population. At the moment there is limited participation by Aboriginal organisations in country areas in such schemes, although in Sydney the Aboriginal Corporation for the Homeless and Rehabilitation Community Services does take CSO persons and has proved a successful location for such offenders.

22.5.37 In New South Wales there is also an Attendance Centre program, but only four country areas have attendance centres (Dubbo, Goulburn, Orange, Tuggerah Lakes). The philosophy behind the program is to encourage offenders to recognise and act upon those patterns of behaviour which need to be modified. The individual program looks to provide skills and to identify specific needs of the individual for personal development. Persons may be directed to the centres either as a condition of a CSO or pursuant to an Attendance Centre Order.⁷⁴

22.5.38 This scheme has operated with legislative backing since 1987, and, whilst early evidence suggests that the scheme may be effective, there are limited numbers of people involved. In the seven months between February and August 1989 only fourteen offenders went through the program at Dubbo and the total number of attendances at all four country centres was 138. Whether there were

Aboriginal participants is not known.

22.5.39 I would doubt whether a scheme which emphasised personal development, identification of personal deficiencies and methods of addressing those deficiencies would have great benefit for Aboriginal people, unless the centres had maximum involvement by Aboriginal people in the design and delivery of the program.

22.5.40 In Victoria in 1986 a single Community Based Order was introduced which replaced Probation, Attendance Centre Orders and CSOs. The court must choose which is the appropriate approach. Evidence of the effectiveness of community-based options in decreasing prison rates is, once again, ambiguous. It is proposed, however, that the recommendations of the Victorian Sentencing Committee, if adopted, will widen the range of community-based activities which might be undertaken by an offender (for example, drug, alcohol programs). Adoption of the recommendations will also establish a Judicial Studies Board to develop sentencing guidelines and to enhance the extent of usage of non-custodial options.⁷⁵

22.5.41 Community-based work seems to me to be a very appropriate means whereby offenders avoid the social and family costs of imprisonment and, at the same time, give back something to the community in which their offences occurred. The most important aspect of community-based orders is the opportunity which they present for providing training, health and education programs which, in benefiting the individual, can also have direct and long-term benefits for the whole community.

22.5.42 In Western Australia Work and Development Orders, which may be imposed as part of the fine default scheme, are tailored to the individual needs of the offender who could be required to undertake counselling or treatment for alcohol or drug dependency, or to attend education, social and life skill courses such as driver training, literacy courses, etc.⁷⁶

22.5.43 NAILSS has noted that in remote areas the accent is placed on 'work' rather than on 'development' because of the absence of programs for education, training, drug and alcohol rehabilitation, etc. which are available to offenders.⁷⁷ CSOs which may be imposed as a sentencing option do not, as I understand the situation, provide the opportunity for personal development tasks to replace work tasks as is the case for Work and Development Orders. In Broome an Aboriginal centre, Milliya Rumurra, provides some opportunities for persons with alcohol problems to be diverted to it but cannot provide a professional rehabilitation service, and corrections officers make little use of it for this and other valid reasons.⁷⁸

22.5.44 In the Northern Territory individual personal development courses can be conducted under a CSO, and alcohol dependent persons are directed towards relevant programs when a vacancy exists. However, the facilities for mental health and alcohol rehabilitation needs are so limited in the Northern Territory, especially in Central Australia, as to thwart the best endeavours of correctional officers to direct offenders to such programs.

22.5.45 In Queensland it is anticipated that the creation of Community Correctional Centres, and the employment in and management by Aboriginal people of such centres, will enable programs to be developed with individual offenders to promote self-development within the terms of correctional orders.⁷⁹

22.5.46 These and other initiatives in other States are all positive and deserve encouragement by the community.

Recommendation 116:

That persons responsible for devising work programs on Community Service Orders in Aboriginal communities consult closely with the community to ensure that work is directed which is seen to have value to the community. Work performed under Community Service Orders should not, however, be performed at the expense of paid employment which would otherwise be available to members of the Aboriginal community.

Recommendation 117:

That where in any jurisdiction the consequence of a breach of a Community Service Order, whether imposed by the court or as a fine default option, may be a term of imprisonment, legislation be amended to provide that the imprisonment must be subject to determination by a magistrate or judge who should be authorised to make orders other than imprisonment if he or she deems it appropriate.

HOME DETENTION SCHEMES

22.5.47 Home Detention schemes currently exist in Queensland, South Australia, Western Australia and the Northern Territory. In the Territory it provides a sentencing option to the courts, but in the two States home detention is a mechanism for early release from prison.

22.5.48 The Home Detention Scheme in South Australia functions as a 'back end' option and allows the release of a prisoner serving a sentence of imprisonment. The Correctional Services Act has restricted the extent to which home detention may be utilised in that it provides a qualifying period before home detention may be considered. This has meant that prisoners with long head sentences but shorter non-parole periods have either been excluded from the scheme or could participate only at the very end of their non-parole period.

22.5.49 The Home Detention Program has had little application to Aboriginal people. In 1988-89 there were only 5 Aboriginal prisoners and **118** non-Aboriginal prisoners subject to Home Detention Orders. In 1989-90 the numbers of Aboriginal prisoners had reduced to 2 (both of whom had their orders revoked for non-compliance) and 144 non-Aboriginal prisoners (of whom 36 had their orders revoked).

22.5.50 The limited usage of home detention for Aboriginal prisoners is explained partly by the restrictions of the scheme itself. The legislation has required that a person be detained at a particular residence; a concept difficult to translate into the habitation, cultural and kinship circumstances of rural Aboriginal people and even more difficult to police. Another factor has been the fact that supervision was generally difficult to provide for Aboriginal prisoners on remote communities.

22.5.51 These deficiencies in the legislation are intended to be removed by amendments which would vary the qualifying period so that eligibility for home detention would arise after serving only one-third of a non-parole period or, if a non-parole period had not been set, there will be no qualifying period at all. Prisoners serving life sentences would not be eligible for home detention.

22.5.52 The restrictions on movement will be significantly reduced by the proposed amendments so that a detainee may be confined not to a particular residence but to a general locality. This would particularly benefit Aboriginal people who may be confined, for example, to the boundaries of a community and only be prohibited from travelling to separate communities.

22.5.53 A further important change, which will have an impact on the operation of all community detention schemes in South Australia, will be the establishment of a

district office of the Department of Correctional Services at Marla. This office will service all of the Pitjantjatjara Lands and operate with the advice of a Community Service Committee whose members will be drawn substantially from members of the Aboriginal community.

22.5.54 The South Australian scheme relies upon the use of electronic surveillance devices enabling monitoring of compliance with the orders. I do not know whether such devices will prove to be too inhibiting or of lesser efficiency for monitoring Aboriginal people in remote communities, but it is clear that the Department and the Government have recognised the need to extend the scheme to Aboriginal people and have shown a willingness to allow for the special circumstances which might apply on Aboriginal communities. I am confident that further expansion of the scheme into Aboriginal communities will only be done with sensitivity and in consultation with those communities. This will certainly be essential.

22.5.55 Since 1987 Queensland has had a home detention scheme which allows selected prisoners to be released towards the end of their sentences of imprisonment. The scheme therefore provides a 'back end' option and not a 'front end' option which might be adopted at the time of sentencing, which was recommended by the Kennedy Commission of Review into Corrective Services. At 30 June 1988 there were 134 prisoners serving such orders. A submission to the Royal Commission from the QCSC discloses that only two Aboriginal prisoners (out of 401 Aboriginal prisoners serving in all categories of non-custodial orders) were serving home detention orders. It is not clear to me why there is so limited use made of home detention orders, but it may be that the Corrective Services Commission (which in its submission shows a very great awareness of the advantages of community-based orders) is forced to proceed cautiously, having identified the need to consult with Aboriginal and Islander communities so that their opinions are known before action is taken. Those communities have a particular interest in the return to communities of people who may cause further problems to the community. In the submission it is noted:

Aboriginal communities are not always forgiving of their members who commit violent crimes. They seek to be involved in decisions about such matters as Community Service Orders, Community Correctional Centres, etc. There is considerable resistance to the return of violent offenders to their communities before they are ready to accept them.

22.5.56 The Queensland Commission also suggested that until recently there had been insufficient staff available to provide community supervision; a problem which it now considers has been largely resolved by the creation of Regional Community Corrections Boards with Aboriginal members. The Queensland Commission now believes that it can provide full-time or part-time community corrections supervision to most remote communities. Submissions from the Attorney-General's Department in Queensland have pointed out that the Aboriginal lifestyle also makes difficult the adequate supervision of the movement of persons on CSOs, and other community-based orders.

22.5.57 Western Australia did not, until recently, have a scheme for home detention. The new scheme provides for release on home detention after a month's sentence has been served of a sentence involving not more than twelve months imprisonment. But in a submission⁸⁰ to the Commission NAILSS has expressed concern that the scheme is proposed to be limited to use only for restriction to identified premises and where the offender has a telephone for the purpose of random monitoring. NAILSS argues that for the scheme to apply to remote Aboriginal communities there will be a need for greater flexibility and for

recognition of the different lifestyles of Aboriginal people on such communities compared with non-Aboriginal people living in urban areas.

22.5.58 Neither Victoria nor Tasmania have a home detention scheme; but in both cases the statistical evidence suggests that those States generally perform well in diverting people from custody by effective strategies to broaden the range of options available to sentencing authorities. New South Wales also does not have a home detention scheme, and it can be said that in view of recent developments in the 'truth in sentencing' approach adopted in that State it seems unlikely that there would be any early moves to adopt such a scheme, at least as a 'back end' process.

22.5.59 In the Northern Territory the Home Detention Scheme is unique because, in contrast to the schemes in South Australia and Queensland, home detention is a sentencing option available to the judiciary; it is a 'front end' option. The program commenced in February 1988, and until March of 1990, 127 orders for home detention had been made of which 18 were for Aboriginal males and 3 for Aboriginal females.

22.5.60 Before a person may be ordered to serve home detention the offenders must be facing a term of imprisonment. The sentencing authority must receive a report from a probation and parole officer which establishes that:

- the offender is facing certain imprisonment;
- the offender consents to the orders;
- the offender is suitable for home detention; and
- the offender's family and close neighbours are in agreement with home detention and will not be placed at risk if such an order is imposed.

22.5.61 The pre-sentence checks which are made also seek to ascertain whether there is any history of child abuse or serious family problems which could be exacerbated if the order was made. The offenders may leave their home for purposes of attendance at work, for treatment or counselling, or for essential personal business (including shopping and funerals).

22.5.62 Surveillance is conducted both by random checks from officers of the Department, and through electronic monitoring devices. Among conditions usually imposed are abstinence from alcohol (or limitation on consumption). The order may also include conditions that the offender receive treatment for alcohol/drug problems or other conditions.

22.5.63 The scheme in the Northern Territory has proved very successful for those placed under such orders. Of the 111 offenders placed on orders up until 31 December 1989 only 8 had failed to successfully complete the term of their orders (which averaged 3.5 months).

22.5.64 However, the scheme has to date been of limited value in reducing the imprisonment of Aboriginal people, a fact acknowledged by Mr Owston in a speech delivered at a conference of the Australian Institute of Criminology in Hobart on 27 March 1990. Mr Owston suggested that the scheme had limited application to Aboriginal prisoners because most Aboriginal prisoners in the Northern Territory come from remote traditional communities. He said that application of the scheme would not be feasible for such offenders 'because of kinship relationships and the need for movement between outstations'. Mr Owston suggested that the scheme would be more applicable to Aboriginal prisoners who lived in major urban centres in the Northern Territory. Twenty-eight per cent of the 618 sentenced prisoners in 1989 were Aboriginal people who lived in such centres, so, clearly, there are people who could benefit from the scheme as it presently operates.

22.5.65 Mr Owston is concerned that should the scheme be introduced into remote communities it could produce a net widening effect. In his opinion the scheme is

not appropriate in those areas, and, since breaches are bound to occur and carry a penalty of automatic imprisonment, would serve only to discredit a scheme which works well in urban areas. In his view probation or CSOs are much more appropriate for offenders in rural areas.

22.5.66 Mr Owston also said that it was intended to couple the home detention program with a residential alcohol treatment program, in recognition of the significant extent to which alcohol misuse is a factor in the offending of those Aboriginal people from urban areas. This is an excellent initiative which I trust will come to fruition.

22.5.67 I appreciate the reservations which Mr Owston has about plans to extend home detention schemes so as to serve Aboriginal people living on remote traditional communities. The very problems which Mr Owston has identified would also apply in the Pitjantjatjara Lands of South Australia to which it is intended to extend the scheme. I believe that this is one of those situations where continued close consultation between Correctional Services Departments throughout Australia would be of great benefit. However, if the experience in the Pitjantjatjara Lands demonstrates that the concerns which Mr Owston has at the moment do not prove to be valid, then there should be no delay in extending the scheme in the Northern Territory. I do not believe that initiatives such as these should be unduly delayed once there is evidence to support their extension. There is a need to seize the initiative and the Northern Territory Department and Government have shown a commendable willingness in the past to take innovative approaches. It is, of course, equally important that novelty, for its own sake, does not motivate the introduction of programs when, with better management and resources, existing programs could be effective.

Recommendation 118:

That where not presently available, home detention be provided both as a sentencing option available to courts as well as a means of early release of prisoners.

PROBATION AND PAROLE

22.5.68 As the Tables 22.11 to 22.17 show, probation is the most widely used court-based non-custodial option. The most important post-prison option is parole.

22.5.69 As will be seen from Table 22.10 the Aboriginal use of parole in New South Wales is extremely limited. Since introduction of the *Sentencing Act 1989* the so-called 'truth in sentencing' legislation--the number of offenders who served parole has dropped from 56% of the prison population to 31.8%.¹¹ This legislation provides that the courts must set two terms of imprisonment, the first being the minimum term of imprisonment which must be served. In addition and cumulative on the first term, the courts must set a non-parole period which commences at the end of the minimum term. This non-parole period may not exceed more than one-third of the minimum term. The court may opt just to set a single fixed term, and the prisoner is, therefore, ineligible for parole and is released when the fixed term expires.

22.5.70 Early evidence indicates that on average, as a result of the legislation, sentences are now fifty-five days longer, and prisoners are serving only a quarter of the time on parole that they served prior to the legislation.

22.5.71 Whilst the desirability of truth in all aspects of the criminal justice system need hardly be debated, the real question is the efficacy and rehabilitative or deterrent effects of sentencers. There has been much public debate about the new legislation, and I do not intend to enter that debate except to make the following

point. If the legislation was introduced to meet public criticism that offenders were being released too soon--and that the time spent in custody was therefore disproportionately small in comparison to either the head or non-parole sentences--then the public need also recognise that there is a demonstrable cost in the loss of rehabilitation opportunities which flows with greater periods of imprisonment.

22.5.72 The Probation and Parole Service in New South Wales is well aware that the system of supervised probation and parole does not well serve the interests of Aboriginal people. There are moves now to involve Aboriginal communities, possibly on a fee-for-service basis, to assist in the supervision of offenders.

22.5.73 Of 300 Probation and Parole Officers in New South Wales, only 3 positions are identified as Aboriginal Probation and Parole Officers and 4 as Liaison Officers. Only 2 other Aboriginal people hold non-identified positions in the Probation and Parole Section. There is a clear need to employ more Aboriginal people in the service and a target figure of 2% has been set for all positions in the Department. At the moment only 17 positions out of a total departmental staff of 3,700 are identified as Aboriginal positions (7 of these places were not filled as at June 1990).

22.5.74 There are some interesting developments taking place in New South Wales. A pilot project, the Aboriginal Community Committee, has been established in Wilcannia to monitor the progress of persons under supervision and to advise the Department, judges and magistrates and the Offenders Review Board. Professor Richard Harding has suggested that there is a need for more assistance and supervision of probationers and parolees, and he recommends the appointment of honorary probation officers from local Aboriginal communities.

22.5.75 A study of North Queensland communities by the QCSC revealed that only 10 Aboriginal prisoners from that area had ever been granted parole.⁸² As will be seen from Table 22.12, only 2.9% of persons serving parole or licence orders in Queensland at 30 June 1987 were Aboriginal. These abysmal figures and others similar led to significant changes in the corrections system, including the employment of Aboriginal community corrections officers in communities and the replacement of the Parole Board by five Regional Community Corrections Boards which have Aboriginal members. Prisoners, although denied the right to legal representation before the Boards now have a statutory right to obtain written reasons for the refusal of parole. Notwithstanding these developments the QCSC reported in a submission to Commissioner Wyvill that 'many' Aboriginal people do not apply for parole and 'to this extent people remain in prison longer than necessary'.⁸³ This suggests that more needs to be done to ensure that the Department's services are conveyed in the most efficacious way possible to Aboriginal people. The QCSC submission demonstrates that it is well aware of that need and is taking appropriate steps to meet it.

22.5.76 One innovation in Queensland is a program to direct drink-driving offenders to courses designed to deal with their drinking problems. The Drink Driving Program is enforced as a condition on probation orders (or in conjunction with CSOs) and provides a much needed sentencing option. It is a long-term program requiring nearly seven months participation by offenders. Whilst it is intended that the program will eventually be available throughout the State, its present scope is limited and would, therefore, not have a major impact on Aboriginal offenders. The program is being evaluated, and it is too early to say whether it will prove valuable. However, it again demonstrates the value of innovation in dealing with social problems which lead to court appearances by offenders.⁸⁴

22.5.77 In common with the evidence gathered elsewhere in Australia, Aboriginal parolees in South Australia have a high incidence of parole breach (53.6% of parole orders commenced in 1986-87 were breached compared with 33.7% for non-Aboriginal parolees).⁸⁵ To deal with this high level of breach of orders the Department sees there is a need to improve the understanding of the conditions of each parole order and to enlist the support of family and community. Aboriginal liaison officers are being employed on communities. Mr Dawes has rejected the notion of employing Aboriginal parole officers, seeing this as being inappropriate 'for obvious cultural reasons'.⁸⁶ I confess that the reasons are not obvious to me, but there is only one Aboriginal probation and parole officer employed at the moment.⁸⁷ With the opening of an office of the Department at Marla there will clearly be increased support for Pitjantjatjara parolees, but it seems to me that this should not reduce efforts to recruit and train Aboriginal parole officers. I note that in the Northern Territory a quite different approach is being adopted. There is a concerted effort being made to recruit Aboriginal people and to train them to become fully qualified probation and parole officers.

22.5.78 In the Northern Territory there has been a remarkable growth in numbers of offenders granted probation, so much so that the Secretary of the Northern Territory Department is convinced 'that probation is being over used' and that 'offenders who do not require guidance or professional help from a probation and parole officer are placed on probation'.⁸⁸ Mr Owston sees this as creating a 'net widening' effect which leads to imprisonment as a result of breaches of probation. Mr Owston considers that probation is being used by courts when a fine, CSO or other non-custodial order was more appropriate. Legislation is being introduced to ensure that the sentencing court must consider an evaluation report from a probation officer before placing a person on probation. Just over half of all probation orders (and also parole orders) are ordered for Aboriginal people in the Northern Territory.

22.5.79 In Western Australia a picture emerges of low usage of parole (See Table 22.13) and high incidence of breaches (in 1986-87 only 50% of 163 Aboriginal parolees successfully completed parole compared with 76% of non-Aboriginal parolees).⁸⁹ Once again this Department identifies the need to increase the Aboriginal community participation in parole. Two of four community corrections officers in the Kimberleys are Aboriginal, but, clearly, the figures suggest that much greater use of Aboriginal people as officers of the Department throughout the State would improve the degree of participation and successful outcomes for Aboriginal people in the parole system.

22.5.80 The breach rate for probation orders in Western Australia over the five-year period from 1 July 1985 to 30 June 1990 was 28% for Aboriginal males and 22% for females, although over a third of all orders were still current. (The breach rates for non-Aboriginal people were 16% for males, 8% for females with a quarter of orders still current).⁹⁰ These rates for breaches are low in comparison to other States, although, as shown in Table 22.13, Aboriginal participation in probation is low also.

Recommendation 119:

That Corrective Services authorities ensure that Aboriginal offenders are not being denied opportunities for probation and parole by virtue of the lack of adequate numbers of trained support staff or of infrastructure to ensure monitoring of such orders.

FINES AND FINE DEFAULT

22.5.81 Imprisonment for non-payment of fines represents a remarkably substantial but little recognised category of offenders in prison. To give an illustration, the South Australian intake of prisoners in the years 1988-89 are given in Table 22. 187

TABLE 22.18: INTAKE OF PRISONERS, 1988 AND 1989, SOUTH AUSTRALIA

<i>Year</i>	<i>Remand</i>	<i>Sentenced</i>	<i>Fine Default</i>
1988	1 492 (30.78%)	1 241 (25.60%)	2 114 (43.62%)
1989	1 360 (30.24%)	1 268 (28.20%)	1 869 (41.56%)

22.5.82 Unfortunately, the South Australian figures do not tell us how many Aboriginal people were in each category, but evidence received by the Commission from many sources suggests that a very significant number of those imprisoned for fine default would be Aboriginal. In Western Australia in the four-year period ending 30 June 1989, 44% of prisoners were admitted for fine default, and, of those, Aboriginal prisoners comprised 23% of such fine defaulters (whilst 23% was the overall figure, by the end of the period surveyed Aboriginal people were more than half of the intake of free defaulters).⁹²

22.5.83 Some indication of the importance of avoiding imprisonment for those unable or unwilling to pay fines can be gained from considering the numbers of those who died in custody while serving terms for nonpayment of fines. Of the 33 deaths in prisons 3 were serving terms for free default.

22.5.84 Governments and correctional administrators have long recognised that there are compelling social and economic reasons to provide an alternative way to address fine default other than to imprison the defaulters. Significant legislative reform has occurred in this area over recent years, but it can be said that for various reasons in some jurisdictions Aboriginal people have not benefited to the extent which they might from such reforms.

22.5.85 In 1989 the number of Aboriginal prisoners admitted to prison in South Australia decreased by 15% from the previous year (795 compared with 942). The non-Aboriginal prison intake decreased by 6.6%.⁹³ The Office of Crime Statistics suggests that the fact that this decrease in admissions did not correspond to a decrease in the daily average prison population (the 'stock' of prisoners) reflects the fact that prisoners are receiving longer sentences than in earlier years.⁹⁴

22.5.86 The decrease in the intake of prisoners most probably demonstrates that non-custodial sentencing options are being employed to a significant degree. In 1989 the number of new CSOs increased by 25.8% over the previous year. In addition, the prison intake was significantly reduced by the extraordinary growth in the numbers of individuals taking up fine option orders. There was an increase of 237% of individuals taking up such options.

22.5.87 I have earlier dealt with Community Service Orders as an option available to the courts when sentencing prisoners. Here I wish to consider the fine default option, which, in all jurisdictions where it has been employed, provides a community service alternative to imprisonment. The fine default option is not imposed by the courts as a sentencing option but is employed administratively upon application of the person fined.

22.5.88 First, however, I will consider the notion of fines. Conceptually, fines are a lesser penalty in the range of sentencing options available to the courts. Fines, however, may well operate merely to delay imprisonment if the person fined does not have the means to pay; this is the case for a great majority of Aboriginal people who come before the courts. The need to find the money to pay fines can cause

many problems within Aboriginal communities. The report to me from the AIU in the Northern Territory records the prevalence of Aboriginal people demanding money from family and friends to meet their fines, often literally resulting in the food being taken from the mouths of children by reducing the already limited funds available to their parents.

22.5.89 Inevitably, however, a great many fines remain unpaid, and warrants for the arrest and imprisonment of those who have failed to pay are issued by the courts.⁹⁵ As a first step in preventing this situation arising the courts should be constrained not to impose fines which are simply beyond the ability and the means of a person to pay. Poverty should not determine that a person is at risk of imprisonment where a person of greater means would pay a similar fine without such possibility arising.

22.5.90 Too often it can be the case that a warrant of commitment for the non-payment of fines or costs has been outstanding for many years, and then, when it is finally executed, the offender's situation is very different to what it was at the time when the warrant was first issued. In the meantime the person may not have re-offended, may have obtained work which he or she will lose as a result of being imprisoned pursuant to the warrant, may have married and settled down to a life without offending. Yet, execution of a warrant on such a person can destroy the gains which have occurred and once again the person is drawn back into the criminal justice system. This can destroy what otherwise were good prospects for the person's rehabilitation. It would be very much in the community interest if such long outstanding warrants were not executed after a period of years during which the person had not re-offended.

22.5.91 In Victoria and New South Wales a statutory obligation has been imposed on the sentencing authorities to take into account the means of the offender to pay a fine before fixing the amount of the fine.⁹⁶ I do not have evidence as to the effect of this legislation, but, in principle, it seems to me to be a valuable legislative reminder to the courts to adopt such an approach when sentencing.

22.5.92 A recent evaluation of the operation of the fine default scheme in New South Wales challenges some of the assumptions which have generally been made about such schemes. Dr Angela Gorta, the Chief Research Officer for the New South Wales Department of Corrective Services, has reported on the first eighteen months operation of the scheme in that State.⁹⁷ The evaluation involved five separate studies which related both to examination of departmental records and interviews with fine defaulters.

22.5.93 The first New South Wales scheme was introduced as a result of the public outcry which followed the brutal bashing in prison of Jamie Partlic, a fine defaulter, in November 1987. The scheme initially provided for the cancellation of driving licences and motor vehicle registrations in lieu of imprisonment for non-payment of traffic and parking fines.

22.5.94 For fine defaulters whose fines had been imposed by a court the scheme provided that defaulters were automatically issued with a CSO. This was changed by the *Fine Enforcement Legislation (Amendment) Act 1989*, which commenced on 9 February 1990. The system now is that when a person defaults he/she is served with notice that a warrant has been issued, and upon service of the notice has seven days in which to either pay the fine or apply to court for a default order. If the offender does not take either course, imprisonment should result. The alternative order is a CSO.

22.5.95 If the offender, having applied for and received a CSO, then fails to comply with its terms, he/she receives a notice from the court giving 7 days in

which to explain the breach. Failure to respond leads to a warrant of commitment, but once served the offender has a further seven days in which to apply for the CSO to be re-issued. If that step is not taken imprisonment will follow and will cease only on payment of the fine or expiration of the sentence.

22.5.96 The evaluation disclosed that, in the eighteen months of the scheme, when a CSO was automatically imposed for default more than half of the people fined did not pay the fines. Of those who, therefore, received CSO orders only 19.4% actually attended Probation and Parole Service to register for work as required. Of those who did register one-third did not report for work.

22.5.97 The researchers concluded that since there were so many opportunities to avoid imprisonment, and which did not require the payment of a fine, it could not be said that fine defaulters were going to prison because of poverty. They concluded that many people were simply choosing not to pay fines, and either would prefer to receive a sentence to cut out the fines or else were simply taking the chance that they would not be pursued by the authorities to enforce the warrant of commitment. Plainly, for very many, it was worth the risk, as there were an extraordinary number of cases where the offenders were, in theory, facing imprisonment but were not being pursued. Between 1 January 1988 and 30 June 1989, 6,869 fine defaulters registered to do community service work. However, there remained 28,587 people (80% of those who defaulted on payment of the fine) who had also failed to register to perform CSO work.

22.5.98 The study estimated that only a very small group, approximately half of the 6,869 people who registered for CSO, were saved from imprisonment by the scheme. Of those who did perform CSOs some 29% had previously cut out fines by imprisonment so it is probable that for this group the scheme provided an alternative to imprisonment. Of the balance who performed CSOs the authors noted that half of those defaulters interviewed said that had the CSO not been available they would eventually have paid the fine rather than be imprisoned.

22.5.99 This study did not examine the question of race, and it would be unwise to assume that the conclusions reached were applicable to any Aboriginal fine defaulters.' It could be, of course, that Aboriginal people, more commonly than non-Aboriginal defaulters, fail to pay fines because of poverty; this would accord with the known economic disadvantages which Aboriginal people face. On the other hand, the study does provide a note of caution about making simplistic assumptions about the reasons for non-payment of fines.

22.5.100 However much the New South Wales system may be failing to locate and penalise those who fail to pay fines it, nonetheless, has had a dramatic impact on the numbers entering prison for fine default. The reception into prisons for fine defaulters in New South Wales is set out in Table 22.19.

TABLE 22.19 RECEPTIONS OF FINE DEFAULTERS INTO NSW PRISONS: 1986-1989

Year	Number of Prisoners
1986	3 476
1987	2 610
1988	143
1989	272

22.5.101 It is in the Northern Territory where claims are made for the most dramatic reductions in prisoner numbers as a result of fine default alternatives to imprisonment. The Secretary of the Department of Correctional Services gave evidence before me of a 25% reduction in prisoner numbers over two years as a result of such schemes.⁹⁸ He also addressed this question in a paper given at a conference convened by the Australian Institute of Criminology in Hobart on 27 March 1990.

22.5.102 In his paper to the conference Mr Owston stated that when the Fine Default Diversionary Program commenced on 19 January 1987 fine defaulters comprised 30% of all prisoners received in Northern Territory prisons. By December 1989 that number had reduced to 17%. The figures are startling: in 1986, 584 persons were imprisoned for fine default; in 1989 only 170 persons were thus imprisoned. Given the substantial Aboriginal component in the prison population (approximately 70% in recent years)⁹⁹ it is clear that Aboriginal people are beneficiaries to a significant degree.

22.5.103 It is interesting to note that in South Australia Aboriginal offenders may not have benefited significantly by its Fine Default Diversionary Program. In the 1988-89 period only 93 Aboriginal offenders, or 8.1% of the total, participated in the free default scheme.¹⁰⁰ In his submission to the Commission Mr Dawes attributed this modest Aboriginal participation rate to a number of factors, most significant of which was the reluctance of many Aboriginal offenders to approach the court in order to take up fine default options. The Department was attempting to increase participation by the employment of Aboriginal liaison officers whose job was to attend Aboriginal centres in major areas to assist Aboriginal offenders to take up fine default options. Clearly, however, South Australia has not seen the dramatic results achieved in the Northern Territory, although, as earlier noted, there has been a reduction in the numbers of Aboriginal people entering prison.

22.5.104 In Western Australia, legislation¹⁰¹ came into force on 1 March 1989 to provide for Work and Development Orders to be substituted for imprisonment for fine default when a warrant of commitment for nonpayment had been issued. Although I do not have any figures relating to Aboriginal participation, advice to me from Commissioner O'Dea suggests that there are some administrative features of the Western Australian scheme which might militate against substantial Aboriginal use of the options available.

22.5.105 Among the factors which Commissioner O'Dea identified is the fact that notice of default, which is sent to an offender when a fine remains unpaid, is in very formal language. Mr David Watson, Centre Manager for the Community Based Corrections Office at Geraldton, speaking of the notice said that it would require a person to be 'fairly well versed in literacy skills' to understand what the options were that were being proposed by the notice.¹⁰² A further problem with the scheme is that at the time of sentencing the magistrate or justice who imposes the fine may give a direction that the fine may not be converted to a Work and Development Order. As Commissioner O'Dea noted in his report to me, this appears to be a somewhat unnecessary restriction, and I would hope that such directions would be given only on rare occasions, although Commissioner O'Dea has reported that there is some evidence that such directions are being imposed, frequently by some magistrates and justices. Finally, the scheme suffers from the disadvantage in that the option to adopt a Work and Development Order rather than imprisonment may arise only at the time when the fine has fallen-due and remains unpaid. The Western Australian scheme does not have the feature of the Northern Territory scheme which enables the offender to opt for a Work and Development Order at the time that the fine is imposed. It seems to me that the greatest use of such orders would be made at an early stage rather than waiting for the fine to fall due and for the offender to respond to a notice in writing which requires the offender to first contact the clerk of courts and then to appear in court if he/she is to be given a Fine Default Order and to avoid imprisonment. Once imprisoned--whether in a police cell or in a prison--the offender has a further opportunity to apply for a Work and Development Order, but this whole scheme seems to me to be less likely to optimise the use of such orders by Aboriginal offenders.

22.5.106 In Victoria there is a Fine Option Order which is designed to avoid imprisonment for non-payment of fines and which is equivalent to a CSO, but there has been little application of this to Aboriginal people. At 30 June 1987 only one Aboriginal person (compared with 105 non-Aboriginal people and 10 of race unknown) was then on such an order.¹⁰³

22.5.107 On the other hand, the Director of Community Based Corrections in Victoria, Mr Denbigh Richards, has said that there has been a 'virtual end to imprisoning fine defaulters and the effective substitution of community work as the fine default penalty'.¹⁰⁴

22.5.108 Mr Richards says that this result has been achieved

*by the courts using their power to convert an unpaid fine to a Community Based Order applying a statistically determined formula; or if warrants are executed and people detained to serve default periods of imprisonment, by using Office of Corrections powers to grant leave on the condition that the person perform a predetermined number of hours of community work. Whilst the mechanisms may be cumbersome, the end result is that essentially only wilful defaulters serve imprisonment terms for non-payment.*¹⁰⁵

22.5.109 In Queensland persons sentenced to imprisonment for fine default may apply for release or home detention, but very few so apply.¹⁰⁶ An alternative, which amounts to a sentencing alternative, is the Fine Option Order, which enables a person sentenced to imprisonment to apply to undertake community service rather than pay a fine. This option must be applied for to the court at any time up and until the period allowed for payment of the fine has expired.

22.5.110 Although there are significant limitations in the present Fine Option Order Scheme, QCSC statistics suggest that increased use of the scheme has been the major factor to explain a recent reduction in what until 1988 had been steadily increasing figures in the prison population. At 30 June 1990 there was a 5% drop in prison numbers according to Mr Ross Evans, Executive Officer to the Director of Community Corrections, compared with the previous year. In the period February 1989 to February 1990 there had also been an 80% increase in the case loads of probation and parole officers relating specifically to free option orders.¹⁰⁷

22.5.111 The Queensland Government has recently published a Green Paper canvassing options to expand the free default program specifically to allow CSOs to be imposed by the court where a person is brought forward to show cause why they should not be imprisoned for non-payment of a fine. In the Green Paper the Attorney-General sets out the preferred government option for reform as follows:

*Where a Statute creating a criminal offence prescribes a fine, the penalty for non-payment of the fine will be a Community Service Order and the penalty for non-compliance with the Community Service Order will be home detention. Imprisonment will be used as a last resort.*¹⁰⁸

22.5.112 I believe that this proposal has much to commend it. I note, however, that the proposal has been criticised in some sections of the community. The Prisoners' Legal Service Inc., in a thoughtful submission to the Attorney-General, which was supplied to the Commission, suggested that the proposal was based on inadequate research and notes that whilst the Green Paper expresses the government's philosophy as being the abolition of imprisonment for fine default the

proposal retains that sanction.

22.5.113 The Prisoners' Legal Service notes, correctly, that CSOs do interfere substantially with the lives of those placed on the orders and query whether it is therefore appropriate to apply a CSO to a person who, through poverty, simply cannot pay a fine. The submission continues:

As it currently stands, the CSO has been devalued as an alternative to prison, its intended function, and this should be rectified before it is adopted as a default option. Its place in the proposed model as the first default step reinforces it as a less serious penalty when in fact it is viewed by offenders as a considerable punishment. Many offenders choose a fine to CSO when given the choice under the Fine Option Scheme.¹⁰⁹

22.5.114 Notwithstanding these comments, I still consider that it is appropriate to consider CSOs as a first option to imprisonment for nonpayment of a fine. The Prisoners' Legal Service suggests that if all processes have been exhausted and the fine remains unpaid, deductions for fines could be taken through the taxation system or in small instalments from social security benefits. Those are interesting suggestions but, in all probability, unworkable in practice. Few Aboriginal fine defaulters, for example, would have any dealings with the Taxation Department, and the concept of deductions for penalties from social security payments is one which does not enthuse me.

22.5.115 It is worth considering, after this brief review, the advantages and disadvantages of the fine default schemes operating throughout Australia in order to assess the extent to which Aboriginal people may gain maximum benefit from such schemes.

22.5.116 In my opinion the Northern Territory scheme has a number of distinct features which maximise its potential value to Aboriginal people.

- The Northern Territory scheme provides a two-stage opportunity for offenders to avoid imprisonment. In the first place, when the fine is imposed the person may elect to undertake a CSO instead of paying the Fine. Secondly, once a warrant has been issued and executed a person may then elect to undertake a CSO. The person to whom application is made is a correctional officer and he need only be satisfied that the person is a suitable candidate for such an order. The only other jurisdiction which allows the person to apply for such an order at a time before the warrant issues is Queensland, and there the offender must appear in person at the court and satisfy the court that they are unable to pay or that payment would cause economic hardship to their family. If, in Queensland, a fine remains unpaid the offender may be required to show cause why he/she should not be imprisoned, in which case the court retains a discretion to rule that they not be imprisoned. Whilst the opportunity to 'show cause' exists, the more usual course is for a warrant to be issued forthwith upon default and the defaulter to be imprisoned.
- In South Australia application must be made in writing to clerks of court and must be accompanied by a range of financial information. It is difficult to imagine many Aboriginal people, especially those with little understanding of English or with limited literacy, adopting this approach. Western Australia relies on the offender responding to written notices and applying to the clerk of courts. The approach in these jurisdictions may be contrasted with the Northern Territory.

In the Northern Territory a considerable number of Aboriginal people have been employed as community corrections officers who are authorised (and encouraged)

to locate defaulters and to bring them under CSOs. Corrections officers are based at all major magistrates courts, travel on circuit where courts sit at remote locations and are also based at all major Aboriginal communities. There is, thus, a wide network of officers dedicated to informing the Aboriginal community of the options available. As a matter of course, officers attend police stations daily to see if anyone with a warrant is in the cells or else may be called in by police when such a person is brought in on a warrant. Evidence given to me in the Northern Territory was that on 98% of the occasions when such officers are called upon to determine whether an offender might appropriately undertake a community service option they decide in favour of such a course. I have heard just how flexible the scheme is in practice. Police officers, for example, are willing to act on a decision conveyed to them by telephone or facsimile from a corrections officer placing a fine defaulter under a CSO.¹

22.5.117 The Northern Territory has made a considerable commitment to ensuring that Aboriginal people learn about their options and have as little difficulty as possible in being brought under the scheme.

22.5.118 The evidence is very clear that once admitted to the option of community service a great majority of the fine defaulters succeed in completing the order. In the Northern Territory Mr Owston showed that 89% of those who opted for community service at the time of sentencing successfully completed CSOs. Seventy-one per cent of those admitted to the scheme after a warrant was executed successfully met the conditions of their CSOs. In Western Australia the figures are even more dramatic. The Department of Corrective Services advised Commissioner O'Dea that 93% of persons who elected to take a fine default option after receiving written notice of default successfully completed the work and development orders. Of those who applied once they were imprisoned the success rate was

Recommendation 120:

That governments consider introducing an ongoing amnesty on the execution of long outstanding warrants of commitment for unpaid fines.

Recommendation 121:

That:

- a. Where legislation does not already so provide governments should ensure that sentences of imprisonment are not automatically imposed in default of payment of a fine; and***
 - b. Such legislation should provide alternative sanctions and impose a statutory duty upon sentencers to consider a defendant's capacity to pay in assessing the appropriate monetary penalty and time to pay, by instalments or otherwise.***
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PART E

REDUCING THE RISKS OF DEATHS IN CUSTODY

In the previous part, Part D, the ways in which the disproportionate number of Aboriginal people detained in this country can be addressed through various police and court processes, was explored. In Part E, I discuss the ways in which the risk of death for those for whom diversion from custody is not achievable can be reduced.

*The three chapters which comprise Part E, draw heavily on the details of the 99 deaths investigated by the Commission. The first chapter, 'The Vulnerabilities of Those in Custody' (Chapter 23), examines the **particular** vulnerabilities of Aboriginal persons entering custody from a physical and mental health perspective. Some particular areas of risk are identified, such as the dangers associated with alcohol misuse, self-harming behaviour and other conditions such as epilepsy and ischaemic heart disease. Such risks have certain implications for custodial practices and procedures, dealt with in Chapter 24 ('Custodial Health and Safety'). In Chapter 24, the ways in which police and prison practices and procedures can be modified in order to reduce the risks of deaths in custody occurring are addressed. A variety of aspects of police custodial practices and procedures are discussed including reception and surveillance procedures and specific issues relating to the management of those considered at risk. In the context of prison deaths, attention is focussed on the operations of prison medical services, as this was the area in relation to which much criticism was levelled in reports of Commissioners. Continuing the theme of reducing the risks of deaths in custody, Chapter 25 examines the way in which prison life, as experienced by Aboriginal people, is implicated in their over-representation in prison and their pre-mature death. It is pointed out that some Aboriginal cultural factors, such as the significance of kin and community relations, make the experience of prison especially difficult for Aboriginal prisoners.*

While the chapters in Part E concentrate on addressing aspects of custodial practices and procedures and the custodial environment which may reduce the risk of custodial deaths, it is important to stress that effecting improvements to the custodial situation is not the 'solution' to deaths in custody but the last opportunity to avert those deaths which are or may be preventable. The first strategy to reducing the number of deaths in custody is to reduce the number of Aboriginal people coming into custody in the first place. The underlying social, cultural and legal factors which bear on deaths in custody must be addressed if this is to be achieved. It is in the following part of this report, Part F, that these issues are addressed.

Chapter 23 THE VULNERABILITIES OF THOSE IN CUSTODY

The Aboriginal deaths in custody occurred through an interaction of factors, some concerned with the individuals who died, some concerned with the custodial experience and some concerned with the way custodians exercised their duty of care. This chapter considers the first two of these, focusing particularly on the health status of Aboriginal people as it is the most important vulnerability related to their custodial deaths.

The chapter opens with descriptive information on the health status of Aboriginal people in the community which, it is well known, is far below that of the non-Aboriginal sector, and then presents an epidemiological analysis of the relative risks of death in custody of Aboriginal and non-Aboriginal people, concluding that police custody is particularly dangerous but that prison is not. Some attention is then given to the topic of mental health, since the Aboriginal community is a neglected area, one of great concern to many Aboriginal people. Self-inflicted deaths, both in the community and in custody, are discussed since they are a major cause of Aboriginal deaths in custody.

The chapters which follow this one consider the reducing of the dangers involved in police and prison custody, respectively, and Chapter 27 examines just what is being done, and should be done, to improve the health of Aboriginal people.

23.1 RELEVANCE OF HEALTH FACTORS

THE HEALTH CONTEXT OF THE DEATHS IN CUSTODY

23.1.1 It is apparent that health was a key vulnerability facing those Aboriginal people who died in custody and, indeed, is a key vulnerability of all people taken into custody. The adequacy of health care for those dying in custody has already been discussed in Chapter 3. The poor health of many individual Aboriginal people reflects the nature of many Aboriginal communities in which feelings of individual despair and hopelessness are often found. These feelings are reflected by violence, drunkenness, vandalism and other forms of crime, as well as illness and self-destructive behaviour. A number of significant submissions have been received by this Commission on the subject of Aboriginal health including submissions from notable Aboriginal communities and organisations, for instance the Victorian Aboriginal Health Service and from the Australian Medical Association. To assist the Commission in understanding the health context of the Aboriginal people who died in custody, Dr Neil Thomson, Head of the Australian Institute of Health's Aboriginal and Torres Strait Islander Health Unit produced a report entitled 'Overview of Aboriginal Health Status'. This report noted that:

Aboriginal people are the least healthy identifiable sub-population in Australia. The health problems of Aboriginal people vary across the country, reflecting different circumstances, but the overall standard of health is low throughout Australia.

By virtually every health status measure, and for almost all disease categories, the health of Aboriginal people is much worse than that of other Australians. The extent of Aboriginal health disadvantages can be gauged from their overall mortality: [Aboriginal people have rates of death] roughly two to four times that of the total Australian population. As a result, Aborigines can expect to live many years less than other Australians: for males, between 12 and 20 years less, and, for females, between 14 and 21 years less.¹

23.1.2 In summarising a variety of health data from different sources, this report, and five others (an overview for each State) prepared for the regional Commissioners drew attention not only to the poor level of health experienced by Aboriginal people, but also to the relative paucity of Aboriginal health statistics. I find it unfortunate that data for any key health indicator for Aboriginal people are not available at a national level, and many are not even available at State and Territory level. Data on Aboriginal deaths, for example, only started to become separately identifiable in the 1980s. Even today, reliable statistics are not available for Aboriginal people living in New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory--although there are some statistics collected for Aboriginal people living in a number of communities. That is, reliable death statistics are available for less than two-fifths of the country's Aboriginal population.

23.1.3 In the absence of comprehensive statistics, to present a picture of Aboriginal health it is necessary to piece together data from different places and for different time periods. In Chapter 31, I will comment further on the need for more comprehensive statistics on Aboriginal health.

23.1.4 To illustrate the very poor health status of Aboriginal people, I will summarise a few of the statistics from the various reports prepared by Dr Thomson and his colleagues at the Australian Institute of Health, and from a recent paper comparing the risks of death of Aboriginal and non-Aboriginal people in custody with the risks in the total populations, Aboriginal and non-Aboriginal.²

Expectation of Life

23.1.5 The extent of Aboriginal health disadvantage is reflected in their expectation of life at birth, markedly lower than that of other Australians, and poor even by international standards.

23.1.6 As part of the detailed comparison of Aboriginal and non-Aboriginal deaths in custody with the mortality experience of the total populations, Aboriginal and non-Aboriginal, the details of Aboriginal deaths and populations from a number of regions were combined.³ From these combined data, the expectation of life at birth of Aboriginal males was estimated at 55 years and of Aboriginal females at 61 years. These expectations of life at birth for Aboriginal people are well below those of the total Australian population in 1986, 73 years for males and 79 years for females.

23.1.7 For males, the estimated life expectancies at birth range from 53 years for Aboriginal people living in the Northern Territory in 1985 to 58 years for those living in Western Australia in 1987-88. For females, the range is from 57 years for Aboriginal people living in the Queensland communities in 1987-89 to 67 years for those living in South Australia in 1988-89.

23.1.8 For those areas of Australia for which separate data on Aboriginal deaths are not available, an inter-census survival analysis of the population figures from the 1981 and 1986 Australian Censuses⁴ revealed what Dr Thomson has

termed 'the striking similarity of Aboriginal mortality throughout Australia' .s

23.1.9 The capacity to monitor changes in the expectation of life (and in other health indicators) for Aboriginal people is greatly restricted by the lack of reliable statistics. In 1975, the National Population Inquiry estimated the expectation of life of Aboriginal people at fifty years,⁵ somewhat lower than the estimates noted above. While some improvements in expectation of life could be anticipated from the substantial reductions that have occurred in Aboriginal infant mortality since the 1970s (I summarise these briefly below), the reliability of the National Population Inquiry's estimate is not known.

23.1.10 Not only is the expectation of life **at** birth lower for Aboriginal people than for the total population, the expectations of life at other ages are also lower, as seen in the combined Aboriginal population referred to above. For this combined population, at age 40 years, the expectation of life of Aboriginal males was estimated at 23 years and of Aboriginal females **at** 27 years.⁷ That is, at age 40 years, Aboriginal males could expect to live to 63 years and Aboriginal females to 67 years. In contrast, at age 40 years, males in the 1986 Australian total population could expect to live to 76 years, and females to 81 years. Inevitably the gap is less pronounced at an older starting age but even at 50 years the differential is 10 years for males and 11 years for females.

Standardised Mortality

23.1.11 A technique known as indirect standardisation is used to provide an estimate of the number of deaths expected by the Aboriginal populations if they experienced the same age-specific death rates as the non-Aboriginal populations. The ratio of the number of deaths observed to the number expected is known as the standardised mortality ratio (SMR). After adjustment is made for differences in the age structures of the Aboriginal and non-Aboriginal populations, generally Aboriginal death rates are between two and four times those of the total Australian population.

23.1.12 For the combined Aboriginal population, the number of male deaths occurring was 3.2 times the number expected from total Australian rates (that is, the standardised mortality ratio, or SMR, was 3.2) and the number of female deaths was 3.6 times the number expected (an SMR of 3.6).⁸

23.1.13 For males, the SMRs range from 2.5 for Aboriginal people living in Western Australia in 1987-88 to 4.0 for those living in the Northern Territory in 1985. For females, the range is from 2.3 for Aboriginal people living in South Australia in 1988 to 4.0 for those living in the Northern Territory in 1985.

Foetal and Infant Mortality

23.1.14 For Aboriginal people, the infant mortality rate (deaths in the first year of life per 1,000 live births) has declined significantly over the past fifteen to twenty years. In 1971-73, the Aboriginal infant mortality rate (around 80 infant deaths per 1,000 live births) was about five times higher than that of the total Australian population (16.1 deaths per 1,000 live births). In 1986-88, the Aboriginal rate had declined to 26 infant deaths per 1,000 live births, quite low by world standards, but still three times higher than that of other Australians, 8.7. Much of the improvement in Aboriginal infant mortality is attributable to better health care for Aboriginal people. This includes better surveillance of the health risks of

Aboriginal women and their babies as part of the maternal/child health programs developed since the 1970s, as well as the greater accessibility to life-saving medical interventions. The continuing lower survival of Aboriginal infants compared

with other Australian infants may not be so easy to remedy, and is a partial reflection of the overall health disadvantages experienced by Aboriginal people.

23.1.15 The key indicator of foetal outcome is the perinatal mortality rate, including late foetal deaths and deaths of live born infants within the first twenty-eight days of life. Aboriginal perinatal mortality rates have also declined substantially since the early 1970s. However, the rate in 1986-88, 32 perinatal deaths per 1,000 total births, was still around three times that of the total Australian population (10.9 perinatal deaths per 1,000 total births).

Age-specific Death Rates

23.1.16 The most striking aspect of Aboriginal mortality is the much higher death rates experienced by young Aboriginal adults than by young non-Aboriginal adults. For both males and females, the highest discrepancy between Aboriginal and total Australian age-specific death rates were for people aged 35 to 44 years. In this age group, the death rates of Aboriginal people are between 6 and 10 times those of the total Australian population.

23.1.17 The pattern of Aboriginal age-specific death rates is highly unusual, even compared with the rates typical of a developing country. While Aboriginal death rates in infancy and early childhood are much lower than those in developing countries, beyond the teenage years the position is reversed, with death rates for young and middle aged Aboriginal adults, particularly males, being higher.

Causes of Death

23.1.18 Throughout the country, the major cause of Aboriginal deaths, for both males and females, is disease of the circulatory system (also the leading cause of death for the non-Aboriginal population). Overall, death rates from these diseases, including ischaemic and other heart disease, are more than twice those of other Australians. For specific age-groups, the peak difference between Aboriginal and non-Aboriginal death rates for these diseases occurs among people aged 25 to 44 years.

23.1.19 For Aboriginal people, the second most frequent cause of death for males, and third for females, is the International Classification of Diseases⁹ (ICD) group 'External causes of injury and poisoning', which includes motor vehicle and other accidents, suicide and other self-inflicted injury, and homicide and injury purposefully inflicted by others. Deaths from these causes are about four times more frequent than expected from total Australian rates.

23.1.20 Disease of the respiratory system is the second leading cause of death for Aboriginal females, and third for Aboriginal males, with death rates six to eight times those expected.

23.1.21 Suicide and other self-inflicted injuries do not feature highly in the official death statistics for Aboriginal people, but it is likely that such causes are under-reported, both for Aboriginal people and for the general community--see Section 23.4.¹⁰ It is likely that the impact of alcohol on Aboriginal mortality is under-reported also- see Chapter 15).

23.1.22 Two other conditions justify special mention. Although only responsible for a small number of deaths, epileptiform seizures (in some cases associated with alcohol withdrawal) cause more deaths among Aboriginal people than expected from non-Aboriginal rates.

23.1.23 Diabetes mellitus is well recognised as being much more prevalent among Aboriginal people than among non-Aboriginal people. Despite its role probably being under-reported in death certification, diabetes mellitus is a much

more important cause of death for Aboriginal people than it is for non-Aboriginal people.

Hospitalisation

23.1.24 Hospital statistics, while not necessarily accurately reflecting the extent or pattern of treatable illness in the community, confirm the relatively poor health status of Aboriginal people, both in terms of the rate of hospitalisation and the length of stay in hospital.

23.1.25 Overall, Aboriginal people are admitted to hospital two-and-a-half to three times more frequently than non-Aboriginals, and, once admitted, tend to stay slightly longer. They are admitted more frequently for virtually every cause, and for every age-group, than are non-Aboriginals.

Causes of Hospitalisation

23.1.26 From combined data for Western Australia, South Australia and the Northern Territory, the leading causes of hospitalisation for Aboriginal males were conditions classified within the ICD group 'External causes of injury and poisoning', the second highest rate being for diseases of the respiratory system.

23.1.27 For Aboriginal females, the leading cause of hospitalisation was the ICD supplementary classification, which includes a number of conditions associated with reproductive function. The next leading causes were the ICD groups 'Complications of pregnancy, childbirth, and the puerperium' and 'External causes of injury and poisoning'.

Sickness and Disease

23.1.28 In terms of general morbidity, malnutrition is still a problem for a considerable number of Aboriginal people. Particularly in remote parts of the country, mild to moderate undernutrition in Aboriginal infants and young children is still quite common. Malnourished children (and adults) are more vulnerable to a wide range of infections, the risk being increased by unhygienic living conditions and high levels of environmental contamination. Many Aboriginal children enter the vicious synergistic cycle of infection-malnutrition, and carry the legacy of impaired growth into early adulthood.

23.1.29 From the early adult years, many Aboriginal people start to gain weight excessively, eventually becoming overweight or obese. High levels of obesity contribute to the high levels of diabetes mellitus, and increase the risks of developing hypertension and coronary heart disease.

23.1.30 As noted above, diabetes mellitus, almost exclusively Type 2 (non-insulin dependent), is much more prevalent among Aboriginal people than among other Australians (probably between two and five times more prevalent). Hypertension, virtually non-existent among Aboriginal people in the past, has become a significant problem for some people. Ischaemic heart disease is now the major cause of Aboriginal mortality.

23.1.31 The communicable diseases, though less important now in terms of mortality, remain important causes of morbidity among Aboriginal people. Of major importance are respiratory tract and middle ear infections.

23.1.32 For many Aboriginal infants and children, diarrhoeal disease still poses a major threat, and in many parts of remote Australia trachoma remains common. Other communicable diseases more common among Aboriginal people than among non-Aboriginal people are skin infections and infestations, the sexually transmitted diseases and hepatitis B, which is being increasingly recognised. A

number of other diseases, such as meningitis and osteomyelitis, also affect Aboriginal people disproportionately.

23.1.33 There are a relatively low number of new cases of tuberculosis and leprosy each year, but these diseases still cause problems for some Aboriginal people.

23.1.34 AIDS has become a significant threat for Aboriginal groups in some parts of the country. As with most sectors of Australian society, the extent of infection is unknown. The studies that have been conducted to date, however, have found only low levels of infection with the virus, and among Aboriginal people, few AIDS cases, as such, have been reported. Nevertheless, complacency is not warranted. Aboriginal people share many of the risk factors of East Africans, who have tragically high rates of infection, mostly transmitted heterosexually. These risk factors include a high prevalence of sexually transmitted disease, malnutrition, chronic ill health and a mobile population. Other factors relevant to Aboriginal people are their high rates of imprisonment (prisons serve as incubators for the AIDS virus, being transmitted there through the sharing of infected injecting equipment and through homosexual activity), and the heavy use of alcohol which reduces people's capacity to engage in safe sexual behaviour. Although effective AIDS education programs are conducted in many parts of Australia, and have been acclaimed for their cultural appropriateness, surveys indicate that unsafe sexual behaviour remains commonplace among Aboriginal people, as it is in the Australian population overall. Sr Gracelyn Smallwood, a leading Aboriginal health authority, has argued that AIDS potentially presents one of the most serious health threats faced by the Aboriginal population today.

23.1.35 The prevalence of psychotic mental disorders among Aboriginal people is similar to that of the general population, but it appears that other mental health problems may be more common (see Section 23.3).

23.1.36 In many instances, Aboriginal use of alcohol is harmful, contributing substantially to both morbidity and mortality. Among Aboriginal children and adolescents, petrol inhalation has reached serious proportions in some parts of Australia.

23.1.37 As reflected in both mortality and hospitalisation rates, the impact of injuries among Aboriginal people is much greater than among other Australians.

23.2 THE RISKS OF DEATH IN CUSTODY

23.2.1 Research undertaken by the Commission's Criminology Research Unit found that although Aboriginal deaths in police and prison custody occurred much more frequently than expected from general population figures, the excess was largely explained by the over-representation of Aboriginal people in custody.¹¹

23.2.2 However, the need to more rigorously examine the relative risks of death for Aboriginal and non-Aboriginal people in custody, compared with general population death rates,¹² required expert epidemiological assistance from the Australian Institute of Health. The completion of this detailed examination also required further assistance from the State and Territory custodial authorities in the provision of details of all deaths occurring in custody in the ten-year period, 1980-89. The Commission is grateful for their assistance.'

Research Methodology

23.2.3 Before discussing the findings of this research, it is necessary to outline briefly the methodology used.¹³

23.2.4 As noted above, the State and Territory custodial authorities provided

information about all deaths occurring in custody in the period 1980-89. For each case, this information included name, age, sex, Aboriginality, date, time and place of death, and cause of death.

23.2.5 The definition of the population at risk of dying in custody poses more problems, as noted by the Commission's Criminology Research Unit in its initial research and in its examination of methodological issues. Clearly, people not in custody are not exposed to the risk of dying in custody, so should not be included in considering the rates of death in custody. Even then, knowledge of the numbers of people in custody (as could be obtained from a census, for example) is not enough. One needs to know also the period of time that each individual is exposed to the risk (that is, of dying in custody).

23.2.6 Death rates for the general population are presented usually as deaths per 1,000 person years (or its approximation, 1,000 persons at the middle of the year in a stable population). The comparison of custodial death rates with those of the general population thus requires knowledge of the number of person years of exposure to death in custody (that is, being in custody). Unfortunately, such details are not routinely available.

23.2.7 For information on the person years in police custody, it was necessary for the Commission's Research Unit to undertake a special survey.¹⁴ For August 1988, this survey collected information about the numbers of receptions (by age, sex and Aboriginality) into police custody and the hours spent in custody. These data were used to estimate the person hours (and hence years) of exposure to death in police custody. There is no way of knowing just how representative for the ten-year period these data are, but, in the absence of other data, they provide the only reasonable estimates of the person hours of exposure to death in police custody.

23.2.8 The situation with regard to prison data is somewhat better, as the Australian Institute of Criminology has for a number of years conducted a census of the prison population on 30 June each year. The information collected includes prisoner numbers by age, sex and Aboriginality (until the 1987 census, not all custodial authorities provided information on Aboriginality or non-Aboriginality), and average months served can be calculated. As the average months served could not be used to calculate total prisoner person years, it was necessary to assume that the census count provided a reasonable estimate of the average daily number of prisoners, and therefore the number of person years served in a year. Clearly, this assumption is a potential source of inaccuracy but, as with the data on person hours of exposure to death in police custody, there was really no other choice. The data for 30 June 1987 were used, as these data are closer to the mid point of the ten-year period 1980-89 than are more recent data.¹⁵

23.2.9 As well as comparing the relative risks of death for Aboriginal and non-Aboriginal people in custody with general population death rates, it was considered worthwhile to provide also a comparison with the overall risk of death for Aboriginal people. For this comparison, data from a number of separate regions and time periods were combined to give single estimates for the Aboriginal populations, male and female.¹⁶

23.2.10 As noted in Section 23.1, a technique known as indirect standardisation is used to adjust for differences in the age structures of different populations. In this case, the age structures of the custodial populations (police and prison, Aboriginal and non-Aboriginal, and male and female) and of the combined Aboriginal populations differed from those of the total Australian populations for 1986. The standardised mortality ratios (SMRs: the ratios of the observed to expected numbers of deaths) provide the basis for the comparison of the mortality

experiences of the various sub-populations.¹⁷ For each SMR, an estimate of the statistical confidence is also provided.¹⁸

23.2.11 The causes of death were allocated to the main classifications of the World Health Organisation's 1977 *International Classification of Diseases*. For non-Aboriginal cases, this allocation was based on the information provided by the custodial authorities. For most of the Aboriginal cases, the classification benefited from the conclusions reached by the Commission from the more detailed information available to it.

The Deaths in Custody

23.2.12 For the 10-year period 1980-89, there were a total of 527 deaths in custody. Of these deaths, 108 were Aboriginal people, 10 females and 98 males.¹⁹ There were a total of 419 non-Aboriginal deaths, 17 of females and 402 of males.

23.2.13 Of the 10 deaths of Aboriginal females, 9 occurred in police custody, and 1 in prison. Sixty of the deaths of Aboriginal males occurred in police custody, and 38 in prison. Of the 17 deaths of non-Aboriginal females, 4 occurred in police custody and 13 in prison. One hundred and twenty of the deaths of non-Aboriginal males occurred in police custody, and 282 in prison.

23.2.14 As noted above, the number of deaths expected for each of the custodial sub-populations was estimated from the death rates of the total Australian populations, male and female. The numbers of deaths, observed and expected, along with the SMRs (the ratio of observed to expected numbers) are shown in Tables 23.1 and 23.2.

TABLE 23.1: ABORIGINAL AND NON-ABORIGINAL DEATHS IN POLICE CUSTODY: OBSERVED AND EXPECTED NUMBERS(*)AND STANDARDISED MORTALITY RATIOS, 1980-1989

	Aboriginal			Non-Aboriginal		
	Observed number	Expected number	SMR	Observed number	Expected number	SMR
Male	60	4.0	15.1 (11.3-18.9)	120	9.3	12.9 (10.6-15.2)
Female	9	0.6	15.3 (5.3-25.2)	4	0.2	20.0 (0.4-39.6)

(a) See text for details of method used in estimating the expected number of deaths

(b) The numbers in parentheses are the 95% confidence limits for the SMRs

(c) Any discrepancy in the tabulated figures is due to rounding for presentation.

23.2.15 For deaths occurring in police custody, many more deaths occurred than would be expected from total Australian death rates, for Aboriginal and non-Aboriginal people, male and female.²⁰ For Aboriginal males, the number of deaths occurring in the 10-year period 1980-89, 60, was 15.1 times the number expected, 4.0. For non-Aboriginal males, the number of deaths occurring, 120, was 12.9 times the number expected, 9.3. For Aboriginal females, the number of deaths occurring, 9, was 15.3 times the number expected, 0.6. For non-Aboriginal females, the number of deaths occurring, 4, was 20.0 times the number expected, 0.2.

TABLE 23.2: ABORIGINAL AND NON-ABORIGINAL DEATHS IN PRISON: OBSERVED AND EXPECTED NUMBERS(*)AND STANDARDISED MORTALITY RATIOS, 1980-1989

	Aboriginal	Non-Aboriginal
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	<i>Observed number</i>	<i>Expected number</i>	<i>SMR</i>	<i>Observed number</i>	<i>Expected number</i>	<i>SMR</i>
Male	38	28.4	1.3 (0.9-1.8)	282	223.8	1.3 (1.1-1.4)
Female	1	0.6	1.8 (0-5.2)	13	4.9	2.7 (1.2-4.1)

(a) See text for details of method used in estimating the expected number of deaths

(b) The numbers in parentheses are the 95% confidence limits for the SMRs

(c) Any discrepancy in the tabulated figures is due to rounding for presentation.

23.2.16 These figures are summarised by the SMRs (previous). The slightly higher SMR for Aboriginal males than for non-Aboriginal males is not statistically significant.²¹ That is, the variation observed may not reflect a real difference, but could have occurred solely by chance. A similar statement can be made about the slightly higher SMR for non-Aboriginal females than for Aboriginal females.

23.2.17 For deaths in prison, the numbers occurring were only slightly higher than the numbers expected from total Australian death rates. For Aboriginal males, the number of deaths occurring in the 10-year period 1980-89, 38, was 1.3 times the number expected, 28.4. For non-Aboriginal males, the number of deaths occurring, 282, was also 1.3 times the number expected, 223.8. For Aboriginal females, the one death occurring was 1.8 times the number expected, 0.6. For non-Aboriginal females, the number of deaths occurring, 13, was 2.7 times the number expected, 4.9.

23.2.18 The SMRs for Aboriginal and non-Aboriginal males are the same, and the difference between the SMRs for Aboriginal and non-Aboriginal females was not statistically significant.

23.2.19 One obvious problem with using the total Australian death rates to estimate the number of deaths expected in custody is that the custodial and non-custodial populations may have differential exposure to certain causes of death. For example, the custodial population (a relatively young population) has much, much less exposure to death from motor vehicle accidents (one of the leading causes of death for young Australians) than does the non-custodial population.

23.2.20 While it is not possible to take account of all causes of death for which the exposure to risk may be different, the expected numbers of deaths were recalculated excluding deaths from motor vehicle accidents from the total Australian rates. These recalculations resulted in the following SMRs. The SMR for Aboriginal males in police custody is 18.8 (95% confidence limits: 14.0-23.6), slightly, but not statistically significantly, higher than that for non-Aboriginal males, 16.5 (13.5-19.4). Similarly, the slightly lower SMR for Aboriginal females in police custody, 17.0 (5.9-28.1), is not statistically different to that for non-Aboriginal females, 25.0 (0.5-49.5).

23.2.21 The recalculation does result in a slight, but not statistically significant, difference between the SMRs of males in prison: for Aboriginal males, 1.8 (1.2-2.4), compared with 1.5 (1.3-1.7) for non-Aboriginal males. The SMR for Aboriginal females in prison is 2.1 (0-6.3), and for non-Aboriginal females 3.0 (1.4-4.7).

23.2.22 To further explore the possibility that the use of total Australian death rates, with or without deaths from motor vehicle accidents, was concealing real differences between the numbers of Aboriginal and non-Aboriginal deaths occurring in custody, another procedure was undertaken.²² This procedure involved comparing the mortality experience of each custodial sub-population, Aboriginal and non-Aboriginal, male and female, police custody and prison, with

the death rates of the combined custodial population.²³

23.2.23 Using these combined custodial death rates to calculate the expected numbers of deaths resulted in the following SMRs. The SMR for Aboriginal males in police custody is 4.7 (3.5-5.9), virtually identical to that for non-Aboriginal males, 4.6 (3.8-5.4). Interestingly, this procedure changed the relativity of the SMRs for females in police custody: the SMR for Aboriginal females, 3.4 (1.2-5.7), is slightly (but not statistically significantly) higher than that for non-Aboriginal females, 2.7 (0.1-5.3).

23.2.24 The SMR for Aboriginal males in prison is 0.6 (0.4-0.8), slightly, but not statistically significantly, lower than that for non-Aboriginal males, 0.7 (0.6-0.8). Similarly, the slightly lower SMR for Aboriginal females in prison, 0.4 (0-1.0), is not significantly different to that for non-Aboriginal females, 0.7 (0.3-1.0).

23.2.25 In summary, this detailed analysis of deaths in custody relating the deaths occurring to the extent of exposure to death in custody (person years) has confirmed the general findings of the Commission's Research Unit: the excess of Aboriginal to non-Aboriginal deaths in police and prison custody compared with general population figures is due to the over-representation of Aboriginal people in custody.

Aboriginal Deaths in and out of Custody

23.2.26 As noted above, the analysis undertaken by the Australian Institute of Health also included a comparison of the mortality experience of the overall Aboriginal populations with the total Australian death rates.

23.2.27 Compared with the numbers of deaths occurring in the combined Aboriginal populations, 1,134 of males and 791 of females, the numbers expected from total Australian rates are 355.8 of males and 219.3 of females (see Table 23.3). The SMR for Aboriginal males is 3.2 (3.0-3.4) and for Aboriginal females is 3.6 (3.4-3.9).

23.2.28 The SMRs for Aboriginal people in police custody are much higher than these estimates, but the SMRs for those in prison are lower. For comparison purposes, the best of the estimates provided above are those excluding deaths from motor vehicle accidents from the total Australian death rates.

23.2.29 As summarised above, the SMR for Aboriginal males in police custody is 18.8 (14.0-23.6), and that for Aboriginal females is 17.0 (5.9-28.1). For Aboriginal people in prison, the SMR for males is 1.8 (1.2-2.4), and for females is 2.1 (0-6.3).

23.2.30 The fact that the SMRs for Aboriginal people in prison are lower than those for the total Aboriginal populations highlights the very poor level of Aboriginal health. Clearly, much more needs to be done to enable Aboriginal people to achieve levels of health comparable with that of other Australians. I will discuss this aspect further in Chapter 31.

TABLE 23.3: ABORIGINAL PEOPLE: OBSERVED AND EXPECTED NUMBER OF DEATHS^(a) AND STANDARDISED MORTALITY RATIOS, COMBINED REGIONS, 1984-1987

	<i>Observed number</i>	<i>Expected number</i>	<i>S M R</i>
Males	1134	355.8	3.2 (3.0-3.4)
Females	791	219.3	3.6 (3.4-3.9)

(a) See text for details of method used in estimating the expected number of deaths

(b) The numbers in parentheses are the 95% confidence limits for the SMRs

(c) These data related to Aboriginal people living in western New South Wales in 1984-87, in the Queensland communities in 1984-86, in Western Australia in 1985-1986, in South Australia in 1985 and in the Northern Territory in 1985

(d) Any discrepancy in the tabulated figures is due to rounding for presentation

Causes of Death in Custody—Aboriginal and Non-Aboriginal

23.2.31 The detailed analysis of all reported deaths occurring in custody in the 10-year period 1980-89 confirm the general findings of the Commission Research Unit's analysis of the information available for the period 1980-88.²⁴

23.2.32 Self-inflicted deaths were much more common than any other cause of death. Of the 527 deaths known to have occurred in custody, 231 were the result of self-harmful behaviour other than by drug overdose. Of these 231 deaths, 218 (33 Aboriginal and 185 non-Aboriginal) were the result of hanging. A further 34 deaths (3 Aboriginal and 31 non-Aboriginal) were the result of drug overdoses. For many of the deaths of non-Aboriginal people, it is not known definitely whether they were the result of an accidental or intentional overdose. Therefore, around a half of all deaths occurring in custody were self-inflicted.

23.2.33 The risk of death from self-harmful behaviour in custody, particularly police custody, is much greater than the risk in the general population. For males in police custody, the number of Aboriginal deaths occurring, 25, was 56 times the number expected from total Australian rates.²⁵ For non-Aboriginal males, the number occurring, 62, was 52 times the number expected. For Aboriginal males in prison, the number of deaths occurring, 12, was 2.6 times the number expected, significantly lower than the ratio for non-Aboriginal males, 5.8 (152 deaths occurred).

23.2.34 Reflecting the much lower rates of death from self-harmful behaviour for females in the general population, for females in police custody the numbers of deaths occurring were very much higher than the number expected: for Aboriginal females, 67 times higher and, for non-Aboriginal females, 107 times. For Aboriginal females, no deaths from self-harmful behaviour occurred in prison. For non-Aboriginal females, the 10 deaths occurring were 29 times the number expected from the rates for the general female population.

23.2.35 For each of the sub-populations, Aboriginal and non-Aboriginal, male and female, police Custody and prison, the numbers of self-inflicted deaths occurring were also compared with the numbers expected from the death rates of the combined custodial population. These comparisons confirmed the statistically significantly lower ratio of observed to expected numbers of self-inflicted deaths for Aboriginal males in prison (0.3) than for non-Aboriginal males (0.8). For males, the ratios of observed to expected numbers of self-inflicted deaths occurring in police custody were similar (Aboriginal 2.9, non-Aboriginal, 3.6), and the ratios were statistically significantly higher than the ratios for deaths occurring in prison. For females in custody, the only noteworthy finding was that the ratio of the number of non-Aboriginal deaths occurring in prison to the number expected (1.1) was similar to the ratio for non-Aboriginal males.

23.2.36 As noted in the research papers of the Commission's Research Unit the pattern of deaths in custody from self-harmful behaviour is quite different from the general community, where hangings make up only 13% of such deaths (14% of males, and 9% of females). In the general community, poisoning and the use of firearms are much more common causes of self-inflicted deaths. The options for self-harmful behaviour are very limited for people in custody, who have virtually no access to poisons or firearms. As well, there is generally a higher level of surveillance of people in custody than would be found in the general community. It should also be noted that hanging is a particularly lethal method of self-harmful behaviour, as it provides little opportunity for intervention, change of mind or resuscitation.

23.2.37 In addition to the self-inflicted deaths, of the 527 deaths reported as occurring in custody in the period 1980-89, there were a total of 86 deaths that would be classified within the International Classification of Diseases grouping 'external causes of injury and poisoning'. Nineteen of these 86 deaths were the result of injury purposely inflicted by another person, the remaining 67 being from other external causes, such as the result of a head injury from a fall. Some of these may have been as a result of the deliberate action of another person, but without definite knowledge of this they cannot be added to the 19 deaths noted above.

23.2.38 Of the 67 deaths from other 'external causes of injury and poisoning', 37 occurred while the person was in police custody. For males, the numbers of deaths occurring in police custody were significantly higher than expected. Although the ratio of observed to expected numbers of deaths was higher for Aboriginal males (13.1) than for non-Aboriginal males (6.8), the difference was not statistically significant.

23.2.39 The other cause of death I will review here is disease of the circulatory system.²⁶ Of the 527 deaths reported to have occurred in custody in the period 1980-89, a total of 83 deaths were attributed to disease of the circulatory system, primarily heart disease. Of these 83 deaths, there were 60 deaths of males and 3 of females. Twenty Aboriginal males died from circulatory system disease, 7 in police custody and 13 in prison. Thirteen of the deaths of non-Aboriginal males occurred in police custody and 47 in prison. All 3 female deaths occurred in police custody: 2 were Aboriginal, and 1 non-Aboriginal.

23.2.40 For males in police custody, the number of Aboriginal deaths occurring, 7, was 7.3 times the number expected from total Australian rates. For non-Aboriginal males, the number occurring, 13, was 6.5 times the number expected. For Aboriginal males in prison, the number of deaths occurring, 13, was 3.1 times the number expected, significantly higher than the ratio for non-Aboriginal males, 0.8 (47 deaths). The very small numbers of female deaths precluded any useful comparison using total Australian rates.

23.2.41 These overall ratios, however, conceal some important differences between Aboriginal and non-Aboriginal deaths from disease of the circulatory system. Overall, the Aboriginal males dying from disease of the circulatory system were much younger than were the non-Aboriginal males. For the 7 Aboriginal males dying in police custody, the mean age at death was 46 years and the median age 50 years. In comparison, for the 13 deaths of non-Aboriginal males, the mean age and median age at death were both 52 years. The differences for those dying in prison were even greater. For the 13 deaths of Aboriginal males, the mean age at death was 37 years and the median age 34 years. For the 47 deaths of non-Aboriginal males, the mean and median age at death were both 48 years.

23.3 THE MENTAL HEALTH OF ABORIGINAL PEOPLE

[P]ilot interviews have exposed extreme destructive behaviour as an issue throughout the Aboriginal community. The question of deaths in custody, we suspect, may be a high profile tip of the iceberg?

THE SIGNIFICANCE OF MENTAL HEALTH

23.3.1 It is apparent that it is inappropriate for me to write at any length on this topic, but the matter is obviously of very great significance. The Commission received many submissions and, on various occasions, heard much evidence relating to this topic. Hence, I feel that it is highly desirable that observations

should be made based upon the material which has been presented to the Commission. I am indebted to a number of researchers for assembling this information for me. Their work is summarised in this section and the next section of this chapter.

23.3.2 The poor health status of Aboriginal people, as outlined above, is well documented. Less well known is the mental health status of Aboriginal people. Hence, in the following section I have devoted significant space to this topic. This comparatively lengthy treatment of this topic is not meant to imply that general health issues warrant less attention than the issue of mental health, both are important. Nor would I wish to imply that mental health necessarily applies differently to Aboriginal and non-Aboriginal people. However, this discussion does imply that, like general health issues, mental health issues are of concern to the Commission. In a number of respects many of the underlying social issues I am concerned with in this chapter could also be applied to general health issues. As the Australian Medical Association (whose policy statement on Aboriginal health I quote in full in Chapter 31) and the Victorian Aboriginal Health Service put in submissions to me, the generally poor health status of Aboriginal people is also reflective of a poor social position.²⁸ The same statement could also be made of mental health. Similarly, the cross-cultural sensitivity essential in the treatment of general health problems is also required in the mental health field.

23.3.3 The ninety-nine cases have highlighted the issue of mental health as a significant underlying issue and a factor of concern for those who died in custody. Similarly, members of the Aboriginal community recognise that mental health is an issue of concern in their community.²⁹ In 1989, the National Aboriginal Health Strategy Working Party pointed out that mental problems continue to be a major part of ill-health, and that, for many Aboriginal people, 'mental distress is a common and crippling problem'. The Working Party noted that, because of the virtual non-existence of culturally appropriate services, this mental distress 'goes unnoticed, undiagnosed and untreated'.³⁰ The recognition by Aboriginal people of the presence of such problems in their community is not new; ten years earlier, in 1979, the National Aboriginal Mental Health Association had pointed out that mental health problems were 'at least as common and as serious as in any other society in Australia'.³¹

23.3.4 In considering the mental health of Aboriginal people, the definition used is that adopted by the Mental Health Working Party established by the Australian Health Ministers' Advisory Council to develop a national mental health strategy:

*[M]ental health is the capacity of the individual, the group and the environment to interact with one another in ways that promote subjective well-being, the optimal development and use of mental abilities (cognitive, affective and relational), the achievement of individual and collective goals consistent with justice and the attainment and preservation of conditions of fundamental equality.*³²

23.3.5 As the Working Party notes, a key feature of this definition is that it does not define mental health in terms of the presence or absence of a mental disorder, nor does it imply that mental health and mental disorder are opposite ends of a single continuum.

23.3.6 The Working Party defines a mental disorder as a recognised, medically diagnosable illness that results in the significant impairment of an individual's cognitive, affective or relational abilities, and notes that the disorder

can result from biological, developmental and/or psycho-social factors. Importantly the Working Party distinguishes a mental disorder from a mental health problem, the latter being

*a disruption in the interactions between the individual the group and the environment producing a diminished state of mental health. Such a disruption may result from factors within the individual, including physical or mental illness, or inadequate coping skills. A mental health problem may also spring from external causes, such as the existence of harsh environmental conditions, unjust social structures, or tensions within the community. An effective response to mental health problems must therefore address a broad range of factors.*³³

23.3.7 The concept of 'mental distress' used by the National Aboriginal Health Strategy Working Party, is particularly useful in considering the mental health of those who died in custody. This term is analagous to the Mental Health Working Party's term, 'mental health problem'. Hence, it appears that the term 'mental distress' has broader applicability--and could well be used in considering many aspects of the overall health disadvantages experienced by Aboriginal people.

23.3.8 Mental health, then, is the result of a dynamic and interactive process involving social and situational, as well as biological, factors. As Dr Joseph Reser (a psychologist and senior lecturer in the School of Behavioural Sciences at James Cook University) has pointed out:

*The question of Aboriginal mental health is embedded in a larger set of questions relating to culture and cultural differences, historical events, social and cultural change and coping.*³⁴

23.3.9 The historical and social experience of Aboriginal people is, in part, the legacy of what Sr Pat Swan of the Redfern Aboriginal Medical Service has called '200 years of unfinished business'.³⁵ Sr Swan attributes much of the mental distress of Aboriginal people to the 'loss' and 'bereavement' they have experienced from, for example, loss of land, social fragmentation, loss of cultural and legal norms, generalised discrimination, institutionalisation, poverty and the forced removal of children. As Sr Swan points out

*the devastating experiences of Aboriginal parents and their families brought on by the removal of their children, the loss of control over their own lives, powerlessness, prejudice and hopelessness have left many problems for us to deal with today.*³⁶

23.3.10 Self-esteem, and identity are just two aspects of mental health, which have been affected, arising from this generalised experience where 'dislocation' has included denial of culture, for instance expressed in assimilationist policies of various governments. These are what the National Aboriginal Health Strategy Working Party referred to as 'reality' factors.

23.3.11 In considering Aboriginal mental health, the limitations of conventional western concepts to the situation of Aboriginal people have to be critically examined. As Professor Arthur Kleinman, a psychiatrist and anthropologist, has pointed out, concepts of mental illness and psychiatric care only appear to reflect a value-neutral science. In fact, these concepts are informed by 'a cultural construction of social reality' that reflects a mixture of empirical knowledge, professional ideology and shared cultural bias.³⁷

23.3.12 In other words, psychiatric concepts like other modalities are embedded in the social system from which they arise. Any approach must be broad enough to recognise the importance of cultural differences, and the diversity of Aboriginal cultural and other experiences. Because the Aboriginal population is not homogeneous there will be a diversity of ways in which Aboriginal people experience and express mental distress. Major urban and other urban-dwellers, for instance town dwellers and fringe dwellers, make up the largest proportion of the Aboriginal population and the cases examined by the Commission reflect this emphasis. For urban-based Aboriginal people, the experience of being Aboriginal in Australian society is compounded by the stresses of urban living. On the other hand, the experience of Aboriginal people living in their homelands will probably be quite different. The town-campers and fringe dwellers may well have an intermediate experience of 'camp' life and urban life style.

23.3.13 An understanding of the diversity of Aboriginal cultural and social experiences is essential in assessing the meaning of specific behaviours. Without such an understanding, some behaviours may be interpreted erroneously as indicating mental illness. While it is true that some disturbed behaviours of Aboriginal and non-Aboriginal people may be a manifestation of mental illness, similar behaviour may be more a reaction to various social forces, and not indicative of any underlying mental illness. Likewise, culture mediates the expression of behaviour, for instance, emotional response and expression. Non-Aboriginal viewers of such behaviour may mislabel it as a mental disorder.³⁸

THE ADEQUACY OF VARIOUS APPROACHES FOR CONSIDERING ABORIGINAL MENTAL HEALTH

23.3.14 A general discussion of the main non-Aboriginal approaches that have been used in examining Aboriginal mental health is necessary before discussing more specific questions of mental disorders and suicide. It is apparent that different disciplines conceptualise and examine the notions of mental health and mental health issues very differently. Conventional psychiatrists largely apply a medical model in conceptualising mental health while, at times, also exploring internal experience and personal relationships as a valid domain of inquiry. In contrast, anthropologists, utilising extensive field work, focus on the underlying social and cultural context of mental health, and the value and belief systems by which people make sense of their world. Cross-cultural psychologists consider 'individual experience' in relation to these value and belief systems.³⁹ Each of these approaches has something to offer in the construction of an appropriate model for comprehending the nature of mental health for Aboriginal people. The dangers are of not acknowledging the bias inherent in each discipline and of being restricted to one disciplinary context. For instance, anthropologists have directed their work overwhelmingly to Aboriginal people living in remote or at least discrete communities.

23.3.15 The ethnocentric bias that each discipline possesses, some more than others, towards the dominant or 'majority' culture can be reduced by using a cross-cultural perspective which takes into account cultural difference. But even with a cross-cultural perspective it must be recognised that it is not a 'within culture' perspective, and an ethnocentric assessment of Aboriginal people can still occur. For instance, cross-cultural studies in psychiatry are largely carried out by Western psychiatrists or indigenous psychiatrists working within a Western frame of reference.⁴⁰ Ideally, 'within culture' input from Aboriginal people is required in order to overcome the shortcomings of a cross-cultural perspective. That is Aboriginal people must contribute their own cultural perspective. In order to highlight the different nature of these approaches to the mental health of Aboriginal

people, my researchers have briefly reviewed two approaches in particular, the psychiatric and anthropological approaches. While not considering the psychological approach (partly because I see it falling, to some extent, within the psychiatric domain) I recognise that this discipline also informs this debate.

The psychiatric approach to mental health

23.3.16 Given that the medical model occupies a dominant position in Western health care, conventional psychiatric assessment and treatment has been the approach applied most commonly by non-Aboriginal medical practitioners to mental illness in the Aboriginal community. While a number of psychiatrists (practitioners and researchers), most notably Cawte, Morice and Eastwell, and more recently Hunter and McKendrick, have utilised and advocated a cross-cultural perspective, it does not appear to have been adopted generally by Australian psychiatry. The Victorian Aboriginal Health Service which made a number of significant submissions to this Commission and with which Dr McKendrick is associated offers an insight into how psychiatric models and health models generally may alternatively be used in this manner. (Refer Chapter 31 for further discussion of this.) At times, the conventional psychiatric treatments for some disorders may be most appropriate, for instance in the control of a recognised mental disorder, but it cannot be applied unproblematically to the situation of Aboriginal people. Reser sums up the complexity of the cultural 'blind':

While it is often possible to recognise severe distress and behavioural disorder, the causes, meanings, and consequences of disturbed behaviour in another culture are not self-evident, nor do they necessarily conform to a Western European diagnostic manual or Western psychiatric assumptions.⁴¹

23.3.17 The Royal Australian and New Zealand College of Psychiatry has recognised that psychiatric services were designed to meet the needs of the 'mentally ill' who presented in a European manner. The cases of Paul Farmer and Malcolm Smith in particular reflect the difficulties western psychiatry has in accommodating an indigenous frame of reference. As the then Commissioner Muirhead, sums up in Farmer's case: 'it is clear that European psychiatry encounters difficulties in reaching accurate conclusions as to the symptoms, or significance of the symptoms displayed by Aboriginal people influenced by their culture'.⁴² One psychiatrist commenting on the case of Paul Farmer notes: 'Psychiatry relies heavily on a cultural understanding of the client'.⁴³ Without an appropriate cultural knowledge base the capacity of mental health professionals to make a diagnosis with some completeness is limited. As the author of a report for the Northern Territory Royal Commission, Phil Elsegood writes:

The ability of non-Aboriginal mental health professionals to diagnose an Aboriginal as exhibiting psychotic ideation, for example, would seem to presuppose an understanding of Aboriginal thought processes and mental experience. Such an understanding is unlikely to be present outside the culture itself.⁴⁴

23.3.18 Paul Farmer's diagnosed mental illness highlights the western frame of reference which it occupies. As the counsel for Farmer's family summed up: 'In European culture Farmer was mentally ill. In Nyungar culture he was in spiritual danger'.⁴⁵ In a review of Royal Commission transcripts and cases, Francine Lorimer argues that 'in the area of Aboriginal behaviour, psychiatrists are asked to and often voluntarily do exceed the limits of their expertise'.⁴⁶

23.3.19 According to the World Health Organisation, mental disorders are conditions in which the

*diagnosis of many of the most important mental disorders still relies largely upon descriptions of abnormal experience and behaviour... [I]mpairment of mental function has developed to a degree that interferes grossly with insight, ability to meet some ordinary demands of life or to maintain adequate contact with reality. It is not an exact or well defined tetra.*⁴⁷

23.3.20 Obviously such diagnoses are premised on what constitutes 'ordinary social life' and 'abnormal behaviour'. To some extent then, the diagnosis of specific cases of mental illness is culturally relative.⁴⁸

23.3.21 The conventional medical model of mental health, in studies of indigenous peoples, has tended to avoid discussion of social factors preferring to present a clinical and diagnostic picture that emphasises a 'causal explanation of mental distress in physical or "mental" terms'.⁴⁹

23.3.22 In the cases heard by the Commission, psychiatrists have provided expert testimony, emphasising the significant role they play in defining and treating mental illness. Generally, psychiatrists have explained mental health problems by referring to such factors as deprivation, an inability to cope or to adapt to modern living standards. This viewpoint is limited to the extent that it assumes that the Western non-Aboriginal viewpoint is the yardstick by which Aboriginal culture is to be measured. Only relatively recently have cross-cultural perspectives been used to consider socio-cultural factors, which in many cases have played a key role. For example, it was not until 1979 that Dr Rodney Morice, a psychiatrist, warned that the increasing use of Western medical diagnostic categories would result in over-diagnosis and that psychiatrists should be careful not to label 'different behaviour as deviant'.⁵⁰

23.3.23 Dr Ernest Hunter has pointed out that the significance of social and historical factors in mental health issues facing Aboriginal people underscores the need for psychiatrists to address a socio-historical perspective, whereby Aboriginal mental health problems are 'seen to be located in wider social processes and forces'.⁵¹ Increasingly, psychiatrists and other mental health professionals are recognising that mental health is a social construction whereby an assessment of social pathology is used to make sense out of the existing situation. There is and should be—an understanding now that the life story and illness experience are as much part of the picture as the biological bases of illness.

Social science perspectives

23.3.24 The increasing awareness of the limitations of conventional psychiatric approaches has largely resulted from the work of social scientists. The social science perspective of mental health, which emphasises social and cultural factors, has argued that psychiatric assessments of Aboriginal people must be balanced by cultural insights.⁵² The study of Aboriginal disturbed behaviour in the Northern Territory, undertaken for the Central Australian Aboriginal Congress by anthropologist Sarah Dunlop, stated as its basic premise that

*it is not possible to adequately understand a problem such as behavioural disorder without understanding its social and cultural context. This includes how communities perceive 'abnormal' (or 'normal') behaviour, how they react to it and how they interact with current agency services.*⁵³

23.3.25 Arthur Kleinman has pointed out that cultural understanding arising from anthropological observations, including ethnographies, can provide the psychiatrist with detailed information about the social and cultural context within which people live--information which is essential to broadening psychiatric perceptions of the meaning of illness. To fail to examine the broader cultural (and social) processes inevitably reflects a narrowing of focus in comprehending the nature of mental distress.

FACTORS CONTRIBUTING TO MENTAL HEALTH PROBLEMS

23.3.26 Dr Janice Reid has pointed out that the issue of identifying the aetiology of general health problems is an extremely complex one:

The current patterns of morbidity and mortality are the product of a constellation of historical, social, structural, economic and political forces.. The breadth and diversity of these forces makes it impossible to attribute blame or locate responsibility in a simple way.⁵⁴

23.3.27 There is a divergence of opinion about what factors are considered most significant in contributing to the mental distress experienced by Aboriginal people. The factors are complex and cannot be understood in isolation. As noted in the definition of mental health problems, at the outset of this chapter, no one factor is the sole determinant but, rather, there is a 'web of susceptibility' that arises out of the complex interaction between a number of factors.⁵⁵ Many of the chapters in this report deal with those factors that contribute to an experience of mental distress.⁵⁶

23.3.28 For Aboriginal people the product of this 'web of susceptibility' is a complex relationship of indirect causation whereby Aboriginal people face heightened vulnerability in particular situations. In these situations social and psychological factors are critical mediating variables for understanding the treatment and prevention of many disorders previously thought of in biological terms.

23.3.29 It is widely accepted that a number of classified mental disorders are organic and/or biochemical in nature--and possibly genetic in origin.⁵⁷ For instance, it has been observed that there are distinct changes in the central nervous system associated with depression and consequent high risk suicidal behaviour.⁵⁸ Hence, in considering the factors contributing to mental health problems these biological bases must be considered. (For a more lengthy discussion of classifications of mental disorders see the section 23.4 'Cases Examined by the Royal Commission').

23.3.30 However, mental health issues are not just located in a biological frame of reference. A broader picture of depression, for example, recognises a combination of interrelated factors, chemical, socio-cultural, personal psychological, and physical environmental. It is within this large 'matrix of causality', embracing the visible and invisible aspects, that the issue of Aboriginal mental well-being and mental distress is

Socio-historical and Socioeconomic Stress

23.3.31 As discussed at the outset of this section, the origin of mental distress among Aboriginal people is, in part, owing to the social and cultural dislocation experienced by Aboriginal people. Undeniably, this experience has had a profound effect on Aboriginal people's mental well-being. However, the stresses that lead to mental ill-health are also economic. Most mental disorders have their highest prevalence in the lowest socioeconomic class. Aboriginal people as a whole

experience a much lower standard of living than other Australians. Economic stress can lead to psychological stress. For instance, high unemployment, or rather, a lack of significant involvement within the community, which is a feature of a number of Aboriginal communities, can be associated with symptoms of depression. Similarly, locations where the social environment is stressful have been shown to have a relatively high prevalence of mental ill health. Many of the Aboriginal communities in which the deceased lived were environmentally and economically stressed. In the most extreme (but not uncommon cases) such communities are characterised by some or several of the following factors: extreme poverty, severe housing shortages, family violence, high crime rates, sexually transmitted diseases, alcoholism and malnutrition (refer in particular to health, housing and economic chapters).

23.3.32 The complex interaction of social factors and the experience of cultural stress as contributing factors to mental distress is part of an important debate that cannot be treated in sufficient depth here; but it is a debate that recognises that socio-cultural, socioeconomic and socio-historical factors all contribute to the mental distress experienced by many Aboriginal people.⁵⁹ Racism and prejudice contribute to and compound this experience.

Cultural Stress and Mental Health

23.3.33 There has been a tendency for examinations of Aboriginal mental health problems to focus on stress and coping mechanisms that arise in the face of rapid social and cultural change. It is necessary to consider the effects of rapid cultural transition as contributing to Aboriginal mental distress.⁶⁰

23.3.34 However, the contribution of 'change' to mental distress must be carefully examined. For instance cultural transition cannot be considered as the only, or even principle, factor. Nor can one say simply that stress arising from cultural adjustment problems has a direct causal relationship with mental disorders such as schizophrenia.

23.3.35 There are also the underlying assumptions implicit in proposing cultural change as a key factor in mental distress which epidemiological studies of 'change-related stress' have failed to critically examine. This point has been mentioned earlier, particularly in regard to the psychiatric assessment of Paul Farmer, in which it was assumed that his failure to adapt to change was the cause of his mental disorder. An alternate view would be that Aboriginal identity, in this case Paul Farmer's, was not congruent with conventional psychiatric (and non-Aboriginal) definitions of appropriate behaviour. Within this frame of reference, it is more relevant to look at coping mechanisms whereby certain behaviours and actions arise in order to alleviate stress. In discussing the role of change one must also be careful not to perpetuate the construction of Aboriginal people as 'victims' in the process of change.

The Role of Alcohol

23.3.36 The subject of alcohol will be discussed, in more detail, later in this section with specific reference to the cases. The broader implications of alcohol are discussed in Chapter 15. For the moment I consider how alcohol relates to mental health issues.

23.3.37 There are obvious organic, psychological (cognitive) and affective disorders that result from the harmful use of alcohol. (The categorisation of such disorders are discussed in the section on mental illness.) Harmful use of alcohol is seen as a primary cause of ongoing ill health, both physical and mental. Alcohol is known to have a range of mental effects which can be transitory or permanent and

which include psychotic states (alcohol psychoses) and the exacerbation of depression.

23.3.38 Most discussions of indigenous mental health have perceived harmful use of alcohol as a cause and symptom, and even mental health syndrome. It is important not to see alcohol in these categorical and over-simplified terms. The fact that alcohol may be a coping strategy in a situation of stress points to the need for a more complex treatment of the harmful use of alcohol as a factor in mental ill health.

23.3.39 Another relationship that warrants closer examination is that between alcohol and violence. There are clear links between alcohol and violence whereby, as Dr Reser points out, 'the consumption of alcohol is an important mediator and facilitator of violence'.⁶¹ However, it is important to note in this respect that alcohol does not cause violence; rather, underlying social and economic problems create an environment in which alcohol consumption has a violent outcome or where consumption of alcohol allows for a normalisation of violent behaviour. (The link between alcohol and violence is examined in some detail in Chapter 15.) It is relevant to identify the experience of violence as a factor in the mental health of the Aboriginal community. As the National Aboriginal Health Strategy Working Party identified, the experience of domestic violence (which is often associated with alcohol consumption) is one particular area that creates a situation of mental distress for Aboriginal people. It is widely understood that heavy consumption of alcohol operates as a situational factor in self-injury and suicide. This matter is taken up further in this section.

23.3.40 Research by a number of authors has addressed what Dr Reser calls the 'institutionalised interrelationship between drinking and violence in an Aboriginal cultural context'⁶² The authors of these studies suggest that there exist social rules, in which drinking serves a number of functions which can relate to a 'time out' from certain proscriptive behaviours, such as responsibility and the containment of grievances. As

The use of alcohol has therefore created a situation in which normal controls are generally ineffective because drunks no longer 'hear' what is being said to them. They are effectively outside the boundaries of normal action
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23.3.41 The cultural role of alcohol may, in this situation, encourage grievances to come to the fore and hence the public expression of anger. In some situations, as Dr Reser has pointed out, anger may be turned inwards, particularly for people who are intoxicated.⁶⁴

Racism, Prejudice and Stereotyping

23.3.42 In a number of the cases examined by the Commission, some witnesses stressed the influence of prejudice and stereotyping. This stereotyping may, at times, reflect a racial bias in the assessor, but may also reflect the limitations of conventional psychiatric approaches which perceive 'different behaviour as deviant'. Too often, there has been a tendency for psychiatric language itself to equate social problems loosely with disorder. This mis-application of categories of mental disorder obscures the clinical meaning of disorder and creates a psychiatric frame of reference which distorts the interpretation of behaviour.

23.3.43 In the case of Paul Farmer, Commissioner Muirhead recommends caution when relying on psychological and psychiatric assessments of those of another culture. In contrast to these assessments which suggested that Paul

Farmer was 'borderline defective', Commissioner Muirhead concluded that Paul Farmer was far from backward. Similarly, in Malcolm Smith's case, Commissioner Wootten, reported that:

*The evidence provides a case study in the dangers of accepting 'expert' assessments at their face value. It illustrates too the danger of readiness to accept stereotypes, something which obviously affects many judgements on Aboriginal people.*⁶⁵

23.3.44 Another case of stereotyping appears in the life of Vincent Ryan. A number of psychiatric assessments viewed Vincent Ryan as being of subnormal intelligence, seriously disturbed and of being an aggressive psychopath. The views of psychiatrists contrasted distinctly with the observations of relatives, friends and acquaintances which communicate a very different picture of an individual who was 'good natured, often clowning around, and infrequently in trouble'. Dr Reser compiled *An Assessment of Vincent Roy Ryan* and concludes from the evidence available to him that it is impossible to clarify what the actual situation was. Dr Reser suspects that Vincent Ryan was not mentally ill and that in fact his admittance to a mental hospital was a deliberate stratagem by Vincent to be released from the juvenile institution he was in at the time.

23.3.45 Vincent Ryan's case illustrates how a lack of cross-cultural assessment or 'within-culture' input can result in an unclear diagnosis. This is particularly the case where there are 'cultural differences in Aboriginal emotional expression and coping'. At the same time this situation is compounded by Vincent Ryan's response as an adolescent to the situation. As Dr Reser sums up:

*It is very easy for the impulsive and emotional responses of adolescents to stressful and threatening situations to be interpreted as either conduct disorder or criminal behaviour, particularly for an Aboriginal youth trying to come to terms with the oftentimes arbitrary and oppressive institutional control which has existed on many Aboriginal communities.*⁶⁶

23.3.46 Another example of stereotypic diagnosis is given in the case of Mark Quayle, who presented at a hospital with delirium tremens and was subsequently taken into custody by the police on the request of a nurse, even though he was still suffering from withdrawal symptoms. In this situation Quayle's treatment as an Aboriginal person would appear to be compounded by the stereotypic treatment that people who are perceived to be 'drunk' receive. (This matter has been discussed in Section 23.1.) In commenting on the role of the nurse, doctor and two police officers in the events that led to Quayle's death by placing him inappropriately in custody, Commissioner Wootten remarked:

*I find it impossible to believe that so many experienced people could have been so reckless in the care of a seriously ill person dependent on them, were it not for the dehumanised stereotype of Aboriginals so common in Australia and in the small towns of western New South Wales in particular. In that stereotype a police cell is a natural and proper place for an Aboriginal.*⁶⁷

23.3.47 This incident highlights, in particular, the issue of racist stereotyping among non-Aboriginal people. It is the viewpoint of a number of Aboriginal groups that non-Aboriginal staff in a hospital environment have a poor understanding of Aboriginal culture and the environmental conditions in which they live and may, as a consequence, exhibit attitudes objectively racist.⁶⁸

THE MENTAL HEALTH CONTEXT OF THE DEATHS IN CUSTODY

*Mental illnesses are a reflection of the vast number of destabilising and dehumanising factors afflicting Aboriginal people today.*⁶⁹

23.3.48 A full assessment of the extent of mental illness within Aboriginal communities is virtually impossible because of the lack of comprehensive population-level data in this area. Such data are even more deficient than those relating to physical disorders. The sources for examining the prevalence of mental illness among Aboriginal people include hospital admission and outpatient data, social welfare department data, various annual reports and occasional psychiatric surveys of particular Aboriginal communities. More systematic data gathering obviously needs to be undertaken.

23.3.49 Two factors, in particular, make it difficult to determine the prevalence of mental disorders in the Aboriginal community. First, mental illness is, by its very nature, difficult to assess. Variations in the reported prevalence of mental disorders have been shown to vary from over 50% to less than 1% depending on methods of research and beliefs about the causes of the disorders. Moreover, a common way of estimating the frequency of serious mental disorders, through hospital admissions, does not distinguish multiple episodes for an individual. Also, given the under-utilisation by Aboriginal people of conventional services, assessment of the use by Aboriginal people of mainstream facilities will reveal only a certain portion of the extent of mental ill-health. Another factor making the assessment of Aboriginal people difficult is the cultural appropriateness of assessment techniques and taxonomy of mental disorders. In other words, a true evaluation of mental health is made more complex by the difficulties encountered in cross-cultural interpretation and classification of mental disorders. The lack of research (particularly epidemiological research) highlights the need to more clearly identify the nature of mental disorders among Aboriginal people.⁷⁰

An Overview of the Literature

23.3.50 The deficiencies of data do not allow one to conclude much about the exact nature of Aboriginal mental health.⁷¹ The National Aboriginal Health Strategy Working Party concluded that Aboriginal people suffered the same major mental disorders as non-Aboriginal Australians (with some variation in presentation owing to cultural differences), but drew attention to the large part of mental distress which 'goes unnoticed, undiagnosed and untreated'.⁷²

23.3.51 Although the finding must be treated cautiously, given the data limitations, in 1981 a National Health and Medical Research Council Working Party concluded that the overall level of psychotic disorders among Aboriginal people was similar to that of the general population, with the extent of non-psychotic disorders being more variable.⁷³ The largest study ever undertaken, by Eastwell, of 10,500 Aboriginal people in the Top End of the Northern Territory in the period 1971-75, found a prevalence of mental disorders roughly equivalent to that found in non-Aboriginals.⁷⁴ The findings of a low frequency, or absence of certain neurotic conditions, including anxiety neurosis, has been noted as consistent with the results of a number of earlier studies in remote areas.⁷⁵

23.3.52 There are strong suggestions that there are significant regional differences which reflect the heterogeneity of the Aboriginal population. Hence, it is possible that the prevalence of mental disorders differs markedly across Australia, and between Aboriginal people living in urban and remote environments. The acknowledgement of possible regional difference is important: the more comprehensive studies have been undertaken in remote communities. Very little

examination, until recently, has been undertaken of the mental disorders of Aboriginal people living in urban or rural areas. Consequently, drawing any 'national' conclusions on the basis of previous studies of Aboriginal communities is clearly likely to result in errors.

23.3.53 While it is unclear as to the exact extent of mental disorders among Aboriginal people, data show that the nature of the disorders may differ between Aboriginal and non-Aboriginal people. Information from the Queensland Department of Health reveals that 0.88% of the Aboriginal population used State-run mental health inpatient and outpatient treatment facilities in 1988, compared with 0.73% of the non-Aboriginal population.⁷⁶ For some disorders, such as neurotic disorders and affective psychoses, a lower proportion of Aboriginal people than non-Aboriginal people used outpatient facilities, while the proportions assessed as suffering from alcoholic psychosis and schizophrenic psychosis were similar. Hospitalisation data from the Northern Territory for 1977-82 reveal that admission rates for mental disorders were lower for Aboriginal people than for non-Aboriginal people. On the other hand, although the numbers were small, admission rates of Aboriginal males for alcoholic psychosis were higher than those for non-Aboriginal males, and increased over the period 1977-82.⁷⁷

23.3.54 Anecdotal evidence and some limited research data suggest that mental disorders are not insignificant among urban Aboriginal people. In fact, for urban Aboriginal people, 'the victim(s) of a changing social system, usually in the context of substantial poverty, symptoms of anxiety, depression, and hypochondriasis are probably more common than in the general population'⁷⁸ A more recent study, carried out in 1987 by Dr Jane McKendrick for the Victorian Aboriginal Health Service (VAHS), casts more light on the prevalence of mental illness among urban Aboriginal people. Dr McKendrick found that 'over half of a random sample of Aboriginal people attending a general practitioner at the VAHS were suffering from a psychiatric disorder'.⁷⁹ The most common diagnosis was depression.⁸⁰ The study of Aboriginal "Heads of Households" (mostly women) carried out in 1989 by Professor Radford and his colleagues in Adelaide revealed that a large minority of caregivers had at least once (and often more frequently) contemplated or attempted suicide. These people had experienced significant trauma in their lives along with stress induced by economic, medical and other social conditions.⁸¹

23.3.55 It appears that stress related disorders among urban Aboriginal people may be more common than expected.⁸² An overview of Aboriginal people utilising the Victorian Aboriginal Mental Health Network between July 1987 and June 1989 found that depression was present in a large majority (three-quarters) of outpatient cases, along with other unspecified mood disorders. Substance-related disorders made up the remaining outpatient attendances. Almost two-thirds of the inpatients were diagnosed as having some psychotic disorder.⁸³

23.4 SELF-INFLICTED HARM AND DEATHS

23.4.1 In Chapter 11 I discussed self-inflicted deaths in the context of the nature of Aboriginal society today, as the self-destructive behaviour frequently (and loosely) called 'suicide' and 'attempted suicide' are all too often caused by social factors and, in turn, impact on the quality of community life. In this section, however, I consider self-inflicted harm and death from a health perspective, since it is clearly one of the most important areas in which Aboriginal people are vulnerable to death in custody.

DEATHS IN CUSTODY RELATED TO MENTAL ILLNESS AND DISTRESS

23.4.2 It is a commonly held view that individuals who deliberately take their own life are, by definition, mentally disturbed, and depression is frequently thought to be the most common disorder present in such cases. The cases investigated by the Commission seem to indicate, however, that the act of self-destruction does not necessarily imply an underlying mental disorder. This is not to say that those without an identifiable mental disorder who died in custody from self-harm were mentally healthy at the time of their deaths. It is apparent that most of the self-inflicted deaths in custody of these people were associated with acute situational factors. As Kleinman has pointed out: 'suicide ... may (and often does) occur in individuals without mental illness who are under great social pressure'. Dr Joseph Reser describes how these situational factors operated for many of the Aboriginal self-inflicted deaths in custody in Queensland. He notes:

Many of the Aboriginal individuals were young, extremely intoxicated at the time of deaths, incarcerated in appalling facilities, in instances which were perceived as unjust, with histories of being targeted and harassed by community police, and within a time frame within which prior suicide deaths were salient and of particular symbolic poignancy.⁸⁴

CASES EXAMINED BY THE ROYAL COMMISSION

23.4.3 The Royal Commission found that, in a small number of cases, specific underlying mental disorders were evident. Mental illness was implicated in a number of the self-inflicted deaths of Aboriginal people in custody. What was found, however, was a complexity of factors occurring in and out of custody. It appears that the interaction of these factors creates an environment where there is more likelihood that self-inflicted death will occur. It seems likely that there may be myriad factors involved in self-harmful acts. My researchers have suggested a number of areas where contributing factors arise, including the socio-historical and situational factors discussed above.

23.4.4 There were a number of cases examined by the Royal Commission, however, where, according to expert medical evidence, a mental disorder falling within established psychiatric classifications was present. I am concerned in this section with mental disorders that fall within this Western classification of disorders, according to the International Classification of Diseases (ICD 9). This classification includes diagnosed psychotic and non-psychotic states. Psychotic states include organic psychoses arising from brain impairment and non-organic psychosis such as schizophrenia and certain depressive disorders. Organic psychosis also includes alcohol-related conditions that produce a temporary or permanent psychotic state.

Psychotic Conditions

23.4.5 Of the self-inflicted deaths, four appear to have been due to a classified mental disorder. A fifth death occurred when a pre-existing mental disorder was exacerbated by harmful use of alcohol. The most clear cut cases where death is seen to be due to a mental disorder are those diagnosed as suffering from an obvious psychotic state.⁸⁵

Peter Campbell died as the result of self-inflicted harm from cutting his throat with a razor blade. During the last few years of his life, and up until his death, Peter Campbell suffered from a severe mental disorder, characterised by psychotic and depressive symptoms. The most likely diagnosis of his condition was paranoid

schizophrenia or a paranoid psychosis according to medical evidence presented to the Royal Commission.

Paul Farmer died as a result of self-inflicted harm by slashing his throat with a razor blade. Although the precise nature of Farmer's mental disorder is debated by psychiatrists,⁸⁶ it is apparent that he was suffering with elements of both depression and psychotic disturbance. While in the remand/prison system, Farmer began to engage in incidents of self-harm and received psychiatric treatment and medication. He was considered to be a suicide risk.

Malcolm Smith died from a self-inflicted brain injury when he drove a paint brush through his left eye. It is clear that at the time of his death Smith was exhibiting signs of psychotic and delusional behaviour, and that he had been engaging in an established pattern of self-mutilation.

Peter Williams The death of Peter Williams by hanging was ascribed to a mental disorder. On the basis of past evidence, Williams was diagnosed as suffering from schizophrenia and severe depression (as well as a drug induced disorder, hypomania). Five days prior to his death, Williams had slashed his wrist. His schizophrenic condition appears to have been a long standing one: he had previously been prescribed medication for treatment of schizophrenia.

Benjamin Morrison died from hanging. Benjamin Morrison suffered from an 'ongoing paranoid state which appeared to represent a severe personality disorder'. In addition, he was assessed as being 'the victim of an abnormal condition relating to drinking behaviour'. The Commissioner concluded that: 'The psychiatric condition of the deceased, especially that which became manifest during periods of intoxication, was a factor in his death'.

Alcohol Induced States of Mental Disturbance

23.4.6 There was another group of cases where alcohol was involved to a point where, according to the evidence presented, it appears that actual mental disturbance was involved. These states may involve transitory alcoholic psychoses such as delirium tremens which accompanies alcohol withdrawal and permanent states of alcoholic psychoses arising from brain damage. At times the actual contribution of transitory and permanent factors may be difficult to distinguish. I also refer to a third category of functional disorders which are associated with, but not necessarily caused by, intoxication and withdrawal. This category occurs within the context of situational precipitative factors where anxiety and depression may arise. Alcohol is one factor in this situation.

Alcoholic Psychoses

23.4.7 The reports reveal that delirium tremens, a condition described by the World Health Organisation as being characterised by disorientation, fear, illusions and hallucinations, contributed directly to the deaths of three Aboriginal people who died in custody, and possibly a fourth.⁸⁷

Brain damage

23.4.8 Mental impairment as a result of alcohol is indicated in a number of cases where organic brain damage has or was thought to have occurred. For instance, Nikira Mau was suspected of having some form of chronic mental impairment as a result of long term alcohol use. Kim Polak was described by expert testimony as a chronic alcoholic, brain damaged, with serious physical health problems, and underlying psychiatric problems. The cases of Benjamin Morrison and Ginger Samson are also relevant.

23.4.9 Other cases, while not specifying delirium tremens, show signs of

alcoholic psychoses. For Benjamin Morrison, an alcohol induced mental disorder and progressive Alzheimer's disease was combined with a perceived existing psychiatric disorder. According to a specialist psychiatrist, when taken into custody Christine Jones was exhibiting classical signs of psychotic behaviour possibly brought on by intoxication.

Situational Factors

23.4.10 In a large number of other cases where alcohol was involved it was not shown that a major psychotic condition was present but that alcohol was involved as one of the situational factors to which I earlier referred. In a number of cases feelings of depression and suicidal ideation appear to be prompted by incarceration and feelings of social isolation. Dr Hunter, in 'Suicide, Alcohol, Incarceration and Indigenous Populations: A Review' (a review of the literature for the Royal Commission), pointed out that the research evidence supports a clear connection between alcohol and suicide, however, the nature of this relationship was complex.

23.4.11 It has been suggested that suicide amongst persons who are intoxicated, or withdrawing from alcohol, is a relatively common phenomenon. It is said that, whilst the blood alcohol level rises, the person feels a sense of euphoria but when the drinker ceases drinking and the blood alcohol concentration falls, depression may result. This point was made in the case of Glenn Clark. While in custody Glenn Clark had experienced a fall in his blood alcohol level. Professor German, a psychiatrist commenting on the death of Edward Cameron, also referred to this link. In addition, he advised of the possibility that people in custody suffering the effects of heavy alcohol consumption who are at risk of suicide may not show outward signs of depression.⁸⁸

23.4.12 It would appear from a study both of the cases themselves and of the expert evidence given in many of the cases that heavy alcohol use, and withdrawal from alcohol intoxication, may exacerbate incipient inclinations towards self-harm. These inclinations may arise from one or a combination of the various factors mentioned earlier, that is, historical, cultural and situational factors.

OVERVIEW OF THE LITERATURE

23.4.13 My researchers have provided the following overview of the literature on self-inflicted harm, in the context of the vulnerabilities of Aboriginal people in custody.

23.4.14 As with data on Aboriginal mental health generally, information about self-inflicted death among Aboriginal people is limited, although in recent years some significant research has been undertaken.

23.4.15 At the outset, it is worthwhile discussing some of the pitfalls of the data that is available. First, the compilation of reliable figures on self-inflicted death and self-harm is extremely difficult.⁸⁹ Moreover, self-inflicted death and attempted suicide are 'extremely difficult concepts to define, identify and confirm'.⁹⁰ For example, the research of the Research Unit relied on the police and prison authorities to furnish information on self-inflicted death and self-inflicted harm, but the figures supplied by these authorities depended largely on their respective comprehension of the terms self-inflicted death and self-inflicted harm. It would seem particularly difficult to obtain information on non-lethal self-inflicted harm. Information on self-inflicted deaths, because of the finality of the outcome, has been easier to collect. However, suicide and other self-inflicted deaths are likely to be under-reported and explained in other ways.⁹¹ Attempted suicides are often not recorded as such, nor are suicide attempt figures maintained.⁹²

23.4.16 Although most studies suggest that self-inflicted death and other self-harm are distinctive patterns of self-mutilation, a large proportion of those who die from self-inflicted actions either have a history of self-destructive behaviour or had attempted suicide previously. But, despite the possibility of distinguishing between these behaviours,

*all attempted suicides, even those forms of behaviour which are not intended to result in death, must be regarded equally seriously for two fundamental reasons: many non-serious suicidal gestures can accidentally result in death and the probability of a non-serious attempter becoming a serious and, in fact, a completed suicide case, is very high.*⁹³

23.4.17 A further issue to consider is the problematic nature of comparing self-inflicted deaths between populations, and even between subsections of a particular population which are quite different in cultural background, socio-historical experience and other social variables.⁹⁴ A reliable comparison of Aboriginal self-inflicted death and attempted suicide with non-Aboriginal self-inflicted death and attempted suicide would need to take account of these variables.

23.4.18 For the purpose of comparison, there are few, if any, non-Aboriginal groups which can be said to be equivalent to Aboriginal communities. It may be more appropriate to compare self-inflicted death and attempted suicide rates among Aboriginal people with other indigenous minority peoples in similar circumstances.⁹⁵ Even among Aboriginal people, it is likely that the nature and frequency of self-destructive behaviour will vary considerably.

23.4.19 As suggested in Section 11.11, it is necessary also to take account of cultural practices. Traditionally, Aboriginal people would cut themselves as part of a range of ritual circumstances. In grieving, for example, 'sorry cuts' were a powerful way of showing distress over the death or injury of kin.⁹⁶ These practices continue today in many communities although they were never intended to produce serious incapacity. It is apparent that, particularly during the last few decades, new forms of self-injury and self-destructive behaviour have developed.⁹⁷ Self-injury in this light, as the Queensland Aboriginal Coordinating Council has pointed out 'must be seen as a measure of low self-esteem, even self-contempt and a sense of futility'.⁹⁸

23.4.20 There appears to have been a dramatic increase in self-inflicted deaths and suicide attempts by young Aboriginal males. This increase may be symptomatic of a 'general increase not just in self-destructive behaviours but in all forms of destructive, violent behaviours, substance abuses and unnatural deaths -- at least amongst a significant minority of Aboriginal people confined neither to rural nor to urban locations'.⁹⁹ It may equally be the case that this trend may reflect a dramatic increase in non-Aboriginal self-inflicted death rates, particularly for the 15 to 19 age group and the 20) to 24 age group.¹⁰⁰ In short, Australia appears to have a serious problem with regard to self-inflicted deaths among its youth both inside and outside of custody.¹⁰¹ A further general finding concerns gender. Aboriginal women may be more prone to suicidal ideation than their male counterparts. Actual self-inflicted deaths are more likely to occur among males¹⁰²

23.4.21 The international literature reveals that there are many more attempted suicides than completed suicides. Studies also show that self-inflicted deaths and attempted suicide are more common in police and prison custody than in the general community. The average rate of non-fatal self-inflicted injuries in the custodial environment is more than twice that in the general community.¹⁰³

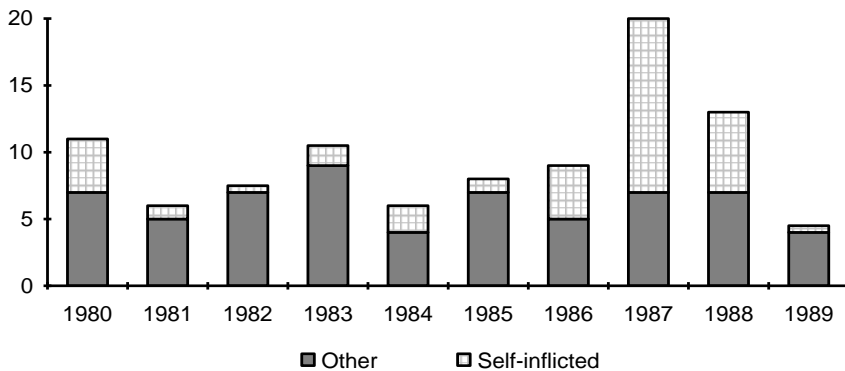
23.4.22 The Commission's Research Unit has analysed statistics and studies on self-inflicted deaths and self-harm in custody in Australia. Of particular relevance to the topic are Research Paper No. 7 and No. 16. These papers make comparisons between Aboriginal and non-Aboriginal populations. The definition of 'suicide' used in these papers is the one generally used by social scientists to include 'all self-inflicted deaths, regardless of whether or not the person had formed a definite intention of dying by his or her own hand'.

Findings of Research Papers of the Royal Commission

Research Paper No. 7 Australian Deaths in Custody 1980-1988: an Analysis of Aboriginal and Non-Aboriginal Deaths in Prison and Police Custody

23.4.23 This paper shows that 462 cases of Aboriginal and non-Aboriginal deaths in prison and police custody occurred over a nine year period. A significant finding of the study, as mentioned in section 23.2, was that self-inflicted deaths were much more common than any other cause of death. Of particular note was the dramatic increase in self-inflicted deaths which occurred in custody in 1987. This dramatic increase is depicted in Figure 23.1.

FIGURE 23.1 ABORIGINAL DEATHS IN CUSTODY 1980-1989, SELF INFLICTED AND OTHER CAUSES



Note: The 1989 data covered the period 1 January to 31 May only.

23.4.24 Other significant findings arising out of this study were that:

- Hanging was the most common cause of self-inflicted death.
- Proportionally fewer Aboriginal people than non-Aboriginal people died in prison and police custody from self-inflicted injury. Overall 49% of non-Aboriginal deaths occurred this way, compared with 34% of Aboriginal deaths.

Research Paper No. 16 Self-Inflicted Harm in Custody

23.4.25 This study provides a detailed description of 375 reported incidents of self-inflicted harm (self-destructive behaviour, including attempted suicide) which occurred in Australian police stations and prisons during the six month period, 1 April 1989 to 30 September 1989. Figures from this study need to be treated with some caution since information provided by the police and prison authorities depended largely on their respective comprehension of the terms suicide and self-inflicted harm. Inter-jurisdictional comparisons cannot be made, but there are a number of significant findings which can be looked at, particularly relating to the over-representation of Aboriginal people in a number of areas.

- In relation to their proportion of the Australian population, the study shows that

Aboriginal people are over-represented in the numbers of those who harm themselves in custody. The higher proportion of incidents of Aboriginal self-harm are explained largely by the higher proportion of Aboriginal than non-Aboriginal people in custody.

- The study confirmed the general pattern of higher proportions of self-harm by Aboriginal people in police custody than in prisons, already documented for deaths in custody.
- Aboriginal people who attempted suicide in custody, or engaged in other self-destructive behaviour, were much more likely to do so in police custody than in prisons. Conversely, non-Aboriginal people were more likely to attempt and complete suicide in prison.
- Aboriginal people contributed 14% of the self-harm incidents in prisons and 32% of the incidents in police custody. These figures are almost the same as the known proportions of Aboriginal people in each form of custody.
- In terms of gender, females contributed 24% of all reported incidents of self-harm among Aboriginal people, compared with 18% of those among non-Aboriginal people. For incidents occurring in police custody, females contributed 27% of the incidents of self-harm among Aboriginal people, compared with only 9% of those among non-Aboriginal people.
- Hanging was by far the most frequently used method of reported self-inflicted harm in police custody, accounting for 70% of all reported cases, whereas in prison laceration was the most frequently reported method of self-harm. In police custody, 73% of incidents of self-harm took place within the first three hours of custody, for both Aboriginal and non-Aboriginal people.
- Alcohol figured significantly in incidents of self-harm in police custody. (Note that the presence or absence of influence of alcohol was recorded in only 75% of the reported incidents of self-inflicted harm in custody.) Some 21% of the cases reported by police were in custody for drunkenness. Of these cases, alcohol was reported to be a factor in 34% of reported incidents of self-inflicted harm. All except four of these incidents took place in police custody. In almost half of the reported incidents in which Aboriginal people were involved in incidents of self-harm (47%), the person was reported to be under the influence of alcohol at the time of the attempt

23.4.26 I conclude this discussion of self-harm and self-inflicted deaths by recalling my discussion in Chapter 11. Self-destructive behaviour is not uncommon in Aboriginal communities nor in custodial situations. It is best understood in its social context, as the interaction of life experiences and immediate stresses (along with serious individual psychopathology in some cases) are at the heart of its aetiology. I discuss in later chapters the action that can be undertaken to minimise the stresses, both chronic and immediate, that so often precipitate the occurrence of self-destructive behaviour among Aboriginal people both in and out of custody.

23.5 AREAS OF GREATEST RISK FOR ABORIGINAL PEOPLE IN CUSTODY

23.5.1 As summarised in Section 23.1, the ninety-nine Aboriginal people whose deaths in custody were examined by the Commission died from a variety of causes. In terms of underlying risks, however, for the vast majority of cases examined by the Commission the most frequent element of risk was alcohol use. For many, a long history of the hazardous use of alcohol contributed 'to their deaths, while, for others, acute intoxication was the major factor.

23.5.2 The impact of alcohol was seen in a number of ways. First, as noted in Section 23.1, acute alcohol intoxication was a major contributing factor in the majority of the self-inflicted deaths. As well, it is highly likely that most, if not all, of

the fatal head injuries were sustained while the deceased was in an intoxicated state. Some of these injuries were the result of fights, and others the results of falls. In evidence presented to the Commission, it was noted that, for many of the people who experienced epileptiform seizures, seizures were commonly associated with the acute effects of alcohol. The acute effects of alcohol also involve mental state abnormalities. The most serious of these are alcohol-induced psychoses, including those associated with alcohol withdrawal and delirium tremens. A substantial number of the cases examined by the Commission had histories of delirium tremens, and in four cases (Gregory Dunrobin, the man who died in Katherine, Mark Quayle and Misel Waigana) it was a factor contributing directly to the death.

23.5.3 Second, the long-term effects of the ingestion of alcohol resulted in disease manifest in different bodily systems. I will give a few examples here. The most clearly recognised long-term effect of alcohol ingestion was liver disease, including cirrhosis. Autopsy evidence of liver damage resulting from alcohol abuse was found in many cases. Cirrhosis of the liver can also cause gastrointestinal bleeding, a component noted in the histories of a number of cases. The permanent damage to the brain from chronic alcohol use is less readily demonstrated, but expert evidence attested to its presence in a number of cases. Alcohol-induced brain damage probably also contributed (along with damage resulting from physical injuries) to the high proportion of people with a history of seizures. Alcohol is known to contribute to a number of conditions adversely affecting the heart and circulation, including cardiomyopathy, cardiac arrhythmias, and the elevation of blood pressure, but the contribution it played in the cases examined by the Commission is not clear. Heavy alcohol use can also damage the pancreas (overall, 36% of deaths from acute pancreatitis can be attributed to alcohol use). Donald Harris' s death from acute pancreatitis may have been caused by his long-term use of alcohol, despite the fact that his death occurred about two months after being incarcerated.

23.5.4 Third, the effect of alcohol abuse was seen in more general ways, such as in the general debility of a number of the people dying in custody. The underlying debility of a number of the people probably contributed directly to their deaths, largely through increased susceptibility to infective processes. Patrine Misi's death from bronchopneumonia is an example, and underlying debility also probably contributed to the deaths of Muriel Binks and Jimmy Njanji.

23.5.5 A fourth way in which alcohol contributed to a number of the deaths was in its 'masking' of life-threatening conditions--as noted in Section 23.1, some of the deaths were clearly avoidable. The conditions 'masked' by actual or presumed acute intoxication with alcohol included: subdural haematoma (Faith Barnes, Albert Dougal, Stanley Gollan, Keith Karpany, Bruce Leslie and Ginger Samson); delirium tremens (Mark Quayle, Misel Waigana); severe infection (Charlie Kulla Kulla, Milton Wells); hypoglycaemia (Arthur Moffatt and Fay Yarrie); and co-existing drug overdose (Joyce Egan, Paul Kearney). The case of Monty Salt, who died from lobar pneumonia, is another example where an effect of alcohol, delirium tremens, was presumed, resulting in a fatal missed diagnosis.

23.5.6 Finally, sleep apnea is a cause of death which may be related to heavy alcohol (and/or other drug) consumption. Sleep apnea is the cessation of breathing caused by a blockage of the airway during sleep. The depression of the central nervous system caused by intoxication means that the person fails to respond normally and wake, thereby clearing the airway, when the body's oxygen supply falls. Heavy snoring by a sleeping, severely intoxicated person, as occurred in the case of Paul Kearney, warns of the potential of sleep apnea. Police cell supervisors should be on the lookout for this obvious sign of a potentially fatal condition.

Specific Health Risks Encountered by Aboriginal People in Custody

23.5.7 I will now summarise briefly the specific risks encountered by Aboriginal people in custody. From the deaths examined by the Commission, the greatest specific risk for Aboriginal people in custody was self-harmful behaviour. As noted in Section 23.4, 38 of the 99 deaths examined by the Commission were as a result of such behaviour, most commonly by hanging. However, the details of the cases suggest that this risk of death could be greatly reduced.

23.5.8 First, a number of those dying in custody from self-harmful behaviour had been incarcerated for minor offences, frequently alcohol related, and the cases may well have been able to be handled without recourse to incarceration. Also, Dr Reser, in considering the self-inflicted deaths occurring in Queensland, draws attention to a variety of situational factors, including age, intoxication, and social environment. To some degree, a number of situation factors apply to many of the cases of people dying in police custody, for instance intoxication, isolation and incarceration in poor facilities. As well, other situational factors (such as domestic or economic difficulties), could also act as triggers for self-harmful behaviour. While many of these situational triggers may not be avoidable, custodial authorities need to recognise the greater risks involved. The improved physical safety of cells needs to be accompanied by the much better surveillance of at-risk prisoners by custodial officers.

23.5.9 In summary, there are a complexity of factors which may be precipitative of suicidal behaviour. The cases investigated have highlighted a number of factors which appear to be significant but which have not been reflected in the past in either custodial officers training or in police and prison practices and procedures (to be dealt with in more detail in Chapter 24). These are:

- Intoxication, including alcohol withdrawal
- Anger, aggression and emotional distress
- Mental disorder
- Previous attempts or threats to commit self-harm
- Age and gender (younger adult males appear to be the most vulnerable).
- Time. The Research Unit found that the majority of suicides occurred within the first three hours of admission to custody. Method of self-harm. The most common method is hanging. Other situational factors, for instance loss of job, family disagreements and isolation in custody.
- There may not necessarily be any outward signs of depression.
- While not discussed in this chapter, the literature identifies first-time prisoners, those prisoners whose offences involve violent crime, for example domestic murders and prisoners who face long sentences. Sexual offenders may possibly also be included in this category.¹⁰⁴

23.5.10 Another area of great risk for Aboriginal people in custody relates to the failure, by health care workers and custodial authorities, to recognise or anticipate treatable life-threatening conditions. I have mentioned already the way that alcohol can mask a number of conditions, such as subdural haematoma, delirium tremens, severe infection, hypoglycaemia and co-existing drug overdose. As well as these, health care workers, in particular, need to be aware that Aboriginal people may present with unusual health conditions or with unusual presentations of common conditions.

23.5.11 The cases of Jimmy Njanji and of the man who died in Perth's Sir Charles Gairdner Hospital provide examples. The exaggerated impact of an infectious agent in a poorly nourished person contributed to the failure by the doctors caring for Jimmy Njanji to recognise that an apparently minor wound could have such a dramatic presentation, eventually leading to his death. In the case of

the man who died in Sir Charles Gairdner Hospital, the delayed diagnosis of miliary tuberculosis, an unusual condition in Australia today, led to his death from tuberculous meningitis.

23.5.12 In general, the vulnerability, of Aboriginal people, in and out of custody, to severe infections is particularly related to the higher levels of malnutrition in the Aboriginal population than in the general Australian population. It is likely that those Aboriginal people coming into contact with custodial authorities are worse off than most other Aboriginal people, to the point that some are, in fact, quite debilitated. This is an area of risk which demands special attention.

23.5.13 Of the ninety-nine cases examined by the Commission, nineteen people had a history of epileptiform seizures, with a seizure being directly implicated in the death of six people. The prevalence, and apparently poor management, of such long-term health conditions needs to be recognised by those responsible for the care of Aboriginal people in custody. Without such recognition, including recognition of the need for medication, needless deaths in custody will continue to occur. Much the same can be said for other long-term health conditions known to be more prevalent among Aboriginal people. Of major importance is diabetes mellitus, and hypertension is also a problem for some Aboriginal people. It is important that custodial authorities do all they can to ensure that people with the need for regular medications continue to receive them while they are in custody.

23.5.14 The deaths, and morbidity, from ischaemic heart disease are really of a different nature. The extent of ischaemic heart disease, particularly among young adults, is absolutely remarkable. Although descriptive studies have documented high death rates from ischaemic heart disease among young and middle-aged Aboriginal people, some doubts have existed about the total accuracy of the certification of these deaths. On the other hand, there can be little doubt about the impact of ischaemic heart disease for many of the Aboriginal people who died in custody; the autopsy evidence is undeniable. In addition to the twenty people whose deaths were caused directly by disease of the circulatory system, autopsies revealed significant heart disease in a number of other young Aboriginal people. In some cases (for example, Stanley Brown and Donald Harris), the disease was so severe that an experienced forensic pathologist noted that, in other circumstances, it could well have been the cause of death.

23.5.15 It is likely that the emergence of significant ischaemic heart disease among Aboriginal people is a relatively recent phenomenon, but it appears that its impact is particularly lethal. Even though the changes found at autopsy of ischaemic heart disease result from long term health factors, the intensity is so severe that the fatal outcome is being seen in very young men.

23.5.16 For the general population, death rates from ischaemic heart disease, particularly for young and middle-aged adults, have declined since the late 1960s. Although a significant number of deaths still occur among middle-aged adults, acute myocardial infarction, the main fatal manifestation of ischaemic heart disease, is increasingly becoming a cause of death found mainly among older Australians. In recent years, 91% of male deaths from acute myocardial infarction occurred to men aged 55 years or more, and 98% to those aged 45 years or more. For men aged 34 years or less, deaths from acute myocardial infarction are now very uncommon.

23.5.17 It is against this background that the deaths occurring in custody from disease of the circulatory system must be viewed. As noted in Section 23.2, the numbers of deaths occurring in custody were well above the numbers expected from total Australian rates (for Aboriginal males, 7.3 times for those in police custody and 3.1 times for those in prison; for Aboriginal females, there were only 2

deaths).

23.5.18 But the differences are much more than these figures suggest, as can be seen from the ages of those dying from disease of the circulatory system. For the 7 Aboriginal males dying in police custody, the mean age at death was 46 years and the median age 50 years. For the 13 Aboriginal males dying in prison, the mean age at death was 37 years and the median age 34 years. The 2 Aboriginal females (both in police custody) who died from disease of the circulatory system were aged 30 years.

23.5.19 The cases examined by the Commission provide undeniable evidence of the alarming impact among young Aboriginal people of disease of the circulatory system, particularly ischaemic heart disease. For Aboriginal people, the extent of premature mortality caused by these diseases warrants urgent attention from all responsible authorities.

CONCLUSION

23.5.20 The deaths occurring in custody highlight the great health risks to which many Aboriginal people are exposed, in and out of custody. In general, there is little doubt that the pattern of deaths occurring in custody is part of what Charles Perkins has described as a 'national calamity'.

23.5.21 Except for the self-inflicted deaths, the pattern of Aboriginal deaths occurring in custody is an unusual combination of deaths from causes associated with underprivilege and from causes often thought to be associated with affluence, such as heart disease and strokes. The self-inflicted deaths, occurring at much the same rate as among non-Aboriginal people in custody, appear to reflect an increasing tendency for some Aboriginal people to behave in self-harming ways. For most of the people whose deaths were examined by the Commission, the hazardous use of alcohol was a major factor contributing to their death.

23.5.22 The unusual pattern of deaths, the increasing frequency of self-harming behaviour and the harmful use of alcohol all result from a complex interaction of social and physical environmental factors, some aspects of which have been considered in other chapters of this report.

23.5.23 As I said earlier, the material in Sections 23.3 and 23.4 were summarised for me by Researchers. I am not competent to express an opinion on many of the questions. I am clearly persuaded by the evidence that:

- there is great need to address questions of Aboriginal mental health;
- that the area has been neglected;
- that it must be studied against the background of the legacy of 200 years of history and the present situation of Aboriginal society;
- that the questions raised in these sections are related to the over-representation of Aboriginal people in custody and to the deaths of some of them.

23.5.24 The elimination of Aboriginal health disadvantages requires a broad national commitment. It requires a comprehensive, well-articulated national strategy, adequately resourced in terms of funds and expertise. The strategy must cover health promotion, disease prevention and treatment, along with research, program evaluation and statistical monitoring. As Aboriginal people emphasise, their effective involvement in the design and implementation of action aiming to improve the health of their people is crucial. Furthermore, the strategy will only be effective if it is accompanied by action that helps to redress the social and economic disadvantage that Aboriginal people routinely experience. Without such

strategies, the standard of Aboriginal health will remain at levels that the international community rightly describes as being totally unacceptable in a society as affluent as Australia's. In Chapter 31 of this report, I examine how such strategies, including the newly approved National Aboriginal Health Strategy, are tackling these vitally important matters.

- 1 N. Thomson and N. Briscoe, *Overview of Aboriginal Health Status: New South Wales*. Research paper prepared for RCIADIC, 1990
- 2 N. Thomson and D. McDonald, *An Analysis of the Relative Risks of Death in Custody for Aborigines and non-Aborigines*, RCIADIC Criminology Research Unit Research Paper No. 20, 1991
- 3 Thomson and McDonald, RCIADIC Research Paper No. 20. The combined data relate to Aboriginal people living in western New South Wales in 1984-87, in the Queensland communities in 1984-86, in Western Australia in 1985-86, in South Australia in 1985 and in the Northern Territory in 1985.
- 4 A. Gray, 'National Estimates of Aboriginal mortality', in A. Gray (ed.) *A Matter of Life and Death: Contemporary Aboriginal Mortality*, Aboriginal Studies Press, Canberra, 1990.
- 5 Thomson, *Overview*, p. 4
- 6 National Population Inquiry, *Population and Australia: a Demographic Analysis and Projection*, AGPS, Canberra, 1975
- 7 Thomson and McDonald, RCIADIC Research Paper No. 20
- 8 D. Biles and others, *Australian Deaths in Prisons 1980-1988: an Analysis of Aboriginal and non-Aboriginal Deaths*, RCIADIC Research paper No. 11
- 9 To permit international comparisons, the World Health Organisation has developed, and periodically updates, a standard international classification of diseases. The current version of the classification is the ninth revision, adopted for international use in 1979. See World Health Organisation, *International Classification of Diseases: Manual of the International Statistical Classification of Diseases, Injuries and Causes of Death*, World Health organisation, Geneva, 1977 for full details.
- 10 E. Hunter, 'On Gordian knots and nooses: Aboriginal suicide in the Kimberley', *Australian and New Zealand Journal of psychiatry*, 22, 1988, pp. 264-82; J. Reser, 'Aboriginal deaths in custody and social construction: a response to the view that there is no such thing as Aboriginal suicide', *Australian Aboriginal Studies*, 1989, 2, pp. 43-50
- 11 D. Biles and others, RCIADIC Research Paper No. 11; Thomson and McDonald, RCIADIC Research Paper No. 20
- 12 Ideally, the comparison should be with the deaths rates of the non-custodial populations. However, because of the comparatively very small numbers of people dying in custody, comparisons with general populations (including custody populations) are satisfactory.
- 13 D. McDonald and D. Biles, *Methodological issues in the calculation of over-representation and exposure to risk in custody*, RCIADIC Research Paper No. 17, 1990 has **an exploration of general methodological issues**;
Thomson and McDonald, RCIADIC Research Paper 20 has a detailed explanation of the methodology used in this research
- 14 D. Biles and others, RCIADIC Research Paper 11
- 15 Of the Aboriginal deaths included in this analysis, the median case occurred in early 1986.
- 16 In Section 25.1, reference has already been made to the results of this analysis, which used data relating to Aboriginal people living in western New South Wales in 1984-87, in the Queensland communities in 1984-86, in Western Australia in 1985-86, in South Australia in 1985 and in the Northern Territory in 1985. Although more recent data are available for some of these regions, these earlier data were used as they are close to the mid point of the 10-year period 1980-89.
- 17 While for each subpopulation the SMR provides a valid comparison with the relevant total Australian population, the individual SMRs are not strictly comparable mathematically. However, the mathematical error involved is not likely to influence the comparison. H.A. Kahn, *An Introduction to Epidemiological Methods*, Oxford University Press, New York, 1983.
- 18 Confidence limits (conventionally, 95% limits are used) show the variation of the SMR which could occur purely by statistical chance. In this, they give an indication whether slight variations in the estimates of SMR could occur by chance, and not be statistically significant. The actual confidence range will vary according to the size of the observed and expected numbers, with wider ranges resulting from smaller numbers.
- 19 The number of Aboriginal cases reported here, 108, differs slightly from the number of cases within the jurisdiction of the Commission, 99. There are three main reasons for this difference. First, a number of cases occurred after 31 May 1989 (the final date for Royal Commission jurisdiction); second, three cases within the Commission's jurisdiction concerned deaths occurring in juvenile institutions and were excluded from this analysis as comparable data for non-Aboriginal deaths were not available; and third, the analysis included a small number of

Aboriginal deaths reported by the custodial authorities which were ruled by the Commission to be outside its jurisdiction.

20 The differences in the various expected numbers reflects the differences in the person years of exposure to death in police custody of each of the populations considered.

21 This is seen in the overlapping 95% confidence ranges.

22 Clearly, there is no 'right' procedure for testing these differences, but the Commission wanted to minimise the risk of overlooking real differences between the various populations.

23 Death rates for the combined custodial population were calculated by dividing the total number of deaths for each age group by the person years of exposure to custody for that age group. These rates were then used to calculate the expected number of deaths for each custodial subpopulation. The combined rates are, of course, most influenced by the largest custodial subpopulation, non-Aboriginal males.

24 D. Biles and others, Research Paper No. 10;
D. Biles and others, Research Paper No. 11

25 Thomson and McDonald, Research Paper No. 20

26 For a more detailed examination of the various causes of death, see Thomson and McDonald, Research Paper No. 20

27 Val Power, Aboriginal Education Foundation Inc., correspondence to the National Health and Medical Research Council, quoted in A. Radford and others, *Taking Control: a Joint Study of Aboriginal Social Health in Adelaide with particular Reference to Stress and Destructive Behaviours ...*, The Flinders University of South Australia, Adelaide, 1989, p. 4

28 Australian Medical Association, RCIADIC Submission, 1990;
Victorian Aboriginal Health Service, *Presentation to the Royal Commission into Aboriginal Deaths in Custody*, RCIADIC Exhibit G23

29 National Aboriginal Health Strategy Working Party *A National Aboriginal Health Strategy*, [Department of Aboriginal Affairs, Canberra], 1989, p. 171;
S. Dunlop, *All That Rama Rama Mob: Aboriginal Disturbed Behaviour in Central Australia*, Central Australian Aboriginal Congress, Alice Springs, 1988. The Central Australian Aboriginal Congress Submission, RCIADIC Exhibit NT/2/G5, p. 20 submits that 'depression and mental illness certainly exists among Aboriginal communities' but, as the authors go on to say, 'it is difficult to assess the extent, as such illnesses have culturally determined presentations'. The Victorian Aboriginal Health Service Submission, RCIADIC Exhibit G23, 1.1.5, puts the view that 'mental illnesses including depression/anxiety states are very serious problems affecting many Aboriginal people and greatly affect other health issues'. Harmful use of alcohol and other drugs and high-risk behaviours 'usually associated with environmental stressors' have additional mental health implications.

30 National Aboriginal Health Strategy Working Party, pp. 171-2

3 1 National Aboriginal Mental Health Association, quoted in C Hennessy, 'The National Aboriginal Mental Health Association: a framework', *The Aboriginal Health Worker*, 12, 4, 1988, p. 5

3 2 Mental Health Working Party, *Mental Health Discussion Paper: a Discussion Paper Presented to the Australian Health Ministers' Advisory Council in October 1989*, AGPS, Canberra, 1989, p. 14

33 Mental Health Working Party, p. 15

34 J. Reser, 'Aboriginal mental health', unpublished chapter in J. Reid and P. Tromp (eds.) *Issues in Aboriginal Health*, Harcourt, Bracer, Jovanovich, Sydney, p. 3

35 P. Swan, 'Appendix H: 200 Years of Unfinished Business: History', in J. H. Muirhead, *Royal Commission into Aboriginal Deaths in Custody. Interim Report*, AGPS, Canberra, 1988, p. 81

3 6 Swan, *Interim Report*, p. 82

37 A. Kleinman, *Rethinking Psychiatry: from Cultural Category to Personal Experience*, The Free Press, New York, 1988, p. 12

38 Kleinman, pp. 47, 150;
Reser, 'Aboriginal mental health', p. 33. It may be noted that some individuals with mental illness may not exhibit any disturbed behaviour.

39 Reser, 'Aboriginal mental health', p. 4

40 Kleinman, p. 25

41 Reser, 'Aboriginal mental health', p. 6

42 J.H. Muirhead, *Report of the Inquiry into the Death of Paul Farmer*, RCIADIC W/5, AGPS, Canberra, 1989, p. 29

43 RCIADIC Exhibit GE/27/W5 p. 3

44 P. Elsegood, *Aboriginal Health Issues: A Report for the Royal Commission into Aboriginal Deaths in Custody, Northern Territory Region*, Research paper prepared for RCIADICp. 10. Psychotic ideation occurs where an individual exhibits ideas or thoughts of a psychotic kind, that is, ideas which are not in touch with the reality around them.

45 Muirhead. *Paul Farmer*, p. 32

46 F. Lorimer, *A Commentary on Psychiatric Assessments of Aboriginal Abnormal Behaviour for the Royal Commission into Aboriginal Deaths in Custody*, Research paper prepared for RCIADC, 1990, p. 1

47 World Health Organisation, 1977, p. 177. The Ninth (1975) Revision of the World Health

- Organisation's International Classification of Diseases (ICD) was adopted for world-wide use from 1979.
- 48 M. Kahn, 'Psychosocial disorders of Aboriginal People of the United States and Australia', *Journal of Rural Psychology*, 7(1), p. 47. The Central Australian Aboriginal Congress report on Aboriginal disturbed behaviour in Central Australia (S. Dunlop, All that Rama Rama Mob) defines disturbed behaviour within the context of how Aboriginal people see such behaviour. The client group considered in this study constitutes Aboriginal people whose behaviour is (a) 'associated with organic, psychological or emotional disorder or which is the result of long term substance abuse; (b) considered unlawful, obnoxious or dangerous by their community and (c) disabling because it prevents participation in the usual community life'.
- 49 Reser, 'Aboriginal mental health', pp. 9, 57
- 50 R. Notice, 'Psychiatric Diagnosis in Transcultural Perspective', *Australian and New Zealand Journal of Psychiatry*, 13, pp. 295, 298
- 51 E. Hunter, 'Using a socio-historical frame to analyse self-destructive behaviour', *Australian and New Zealand Journal of Psychiatry*, 24, 1990, p. 191
- 52 D. Biernoff, 'Psychiatric and anthropological interpretations of 'aberrant' behaviour in an Aboriginal community', in J. Reid (cd.) *Body, Land and Spirit*, Queensland University Press, St Lucia, Qld, 1982, p. 150
- 53 Dunlop, p. xix
- 54 Reid (cd.) *Body, Land and Spirit*, p. xii
- 55 Kleinman, p. 58
- 56 For Instance in Chapter 18 on Housing and Infrastructure a section is devoted to 'Housing as loss of control and a source of stress'.
- 57 Kleinman, p. 16. These diseases include organic brain disorders, schizophrenia, manic-depressive psychosis, certain anxiety disorder, and perhaps major depressive disorder. Conversely, there is doubt about other psychiatric diagnoses e.g. certain personality disorders, dysthymic disorder and agoraphobia.
- 5 8 J. Spencer, *Submission by Dr. John Spencer to the Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody*, RCIADIC Submission
- 59 Discussions of socio-historical and socioeconomic 'stress' are presented in the following texts: Kleinman, pp. 54, 56;
- R. Kosky, *Submission by Professor R. Kosky to the Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody*, 1990, p. 2;
- P. Memmott, *Aboriginal Culture, Social problems and the DIC Victims*, part 4, Research paper prepared for RCIADIC, 1990, p. 43;
- Queensland Aboriginal Issues Unit, *Report*, 1990, pp. 136-65
- 60 Discussions of cultural stress and mental health are presented in the following texts: Reser, 'Aboriginal mental health', pp. 26-8;
- E. Hunter, 'Suicide, alcohol, incarceration and indigenous populations: a review', in J. Greely and W. Gladstone (eds.), *The effects of alcohol on cognitive psychometer, and Affective Functioning*, Report and Recommendations prepared by an expert working group for the RCIADIC, 1990, p. 97;
- Victorian Aboriginal Health Service, RCIADIC exhibit G23;
- Central Australian Aboriginal Congress, RCIADIC exhibit NT/2/G5; Hunter, RCIADIC submission
- I. Anderson, *Koorie Health in Koorie Hands: an Orientation Manual in Aboriginal Health for Health Care Providers*, Koorie Health Unit, Department of Health, Melbourne, p. 103;
- M. Brady, *Heavy Metal: The Social Meaning of Petrol Sniffing in Australia*, Report to the Research into Drug Abuse Grants Advisory Committee, Commonwealth Department of Community Services and Health, 1989, p. vi
- 61 Reser, 'Aboriginal mental health', pp. 42, 45
- 62 Reser, 'Aboriginal mental health', p. 43
- 63 M. Edmunds, *Doing Business: Socialisation. Social Relations, and Social Control in Aboriginal Societies*, Research paper prepared for RCLADIC, 1990, p. 38
- 64 Discussions of the role of alcohol are presented in the following texts: Reser, 'Aboriginal mental health', pp. 31, 42, 43, 45;
- J. F. J. Cade, RCIADIC Submission;
- Dr J. Spencer, RCIADIC Submission;
- C. Tatz, 'Aboriginal violence: a return to pessimism', *Australian Journal of Social Issues*, 25, 4, 1990, pp. 245-60
- 65 J.H. Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith*, RCIADIC N/2, AGPS, Canberra, 1989, p. 71. A similar issue is raised in the case of Clarence Nean e.g. the use of a 'culturally biased intelligence test' and the psychiatrists' summation that Clarence Nean's problems were 'the reaction of a rather dull boy to a very unfavourable home environment in which he feels unloved and unwanted.' On page 4 of the *Report of the Inquiry into the Death of Clarence Alec Nean*, Commissioner Wootten says that such a view, made without seeing the parents and without an experience or knowledge of Aboriginal life, was inadequate.

- 66 J. Reser, *An Assessment of Vincent Roy Ryan from a Clinical and Social Psychological Perspective*, RCIADIC exhibit QQ 78, 1989, pp. 4-6
- 67 J.H. Wootten, *Report of the Inquiry into the Death of Mark Anthony Quayle*, RCIADIC N/6, AGPS, Canberra, 1991, p. 2
- 68 Central Australian Aboriginal Congress, RCIADIC Submission NT/2/G5; Victorian Aboriginal Health Service, RCIADIC Submission G23
- 69 Victorian Aboriginal Health Service, RCIADIC Submission G23
- 70 Discussions of the assessment of mental illness are presented in the following texts:
 Reset, 'Aboriginal mental health', pp. 17-18, 20, 25;
 N. Thomson, *Inequalities in Aboriginal Health*, MPH Thesis, University of Sydney, 1989, p. 153-4;
 National Aboriginal Health Strategy Working Party, p.172;
 P. Lake, *Mental Health Services for Aboriginal People in South Australia*, Research paper prepared for RCIADIC, 1990, p. 4;
 H. Eastwell, 'Urban Aborigines: lifestyle and psychiatric disorders', *Patient Management*, Jan, 1985. Eastwell argues that the real extent of psychiatric disorders among the Aboriginal community is hidden because of a probable under-utilisation of conventional services and the possibility of under-diagnosis.
- 71 Reser, 'Aboriginal mental health', p. 20
- 72 National Aboriginal Health Strategy, p. 172
- 73 G. Urquhardt, 'Address to a conference Aboriginal and Mental Health', *Aboriginals and Mental Health*, Australian National Association for Mental Health, Sydney, 1981, pp. 49-53
- 74 H. Eastwell, *The State of Risk of Psychiatric Illness among Tribes of North Australia*, MD Thesis, University of New South Wales, Sydney, 1977; H. Eastwell, 'Urban Aborigines', pp. 63-8
- 75 Thomson, *Inequalities*, pp. 156-7
- 76 Reser, 'Aboriginal mental health', p. 19
- 77 D. Devansen and others, *Health Indicators in the Northern Territory*, Northern Territory Department of Health, Darwin, 1986, p.253; Reset, 'Aboriginal Mental Health', p. 18
- 78 Eastwell, 'Urban Aborigines', p. 63
- 79 Victorian Aboriginal Health Service, RCIADIC Exhibit G23, p. 40
- 80 J. McKendrick and others, 'A unique and pioneering mental health service for Victorian Aboriginal People', *Aboriginal Health Information Bulletin*, 13, 1990, p. 18
- 81 Radford and others, p. 2
- 82 Kosky, *Submission*
- 83 McKendrick and others p. 20
- 84 Reser, 'Aboriginal mental health', p. 55
- 85 I have not included Vincent Ryan's case in this section although he was diagnosed as suffering from 'congenital mental deficiency and pathological personality.' He was also perceived as being given to 'unprovoked aggression' and 'violent outbursts'. However, subsequent research of Ryan's records by Dr Reset suggests that the mental health picture presented of Ryan was 'incomplete and inconclusive and at times contradictory'. Moreover, the opinion of medical persons differed significantly from the view of friends and family. Also, once Ryan left hospital he did not display any signs that he required further psychiatric treatment or examination. See Dr Reser's *Assessment*.
- 86 The main debate concerns whether Farmer was suffering from a schizo-affective disorder or psychotic depression.
- 87 Mark Quayle, Gregory Dunrobin and the man who died at Katherine were suffering delirium tremens, and Stanely Gollan was a possible fourth. Delirium tremens is indicated as an underlying condition in the death of three other cases: Misel Waigana, Eddie Betts and Jimmy Njanji
- 88 Prof. German, RCIADIC Exhibit GEO/16, p. 2;
 J.H. Wootten, *Report of the Inquiry into the Death of Glenn Allan Clarke*, RCIADIC T/I, AGPS, Canberra, 1990, p. 87;
 D.J. O'Dea, *Report of the Inquiry into the Death of Edward Cameron*, RCIADIC W/20, AGPS, Canberra, 1990, p. 32
- 89 Radford and others, pp. 23-6
- 90 J. Fleming, D. McDonald and D. Biles, *Self-Inflicted Harm in Custody*, RCIADIC Criminology Research Unit Research Paper No. 16, 1990
- 91 Reser, 'Aboriginal mental health', p. 54
- 92 Reser, 'Aboriginal mental health', p. 53
- 93 Fleming and others, p. 6
- 94 Reser, 'Aboriginal mental health', p. 53; Hunter, 'Socio-Historical Frame'
- 95 Reset, 'Aboriginal mental health', p. 53
- 96 C. Anderson and S. Coates, *Like a Crane Standing on One Leg on a Little Island: An Investigation of Factors Affecting the Lifestyle of Wujal Wujal Community, North Queensland*, Research Study No. 1, National Aboriginal and Islander Legal Services Secretariat (NAILSS), Sydney, 1990, p. 26; Memmott, p. 30
- 97 Reset, 'Aboriginal mental health', p. 4

- 98 Anderson and Coates, p. 26
 99 Radford and others, p. 38
 100 Reser, 'Aboriginal mental health', p. 53; Fleming and others, p. 4
 101 Fleming and others, p. 4
 102 Radford and others, pp. 36-7
 103 Fleming and others, p. 1
 104 C. Lloyd, *Suicide and Self-injury in Prison: A Literature Review*, A Home Office Research and Planning Unit Report, Her Majesty's Stationary Office, London, 1990, p. 23. The report found that there was little evidence to suggest that sex offenders were prone to commit suicide in prison;
 RCIADIC Research Paper No. 16, p. 19 found that sexual offences were among the most common offences reported for self-inflicted harm in custody between the 1 April 1989 to 30 September 1989;
 R.W. Harding, *Review of Suicide and Suicide Attempts By Prisoners in the Custody of the Office of Corrections*, Victoria, 1990, p. 8

Chapter 24 CUSTODIAL HEALTH AND SAFETY

Chapter 24 builds on the information presented in the previous chapter concerning the nature of the vulnerabilities of Aboriginal people in custody by identifying the specific measures which, if implemented effectively, may reduce the risks of death in custody. The chapter commences by noting that one of the most disturbing findings of the Commission has been the frequent failure of both police and prison authorities to learn from the deaths which had occurred, and to act to prevent subsequent deaths in similar circumstances. Police and prison custodial practices and procedures are then dealt with separately, as the two custodial environments present very different patterns of risk and consequent opportunities to minimise those risks. Specific deficiencies and methods of remedying them are discussed, including action in the areas of receptions into custody, the supervision and monitoring of detainees, the management of particularly 'at risk' detainees (e.g. intoxicated and/or potentially suicidal people), staff training and the physical environments in which people are detained. The special circumstances of juvenile centres are mentioned.

Features common to both the police and prison environments then receive attention, particularly the procedures needed to deal with emergencies, such as resuscitation, as well as the use of restraints and firearms. This chapter is highly practical in nature, including many specific recommendations for action which must be taken to reduce to an absolute minimum the number of people dying in custody. The following chapter looks in depth at the significance, to Aboriginal people, of the prison experience.

2 4.1 INTRODUCTION

24.1.1 The Interim Report of the Commission explained one of the purposes of that Report as being:

to express recommendations and suggestions which if implemented may serve to improve practices and procedures and limit future custodial deaths, objectives which must be recognised as the primary justification for the Commission's work.¹

24.1.2 Since the commencement of the Royal Commission hearings, the inquiries into individual deaths have focused on arrest, detention and death. As evidenced by the case reports published by the Commission, custodial procedures and practices vary between jurisdictions. The Commission has had the benefit of a detailed analysis of these practices and the way in which they have changed since the start of the 1980s. Systemic inadequacies in all jurisdictions were highlighted.

Some still persist. In Chapter 4, I have commented on the fact that police investigations and coronial inquiries have not operated to sufficiently identify these inadequacies. Few of the dangers were recognised and fewer remedied. In some locations where deaths occurred, sadly, systems did not change quickly enough, and deaths continued to occur.

24.1.3 The extraordinarily high proportion of Aboriginal people being detained in both prisons and police lockups throughout Australia means that the danger of deaths will continue to occur. In other chapters of this report I have identified ways of diverting Aboriginal people from custody both in terms of the alleged offences for which they are arrested and in terms of sentencing practices. I have also identified those factors which make Aboriginal people particularly vulnerable to involvement in the criminal justice system. Until governments and local authorities and the society generally address these broader issues as identified in this report, Aboriginal people will continue to be arrested and detained. Whilst it will not be possible to entirely eliminate all deaths occurring in custody, there are certain measures which can and should be taken to avert those deaths which are or may be preventable. This chapter aims to identify those measures which may reduce the risks of death for those people who are detained.

24.1.4 A number of themes emerge from the work of the Commission as necessary for consideration in order to reduce the risk of death. These are examined in the following pages. Some are of common application to police lockups, prisons and juvenile institutions-others are not. By its very nature, police custody is of shorter duration than prison custody. This has certain implications in terms of custodial care. For example, while it is necessary that health service delivery to those detained in police watch-houses should concentrate on immediate care, there should be greater emphasis on long term health care in prisons to reduce the risk of death. Many of those who died in police custody were suffering the effects of alcohol often masking some other illness--creating difficulties for watch-house keepers that may never arise for prison officers.

24.1.5 It must be understood, however, that police officers, prisons officers, and those who operate juvenile detention facilities share a common duty. In Chapter 3, I have discussed the duty of care owed to those detained both by custodial authorities and by individual officers employed by those authorities. Many of the deficiencies in custodial procedures were a reflection of lack of emphasis on custodial care stemming, I believe, from a misunderstanding of the relationship between custodian and detainee and the duties which flow from that relationship. Failure to provide the requisite standard of care may provide grounds for civil action for damages for any injury or loss sustained as a consequence of that breach and grounds for criminal prosecution. I think it is important for this to be recognised by custodial authorities and individual officers, in order to bring home the onerous nature of their responsibility to prisoners and the very serious consequences which can ensue from a breach of that duty. Awareness of this personal duty of care may have a powerful impact on the attitudes of custodial authorities and of individual officers and on their appreciation of those responsibilities.

24.1.6 It is my view that the duty of care to persons held in custody is of such importance that it should be explicitly referred to in those institutional directives which define the general framework of custodial officers' responsibilities. It is not merely a matter of reinforcement of this responsibility, it is also a matter of fairness to the officers that they should be informed of their individual duty of care and that breach of their duty may entail personal legal liability as well as institutional disciplinary action. As I stated in Chapter 3, this issue should form part of recruit training and be continuously reinforced by senior officers to those officers under their charge.

Recommendation 122:

That Governments ensure that:

- a. ***Police Services, Corrective Services, and authorities in charge of juvenile centres recognise that they owe a legal duty of care to persons in their custody;***
 - b. ***That the standing instructions to the officers of these authorities specify that each officer involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person, and may be held legally responsible for the death or injury of the person caused or contributed to by a breach of that duty; and***
 - c. ***That these authorities ensure that such officers are aware of their responsibilities and trained appropriately to meet them, both on recruitment and during their service.***
-

24.1.7 In this chapter, I shall deal with the issues arising from the police and prison custody deaths separately. The issues are quite distinct. There are, however, some areas which are common to both, and I deal with these issues in a separate section. In the final section, I deal briefly with those issues relevant to juvenile detention centres. Before proceeding to review in detail those police and prison practices and procedures which have a direct bearing on the prevention of deaths in custody, it is necessary to consider how changes to established practices can be most effectively achieved. This is an area which has been highlighted as one of critical importance throughout the Commission's investigations in each jurisdiction.

2 4.2 MECHANISMS FOR EFFECTING CHANGE

24.2.1 One of the most disturbing features of the inquiries conducted was the inability of both custodial authorities to learn from the deaths which occurred. In few (if any) instances, were efforts made to review existing practices and procedures following a death with a view to identifying problems and taking the necessary steps to remedy them. This deficiency was most obvious during the investigations into the most recent deaths. Despite the publicity surrounding the Royal Commission hearings, and the release of both the Criminology Research Unit's Research Paper No. 2 *Draft Guidelines for the Prevention of Aboriginal Deaths in Custody* in April 1988, and the Commission's *Interim Report* in December 1988, deaths in custody continued to occur, some of which might have been prevented had the work of the Commission been accorded greater urgency by custodial authorities, and steps taken to translate that urgency into change at the operational level.

24.2.2 In many instances, the panacea for avoiding custodial deaths was to promulgate new, or alter existing, police or prison 'instructions'.² But it became apparent throughout the hearings that this measure alone did not and could not achieve any, or any significant, reduction in the risk of custodial deaths occurring. In some cases it was found that, although written instructions had been issued, inadequate steps had been taken to bring these instructions to the attention of officers or to ensure that they were understood and applied. Generally, it was found that reliance was placed on individual officers to read and understand the instructions and orders issued. In very few cases was it found that the promulgation of instructions was accompanied by training in their practical application. Without proper practical instruction, even the most clear and straightforward written orders can fail to resolve the problem which is sought to be

addressed.

24.2.3 Recognition of the entire range of operative factors is required before change can truly be effected at the operational level. An understanding of the impact which a change to one factor will have on others is also necessary. Unless an integrated approach is adopted reflecting a true commitment to reducing deaths in custody, there is a danger of merely displacing a problem or deepening it. There is evidence that attempts are being made to tackle this problem in a number of jurisdictions. I mention an instruction which was issued by the Northern Territory Police Service during the course of my inquiry into the death of the man at Katherine, to inform officers of the signs and the acute dangers of Alcohol Withdrawal Syndrome (AWS). The promulgation of this instruction was not the only administrative response: it was accompanied by the introduction of training concerning AWS at both recruit and in-service levels. Such a comprehensive approach--amendments to mandatory directives, the provision of immediate information combined with recruit education and in-service training--offers a good prospect of refining the judgment of operational officers in discriminating between the effects of alcohol and illness. Such a comprehensive approach is generally required in order to achieve genuine, positive shifts in custodial practices.

24.2.4 I raise one further issue concerning compliance with instructions. In Chapter 3, I noted that very little effort was put into checking whether instructions were being applied at the operational level, and that it was the view of Commissioners that this state of affairs was a reflection, at least in part, of a general lack of commitment to custodial care. This lack of commitment was mirrored in the approach taken by those who subsequently investigated the deaths who rarely made any inquiry as to whether the officers involved had properly discharged their duties and responsibilities towards the prisoner. In some instances, bad practices and deficient systems were left uncriticised and, on occasions, condoned by senior officers. It can only be expected that bad practices and attitudes will continue in the face of such indifference.

24.2.5 The cases investigated in New South Wales, Queensland and Western Australia revealed a lack of understanding by, or consensus between, officers, particularly police officers, regarding the status of departmental instructions.

24.2.6 Commissioner O'Dea has reported that Police Routine Orders issued by the Western Australian Police Service were viewed by many police officers who gave evidence during the hearings, including the Police Commissioner himself, as guidelines only and not imposing positive obligations on them. Thus, in one case (Ginger Samson) it was claimed by an officer that he was not required to comply with an Order directing him to obtain medical assistance for a prisoner who exhibited an impaired state of consciousness.³ Commissioner Wootten has also raised this issue in some of his reports into individual deaths in New South Wales.

24.2.7 In his *Report of Inquiry on the death of Muriel Binks*, Commissioner Wyvill commented on the situation in Queensland:

[T]here was no consensus, as there should have been, about the status of the instructions contained in the Queensland Policeman's Manual. The commissioned officers who gave evidence regarded those in respect of watch-houses as having the status of orders from a superior officer. Those lower down the chain of command regarded them merely as guidelines. Few amongst the non-commissioned officers and constables who gave evidence had ever heard in their entire careers of an officer being charged with a disciplinary offence at

*all, much less for a breach of the provisions of the Manual concerning watch-houses.*⁴

Apart from the lack of consensus about the status of instructions, the inquiries also revealed an almost total absence of disciplinary proceedings against individual officers for breach of such instructions.

24.2.8 It is my view that police and corrective services authorities must establish clear policies in relation to breaches of departmental instructions. Those instructions relating to the care of persons in custody should be in mandatory terms and both enforceable and enforced. Police and corrections officers are part of disciplined units. Instructions, rules, circulars and standing orders are used throughout the country in the day-to-day activities of these officers. Such instructions are often made pursuant to legislative enactments. They make quite elaborate provision for holders of rank at various levels to discharge their duties in a proper manner and for the taking of disciplinary proceedings for breach. They bring with them a degree of certainty to both officers and members of the public by detailing expected standards. This in turn allows for greater public accountability. The Queensland Police Service in its 'Code of Conduct' has recognised that 'The community is entitled to expect that: ... officers will obey the spirit and letter of the law and, in particular, the provisions of all relevant statutes, regulations and instructions'. I am not suggesting that every breach of an instruction should be followed by formal disciplinary action. It is important, however, that individual officers recognise that instructions are important and that violations will, in general, be met with such action.

24.2.9 It is also my view that such instructions should be made available to the public. In making this recommendation, I accept that there will be some instructions setting out certain operation procedures which could not and should not, for reasons of security, be made public.

24.2.10 Senior officers can play a very important and positive role in continuing the education of those officers junior to them. They should be reinforcing the importance of the most crucial instructions and use practical examples where this is possible. As Commissioner Wyvill has commented:

*Day-to-day tactical control is a function of the non-commissioned ranks. It is they who exercise the intimate control of the activities of subordinate constables. Their task is all the more difficult because of that intimacy of control. They not only control an activity but themselves participate in it. If, when on duty with a constable, the sergeant or senior constable conducts infrequent inspections of a watch-house and, on the inspections he or she does conduct with a constable, has nothing more than fleeting, disinterested contact, displays a cynicism founded on ignorance about the possibility of a person arrested for drunkenness having some underlying ailment and fails to adhere to general instructions, it is only natural that it will be inculcated in the junior officer that such behaviour is acceptable. This will be particularly so if he fails to detect any policing of adherence to instructions either by an officer in charge of a station, a district officer or an external inspectorate.*⁵

24.2.11 Additionally, I think there would be much value in 'debriefing' sessions between staff members following any incident of importance; for example, a medical emergency or attempted suicide. As I noted in Chapter 3, in no case did

constructive discussions such as this take place. I believe that much can be learned from such sessions: deficiencies can be noted and steps taken to remedy them; positive responses and actions can be congratulated and bad custodial practices and attitudes criticised and changed. Incidents such as this can be traumatic for some officers; the 'de-briefing' session may serve also to provide support and reassurance for those so affected.

Recommendation 123:

That Police and Corrective Services establish clear policies in relation to breaches of departmental instructions. Instructions relating to the care of persons in custody should be in mandatory terms and be both enforceable and enforced. Procedures should be put in place to ensure that such instructions are brought to the attention of and are understood by all officers and that those officers are made aware that the instructions will be enforced. Such instructions should be available to the public.

Recommendation 124:

That Police and Corrective Services should each establish procedures for the conduct of de-briefing sessions following incidents of importance such as deaths, medical emergencies or actual or attempted suicides so that the operation of procedures, the actions of those involved and the application of instructions to specific situations can be discussed and assessed with a view to reducing risks in the future.

24.3 POLICE CUSTODIAL PRACTICES AND PROCEDURES

RECEPTION PROCEDURES

24.3.1 The cases involving deaths in police custody have clearly highlighted past inadequacies in relation to the assessment of whether prisoners and detainees were at risk through either illness, injury or self-harm both at the time of reception at the lockup and generally throughout the period of custody. Police instructions rarely spelt out in a clear and precise way the responsibilities of custodial staff in relation to the initial and ongoing assessment of prisoners and, in some cases, who bore such responsibilities. But, quite apart from the lack of clear instructions, the training of those officers who were responsible for the care and safe keeping of prisoners was found to be seriously deficient. This training was deficient in relation to custodial care generally, but more specifically, in the recognition of serious illness, in the dangers associated with alcohol, and in recognising behaviour which may indicate risk of self-harm. The ability to properly assess upon reception was also impeded by the absence of comprehensive and reliable systems for the recording and dissemination of information relative to the vulnerabilities of particular individuals who were taken into custody. As a result of these inadequacies, symptoms of serious illness and injury went undetected and behaviour, possibly indicative of suicidal tendencies, went unnoticed.

24.3.2 This is an area in relation to which some very positive improvements have been made in recent times and for which police authorities and individual officers should be commended. Instructions to police have been revised in many places to emphasise the importance of assessing a prisoner's physical and mental condition during the reception process and to clearly set out the responsibilities of

individual officers in this regard. Another improvement has been the introduction of prisoner screening or assessment forms to assist in the assessment process. There have been improvements in police training (both at recruit and in-service levels) to assist officers to identify those at risk and in custodial care generally. There have been advancements in the recording and dissemination of known histories of illness and self-destructive behaviour. In at least one location, a permanent nursing presence is proposed for a large city police lockup to enhance the assessment process. These improvements, I believe, reflect a growing awareness and recognition by police of the importance of their role in custodial care, and a recognition of the duties owed by them to those taken into custody. I detail some of these improvements below.

The Importance of Assessment

24.3.3 The importance of an effective system for the physical and psychological assessment of persons taken into police custody has been emphasised by myself and my fellow Commissioners throughout the various reports on the individual deaths. I have detailed in the previous chapter, the appalling health status of Aboriginal people generally and the particular vulnerabilities of those who are taken into custody. It is important that those responsible for developing lockup assessment procedures recognise and take account of these factors.

24.3.4 I think it important to stress at the outset that police officers cannot and should not be expected to make a diagnosis of a prisoner's medical condition. This is a point which has been raised time and time again by the various police associations and others. Police are not medically trained and do not have the requisite knowledge to enable them to come to any conclusion about the cause of apparent symptoms of illness or unusual behaviour or distress. But whilst they should not be required to make a diagnosis of the condition suffered by a prisoner, they do have certain responsibilities which must be discharged. Their job is to make a preliminary assessment of the prisoner's mental and physical state on the basis of known information about that prisoner's health, on their own observations and the application of common sense. It is on the basis of this assessment that decisions such as whether the person requires professional medical attention, special supervision or transfer to a more appropriate facility must be made. The responsible officers must then observe the prisoner closely for any changes in his or her condition and continually re-assess the prisoner's health and welfare needs. The duty to assess is a continuing one. Whether or not medical assistance is required will, of course, be determined upon the circumstances of each individual case; however, those responsible for that decision must bear in mind the limitations of their expertise and act always on the side of caution. It is important that assumptions about the possible cause of certain unusual or unexplainable behaviour not be made: the cases have shown the regularity with which such assumptions were proven wrong. The area in which this was found most frequently to occur was in relation to persons believed to be intoxicated but who in fact were suffering from some very serious illness or injury. It is obvious that, where such assumptions are made, the officer takes the risk of being wrong. If an officer is careful in observation, listens to what she or he is being told by the detainee and others, exercises common sense and observes instructions, she or he cannot and should not be required to do more.

24.3.5 I make the following general comments about the assessment of prisoners during the reception process:

- The reception process is a crucial period for both the prisoner and his or her custodians. For the prisoner, it can be a time of great trauma and distress. For

the custodian, it provides a unique opportunity for observation and evaluation of the physical and mental state of the prisoner on a one-to-one basis.

- The cases investigated have highlighted five principal factors which should form the basis for inquiry during the screening process. These are: the presence of obvious external injury (i.e. bruising, lacerations); whether there is evidence from the detainee from his possessions (e.g. medication etc.) or from any other police officer or party that may be present as to whether the detainee may suffer a serious medical conditions such as epilepsy, diabetes, heart and respiratory disease; the prisoner's apparent mental state (potential for committing acts of self-harm); the level of alcohol or drug intoxication and the level of consciousness. Each of these factors must be considered by the officer responsible for the assessment of prisoners. The assessment expected is that of a responsible layman assisted by some training and instructions.
- If prisoner assessment is carded out in a thorough and professional way, those 'at risk' may be identified at an early stage and steps taken to reduce the likelihood of the death occurring. Timing is essential. It has been clearly established that the period immediately following placement in a cell is the most crucial. It is thus critical that no person be placed in a cell without being properly assessed. For those who are feeling a sense of despair and hopelessness at the time of reception, the attitude of the arresting and receiving officers may also be crucial. The personal interaction between the prisoner and his custodians may either exacerbate his/her feelings of despair or alleviate them.
- It is essential that active enquiries are made of the person being taken into custody regarding his/her medical and other needs. It is not enough to merely wait for the prisoner to make some form of complaint about his/her health.
- Thorough visual observation of the prisoner is also important. In some cases no, or only cursory, visual assessment of the prisoner was made by the responsible officer prior to him/her being taken to the cells. In one case, the deceased was brought into the charge room, apparently unconscious through alcohol, and was laid on the floor in front of the receiving officer's work desk. The visual assessment made by that officer was less than cursory (he merely leaned over the charge counter).
- The arresting or apprehending officers should be required to provide all information known to them about the prisoner such as known or suspected illness or injury, previous attempts or threats of self-harm and any other information concerning the circumstances of arrest which may assist in providing a complete picture of the prisoner's physical and mental health. All other potential sources of information which may assist in the identification of the vulnerabilities of the prisoner should be consulted.
- There should be at least one officer, or other person who is not a police officer, designated as responsible for the assessment of prisoners during each shift.⁶
- It is essential that the duties and responsibilities of those individual officers who are responsible for the assessment of prisoners should be stated clearly in writing. Such instructions should require the responsible officer to assess whether the detainee is 'at risk', to whether immediate referral to medical care is needed, what supervision is required and to record the same. They should clearly state the duty to seek medical assistance in all cases in which there is any doubt about the physical or mental condition of the prisoner.

It is essential that each of these matters be addressed in police training and instruction.

Screening Forms

24.3.6 I mentioned earlier that prisoner screening forms have been introduced as an aide to assessment. I understand that, to date, such forms have been introduced in South Australia, New South Wales, Western Australia and the Northern Territory, although they are referred to by different titles in each location.⁷

24.3.7 There is considerable variation between the forms. There is variation in the format of the individual forms and, whilst there is some overlap regarding the subjects about which inquiry must be made, the emphasis placed on certain matters varies. The South Australian form, for example, places considerable emphasis on head injuries, whilst in Victoria, it is alcohol withdrawal. Some forms contain a 'questionnaire' containing questions to be put to the prisoner; others do not. I think that each of the forms currently in use has some very positive features. I am particularly impressed by the form being used in New South Wales police lockups. The form was introduced in July 1990 in combination with a very comprehensive manual (the 'Custody Manual') which contains extensive guidelines and advice on the use of the form and on custodial care issues generally. The Manual is incorporated into Police General Instructions. I understand that the form and manual were introduced to officers through an in-service training package and is also part of recruit training. The form requires information to be provided by the arresting officers regarding the prisoner's medical and mental condition, a visual assessment of the prisoner by the assessing officer and a prisoner questionnaire. Additionally, the form requires decisions to be made and recorded by the assessing officer regarding the placement and observation of the prisoner, the time for review of those decisions and instructions relating to medical treatment and access to medication. A further positive feature is a section which allows for the recording of the time of, and the name of the officer conducting, all inspections made of the prisoner during the term of detention. Thus, the officer responsible for cell inspections has written confirmation of the frequency with which such checks should be conducted, the special needs of the prisoner and general information relative to the prisoner's risk status. These features, in my view, will all help to overcome a problem noted in many of the cases investigated, being the communication of information between arresting and receiving officers, between receiving officers and those responsible for the supervision of the prisoner and between officers on subsequent shifts (an issue which I will comment on shortly).

24.3.8 In my view, prisoner screening forms are an extremely valuable 'aide-memoir' to the officer responsible for the assessment of prisoners. They require officers to turn their minds to those matters which may assist in the identification of prisoners at risk through illness or self-harm. They also ensure a written record is kept of matters relevant to the management of that prisoner both in the immediate sense and in the case of the person being taken into custody again in the future. They also facilitate the dissemination of information between those officers responsible for the care of the person whilst in custody (providing, of course, that the forms are readily accessible and that all officers responsible for the care of the prisoner are under a duty to either acquaint themselves, or are provided, with the information contained on the form).

24.3.9 I mention one further matter relating to the requirement contained in some of the forms for active inquiries to be made of the prisoner regarding medical problems and propensity to commit acts of self-harm. It is obvious that some, and perhaps many, prisoners will be unwilling to volunteer information to a police officer regarding their medical problems or previous attempts at suicide or self-harm. Therefore, questions such as, 'Have you ever tried to take your own life' or 'Do you have any serious medical or mental problems', are unlikely to elicit any useful or reliable information. In the case of persons under the influence of alcohol or drugs, the likelihood of reliable information being elicited is even further reduced. Indeed, the case of Joyce Egan provides a very good illustration of this

point. In that case, the officer receiving Joyce into custody asked her a series of questions upon reception including whether she had taken anything by way of mouth. The question was asked on the basis of a prisoner screening form then being trialed by the South Australian Police Department. The deceased responded in the negative. In fact, the evidence disclosed that she had consumed a large quantity of prescription drugs shortly before her arrest which eventually caused her death. Whilst acknowledging the limitations inherent in such questioning, I think that it does have some value in providing a setting for conversation between the officer and the prisoner during which the responsiveness of the person, their apparent understanding, confusion or distress may be evaluated.

24.3.10 The value of prisoner screening forms should not, however, be considered in isolation. Unless police officers are properly trained in the identification of prisoners at risk and the importance of the screening process, then the potential benefits flowing from the use of such forms will be lost. The issue of training will be discussed shortly. I mentioned earlier the Custody Manual introduced by the New South Wales Police Service. I think that it is a very valuable document and might well serve as a model for use in other States and the Territories. It provides useful and readable guidelines on the identification of prisoners at risk through illness or self-injury and in relation to custodial care generally.

24.3.11 It is important that the effectiveness of prisoner screening forms be monitored and evaluated in light of experience in their use and in consultation with other police departments/services across the country.

Access to Medical Support

24.3.12 In the Interim Report, Commissioner Muirhead raised the question of whether police officers were the best persons for assessing the medical needs or risk status of persons coming into police custody and whether this role might be better performed by a medically trained person such as a doctor or nurse.⁸ A number of submissions have been received supporting the medical assessment of all prisoners taken into police custody, including a submission received from the Police Federation of Australia and New Zealand.

24.3.13 Western Australia is the only State, of which I am aware, that has considered the permanent placement of medically trained personnel at police lockups to assist in the assessment of prisoners and detainees at the time of reception. The Police Department in that State has advised that as part of its current renovation program at the East Perth Police Lockup (its largest metropolitan police lockup) it proposes to appoint a qualified nurse on a part-time basis (during afternoon and evening shifts) to assist in the assessment of new admissions to the lockup.⁹ Plainly, the assessment of prisoners and the identification of those at risk will be greatly enhanced by such an appointment.

24.3.14 In most other jurisdictions, medical services are provided to persons in police custody by informal arrangement with local medical practitioners, nurses and health workers or in major city watch-houses by the police surgeon. Attendance is generally on a needs basis, at the request of police or the detainee. I believe that Victoria is the only State which has established a structured medical service (known as the Office of Forensic Medicine) which provides, *inter alia*, medical services to persons detained in all police lockups throughout the State, and which is independent of the Police Department. The organisation is staffed by a network of about forty medical practitioners: four are employed on a full-time basis in the Melbourne metropolitan area; those providing a 24-hour on-call service in country areas are paid a retainer and a fee for service, and others are paid by

attendance. Doctors employed by the organisation may be called upon to assess or treat those in custody, not only at the request of police, but also by others such as family members or solicitors. I believe that staff of Aboriginal Health Services have also called upon the organisation from time to time. The services of the doctors who are retained are not called upon to assess all those taken into custody as a routine measure.

24.3.15 I note that one unique aspect of the Victorian operation relates to training. Every medical practitioner who is employed or retained by the organisation must take part in certain training seminars which include components on the vulnerabilities of Aboriginal people in custody, intoxicated persons and watch-house practices.¹⁰ Thus, the delivery of health services to those in police custody is being developed as a specialist field. Although I have little information about the success of this operation, it seems to me it has the potential for providing a very valuable service to both police and prisoners alike.¹¹

24.3.16 I think that there is real merit in having a permanent medical (or nursing) presence in all major police lockups; however, I note that, whilst the appointment of medically trained personnel to conduct prisoner assessments may not pose significant problems for major city lockups and other major centres, it would be both problematic and impractical for such a scheme to be introduced elsewhere.

24.3.17 In other locations, I think that it would be desirable if arrangements could be made between local police and medical agencies to have doctors, nurses or other health professionals available on-call to attend police lockups to assess persons taken into custody and to make regular visits to inquire after the medical needs of those persons. This is an area in relation to which the valuable skills and expertise of the staff employed by Aboriginal Medical Services could be utilised. The Commission has, in fact, received many submissions supporting greater involvement by staff of Aboriginal Medical Services, particularly health workers, in the delivery of health care to Aboriginal prisoners detained in police lockups in both metropolitan and country areas. Commissioner O'Dea has reported to me about some very successful arrangements which have been entered into between the Western Australian police and Aboriginal Medical Services in both the metropolitan area and some country areas.¹² One outstanding example is that which operates at Carnarvon where the Aboriginal Medical Service provides daily visits by health workers to the police lockup for the purpose of assessing the health needs of Aboriginal people in custody. In addition, the Medical Service provides police with twenty-four hour access to a medical practitioner for advice and attendance at the lockup.

24.3.18 I am advised also that, in Queensland, discussions are underway with the Aboriginal Medical Service in Brisbane to provide regular visits to the City Watch-house. It is envisaged that the scheme will be extended to other watch-houses throughout the State.¹³

24.3.19 In other locations, such as in the Northern Territory, protocols between local police and medical agencies (including Aboriginal Medical Services, hospitals, and ambulance services) have been agreed upon to facilitate the prompt assessment of those taken into police custody where the need arises. In Tennant Creek, for example, an agreement exists between the Central Australian Aboriginal Legal Aid Service (CAALAS) the Northern Territory Police Service the Anyinginyi Congress and the Tennant Creek Hospital. The agreement covers a number of matters, but in this context sets out the procedures to be followed by police where prisoners exhibit signs of mental or physical distress or require medical assessment for any other reason. The agreement states that, in the case of Aboriginal prisoners, a doctor from the Anyinginyi Congress (the local Aboriginal

Health Service) should be contacted to attend and assess the prisoner at the cells; for non-Aboriginal prisoners, the on-call doctor at the local hospital should be called. To facilitate prompt contact with medical personnel, police are provided with a roster of doctors from Anyinginyi Congress and the hospital. A similar protocol has been developed in Katherine between the police, the local hospital and the Ambulance Service, although I observe that this agreement, unlike the Tennant Creek agreement, does not include the local Aboriginal organisation, Kalano, which provides health services to Aboriginal people in Katherine. In my view, such protocols are of enormous value. Not only does it clearly set out the duties and responsibilities of each organisation in circumstances where a request for medical assistance has been made, but it shows a genuine commitment by local organisations, both Aboriginal and non-Aboriginal to ensure the well-being of those in custody.

24.3.20 It is my view that the delivery of medical services to those in police custody should be urgently reviewed both as to the assessment of prisoners at the point of reception and in the development of systems to ensure that reliable and prompt medical treatment is provided where the need arises. I believe that Aboriginal Medical Services can play a more significant role in this area. They have particular skills and expertise in dealing with Aboriginal people and in many cases would bring with them specific knowledge of the medical histories of prisoners or detainees whom they have previously treated. Clearly, however, the extent of their involvement will be dependent on the availability of sufficient resources to extend their operations beyond current limits. It is unlikely that any Aboriginal health service would be able to provide an effective service to those in police custody on current funding levels. I discuss the issue of funding of these services in more detail in Chapter 31. In those areas where an Aboriginal Medical Service is not in operation, similar arrangements could be made with other local community health and medical services.

24.3.21 I mention one final matter relating to prisoner assessment. I am particularly concerned about those persons who are detained in police lockups for periods longer than a few days without proper medical assessment. Legislation in each State and Territory provides for the gazettal of certain police lockups as 'police prisons' which can legally hold prisoners for periods between fourteen and thirty-one days. These prisoners, whilst being in the *de facto* custody of the police, are in many jurisdictions in the legal custody of the Departments of Correction. It is my view that many of the lockups used as 'police prisons' are totally unsuitable for the detention of persons for any period longer than a few days. Many lack toilet and ablution facilities, proper lighting, ventilation and exercise areas. One matter of particular concern to me, however, is the fact that these prisoners are not medically examined as a routine measure as they would be entitled to be if they had been received at a correctional facility. Thus, in some locations, it is possible that a person could be detained for up to thirty-one days without being medically assessed. Such a state of affairs is completely indefensible. I endorse the recommendation of the Vincent Committee in its Report of the Interim Inquiry into Aboriginal Deaths in Custody in Western Australia (1988)

*Sentenced prisoners being held in police lockups on behalf of the Department of Corrective Services should as far as practicable, have access to similar standards of custody and services as are provided in prisons.
(Recommendation 18)*

I shall return to these issues later in this chapter.

Access to Medical Information

24.3.22 In a number of cases, it was observed that police were unaware of serious medical and mental conditions suffered by those taken into custody which, if known, might have averted the death. I pause, however, to state an obvious matter: knowledge of the existence of a particular medical condition could not, of itself, have averted the death; such knowledge, to be effective, must be accompanied by some understanding about the nature of the condition and of its possible consequences.

24.3.23 Access to information concerning the vulnerabilities of prisoners both in terms of physical and mental health has been highlighted throughout the cases investigated as an issue of importance. The fact that a prisoner suffers from a medical condition such as diabetes or epilepsy; has a history of excessive alcohol or drug ingestion; is taking medication or has a history of acts of self-harm can, and should, have ramifications in terms of the management and supervision of that prisoner during the period of detention.

24.3.24 An issue consistently raised throughout the cases was the absence of any effective and reliable system for the recording and dissemination of information concerning the vulnerabilities of prisoners, the two major areas being previous attempts or threats to commit self-injury and information relevant to the general health of the prisoner. In the case of Shane Atkinson, a young man who died by hanging in Griffith, New South Wales, the arresting officers were aware of a previous act of self-mutilation and threats of self-harm made by him one month before his death, but failed to pass this information on to the officer who was supervising Shane at the time of his death. The information was not recorded in any way. In the John Pilot case, it was known to some police officers that the deceased had suffered a fit in the Brisbane City Watchhouse four months before his death: however, this information was not generally known or accessible to other officers. In both cases, the information was clearly relevant to the management and supervision of the deceased and, if known to supervising officers, may have averted the death.

24.3.25 In many instances, the making of a few simple inquiries of the prisoner at the time of reception might have elicited this information: however, such active inquiries were rarely made. It was noted that many receiving officers relied solely on detainees to volunteer information about their health and well-being. Such an approach is clearly not acceptable. In my view, when a prisoner is being received into custody, police should have a positive duty to make active inquiries regarding both the physical and mental condition of the prisoner. The introduction of prisoner screening questionnaires (discussed earlier) will facilitate this process. Problems may arise, however, in cases where the person detained is intoxicated to such a degree that he/she is unable to provide relevant details or in those cases where the person, for whatever reason, is unwilling to provide such details. It is in these circumstances that some permanent record of personal details of prisoners would be of enormous benefit to those officers responsible for the assessment of prisoners before they are placed in the lockup.

24.3.26 The Commission has been informed about the introduction of a number of initiatives, some local and others on a State-wide basis, by police across the country to facilitate the recording and dissemination of information pertaining to the 'at risk' potential of certain prisoners. On the local level, police at the Mount Gambler Police Station in South Australia have introduced a 'Prisoners At Risk Book', the purpose of which is to maintain a permanent record of the names of those prisoners considered to be 'at risk' on a variety of bases, whether because of some illness or known propensity for self harm. The information is accessible to charging officers to assist in the assessment process. Whilst such a record is a very valuable one, it has a number of obvious limitations, one of which is the fact that the information is not accessible to police in other regions.

24.3.27 On a more extensive footing has been the development of computer based recording systems. Such systems, I am told, are currently operating in at least two States, Western Australia and Queensland.¹⁴ In Queensland, the computer recording of details of persons considered to be at risk was introduced in December 1989. Information recorded in the data base includes known or suspected illness or suicidal tendencies, communicable diseases and the person's propensity to violence. Police officers acquiring such information are required to forward it to a central reporting authority where it is subsequently fed into the computer. Once recorded, the information is accessible via a computer terminal to officers throughout the State. All receiving officers are required to conduct a search to determine whether a warning exists for every prisoner taken into custody.¹⁵

24.3.28 Commissioner O'Dea has reported to me that the Western Australian Police Department is considering expanding the information recorded in its computer data base on the risk potential of detainees. The information currently available is limited to propensity to violence and suicidal tendencies. The Western Australian Commissioner of Police has advised that the Department is considering extending the information recorded to include such things as: whether the person is a known alcohol or drug abuser; whether the person suffers from any major illness, e.g. diabetes, epilepsy; whether the person is taking medication and whether they have had previous psychiatric care. It is proposed to expand the data base in conjunction with the introduction of the Department's new prisoner screening questionnaire.

24.3.29 In my view, there can be no doubt that the maintenance of permanent records on the vulnerabilities of persons coming into custody will reduce the likelihood of deaths occurring. However, it has been submitted from a number of quarters that authorities should proceed with caution in this area, given the very personal and sensitive nature of the information to be recorded. It is said that the issues of privacy and confidentiality should be fully and publicly canvassed and a number of safeguards developed before any such system is implemented.

24.3.30 One area of particular sensitivity is the transfer of information between government agencies (particularly Police and Corrections Departments and those responsible for the care of young offenders) and outside agencies such as hospitals and health services, concerning the 'at risk' potential of prisoners. In this regard, I note recent advice from the Queensland Police Service that discussions are currently underway with the Queensland Corrective Services Commission with a view to establishing a system for the exchange of information between the two agencies regarding 'at risk' prisoners. The Police Service has also advised that it will consider developing a mechanism for the exchange of information between itself and Aboriginal Health Services. The advice continued:

*It should be clearly understood that the Police Service does not seek the medical history of any individual, simply an indication as to the presence of a medical condition e.g. diabetes, or an indication that the person may pose a risk while in custody.*¹⁶

24.3.31 Harrison Day, who died of an epileptic fit, was well known to staff of the Aboriginal Medical Service as suffering from epilepsy: however, there was no mechanism for this information to be exchanged between the medical service and police. The death might have been averted if this information had been known to police. Given the very large number of Aboriginal persons taken into police custody, and the generally poor state of health of many of these people, it is important that proper systems of liaison between police and Aboriginal Health Services be established to facilitate the exchange of this type of information.

Plainly, the greater involvement of Aboriginal Health Services in the delivery of medical care to those in police custody would facilitate the passage of information relative to the health and welfare of Aboriginal prisoners and detainees. This is an area which requires exploration by both police and Aboriginal Health Services.

24.3.32 With regard to the transfer of information between police and other government agencies, particularly corrections authorities, I make one important observation. The failure of police to notify the Corrective Services of previous threats made by Patrick Booth to take his own life was found by Commissioner Wyvill to be an important factor in his death.

At the time, there was no system for recording and exchanging this type of information between the two agencies. This deficiency has since been resolved with the introduction of a new procedure which requires information relating to an individual's medical condition, medication, mental condition, and any other information relevant to risk potential, to be recorded on an 'Inventory of Property' form which accompanies the prisoner on transfer to a correctional institution. The responsibility of police to exchange this type of information with corrections authorities was raised in a recent decision of the English Court of Appeal in *Kirkham v. Chief Constable of the Greater Manchester Police* [1990] 3All ER 246. In that case, the Court held that, as part of their duty of care towards prisoners, police were charged with the positive responsibility to exchange information which might affect a prisoner's well-being (in this case, known suicidal tendencies) with the prison authorities. The case naturally raises the question of whether the responsibility is reciprocal.

24.3.33 Providing that appropriate safeguards are developed, in my view, the exchange of information between custodial authorities has very positive benefits in terms of reducing deaths in custody. Systems should be established to facilitate the ease of transfer of information. One area which may be problematical, however, is information retained by the Prison Medical Service, to which corrections authorities may not be privy. As will be discussed later in this chapter, the issue of confidentiality of information held by the Prison Medical Service is one which has arisen in a number of contexts during the Commission's hearings, but particularly in relation to access to this information by corrections authorities.

24.3.34 Given the very sensitive nature of much of the information and the possible civil liberties implications, it is important that the issues of the gathering, recording, and dissemination of this information (and, in particular, the exchange of information between governmental and non-governmental agencies) be fully canvassed. Questions which will need to be addressed include: the persons to whom, and the circumstances in which, access to such information should be given; the use to which the information may be put and the rights of prisoners in relation to the information held.

24.3.35 In relation to appropriate safeguards, I note that the Vincent Committee, in its Report of Inquiry into Aboriginal Deaths in Western Australia, expressed the view that the endorsement of serious medical complaints in police records 'may be crucial in averting possible tragedy'.¹⁷ It recommended, however, that the authority of a prisoner should be obtained as a pre-requisite to the recording of medical information about that person. Specifically, the Committee recommended

Aboriginals be able to have medical information recorded in their police records upon them forwarding written notification to the Department, countersigned by their medical adviser. (Recommendation 15 (b))

Whilst there is some merit in this suggestion, I think there would be some practical difficulties in its implementation.

Breath Analysis

24.3.36 Alcohol has been a complicating factor in many of the deaths investigated. In some cases it was found that, the deceased, whilst appearing to exhibit common symptoms of intoxication at the time of detention, was in fact suffering from some life threatening condition (the most common being head injury), the symptoms of which were masked or mimicked by intoxication. There has been some support amongst medical experts and others during the hearings for the introduction of compulsory breath testing of those persons taken into custody who are suspected of being under the influence of alcohol. It is argued that the use of breath analysis equipment will enable police to determine a person's level of intoxication and thereby facilitate the early diagnosis of serious and potentially fatal medical conditions. The use of hand held breath testing units, similar to those used by police in road traffic work, has been suggested. These would be available at all police lockups for use by the receiving officer at the time of reception (or within a short time thereafter). It is suggested that an additional test be conducted at a later time to determine whether the blood alcohol is rising or falling.

24.3.37 The use of breath analysis equipment for this purpose has not received support from all quarters.¹⁸ Those who oppose the proposal point to the importance of co-operation of the person being tested in the successful administration of test, it being clearly foreseeable that many prisoners will not voluntarily submit to the test being conducted. They stress that, whilst the test may assist where a person is showing apparent signs of insobriety but registers a low breath-alcohol reading, it could have the adverse effect in cases where a high breath-alcohol reading is registered. In the latter case the test can provide an additional and objective basis for assuming that a person's condition is due solely to intoxication and thereby increase the likelihood that other more serious conditions may be overlooked. This would certainly be a problem in cases where the person is intoxicated but is also suffering from the effects of a closed head injury, or a condition such as hypoglycaemia or who has taken a drug overdose in combination with alcohol.

24.3.38 There are at least two situations, to my mind, in which such equipment would be of great assistance to police. The first is the situation referred to above--where the person is exhibiting symptoms consistent with intoxication of some significant degree but whose blood-alcohol reading is nil or low. In these circumstances, alcohol could be eliminated as being the sole cause of the condition and alert those responsible for assessing the person's condition to the possibility that some other more serious factor may be responsible. The second situation is where the person has a dangerously high blood-alcohol level, but owing to the development of a high tolerance to alcohol often observed in alcohol dependent persons, has the appearance of being only mildly intoxicated.

24.3.39 I do not feel sufficiently informed about this issue to make any firm recommendation. But, given the prominent role played by alcohol in the deaths investigated and the considerable risks found to be associated with the detention of intoxicated persons, I think that it is one which requires further investigation. There are a number of important issues which would have to be addressed, including: whether the costs of such an exercise would outweigh its potential benefits; the provision of a legislative framework if it was to be introduced, and the rights of an individual to refuse the test. If breath testing were to be introduced, it must be emphasised that it is valuable only as an assessment aid, and not as a conclusive determinant of the individual's level of intoxication.

Communication

24.3.40 I noted in Chapter 3 that an area of deficiency found in a number of cases was the failure to communicate particular information which might be important to a prisoner's health and safety between arresting officer and watch-house personnel, between watch-house personnel, and between officers on one shift and the next. It is important that systems be put in place to ensure that relevant information is communicated to those who need to know. Station orders and instructions should clearly state the duties of all officers in this regard. I mention that the South Australian Police Department has sought to overcome the problem of communication of information by a recent amendment to their General Orders which places a positive duty on the retiring officer to ensure that the on-coming shift be 'comprehensively informed of the status of each prisoner in custody' including such matters as 'health, welfare and issues relevant to bail'. Commissioner Wyvill suggested in the case of Muriel Binks that a checklist of relevant matters be drawn up to ensure that no matter is overlooked. I think this is a sensible suggestion. Certainly the introduction of comprehensive prisoner screening forms (discussed earlier) will go a long way to addressing this problem.

TRAINING

24.3.41 I have discussed at length in the previous chapter, the vulnerabilities of Aboriginal people generally and the particular vulnerabilities of those taken into custody. It was a significant feature of many of the deaths investigated that police received inadequate or no training, at either recruit or in-service levels, to enable them to identify prisoners who were at risk either through physical illness or injury or self-harm. This applied equally to prison officer training. In many cases, training consisted of nothing more than a basic rust-aid course during recruitment, and no opportunities were given for officers to update their skills in the course of their careers. The placement of officers in positions of responsibility for the care and safety of prisoners and detainees without adequate training to identify those at risk in my view constituted a serious breach of duty by police authorities towards those in custody.

24.3.42 It is not my intention in this section to detail and evaluate the various training programs which are now in operation as I have neither sufficient knowledge of them nor expertise in this area to do so thoroughly. What I would like to highlight in this section are the areas of training identified from the cases in which serious deficiencies were noted. I do not mean to suggest that these are the only areas which should be covered during training. I mention them only because their significance has, at least in the past, been largely ignored.

24.3.43 Before proceeding, however, I wish to stress again the point I made earlier, that is, that officers cannot and should not be expected to come to any preliminary diagnosis about a prisoner's condition. That is a matter for medical assessment. What is required is that police make a preliminary assessment based on known history and observation. Where any doubt arises about the prisoner's immediate condition or as to his/her ability to withstand a period of confinement, medical help should be sought immediately. It is therefore important that police have ready access to medical support agencies and have confidence in calling upon them for assistance at all times. Additionally, I wish to stress that whilst the training of all operational police personnel in the identification and management of those at risk is important, particular attention should be given to those officers who are regularly engaged in lockup duties. Indeed, I think that there is much worth in the suggestion that dedicated cell guards (with special training) be appointed as lockup keepers at least at larger lockups. I deal with this issue a little later.

24.3.44 There were a number of areas in which training was particularly deficient. Little was known about the risks associated with reasonably common

illnesses, such as epilepsy and diabetes, or the other major causes of illness and death amongst the Aboriginal population. The high incidence of conditions such as heart and respiratory disease makes it highly predictable that Aboriginal persons taken into custody will suffer and die from these conditions. It is important that custodial officers have some knowledge of these matters and be instructed as to the risks associated with the detention of persons suffering these illnesses.

24.3.45 Whilst the health implications of alcohol misuse may be considered a matter of common general knowledge, the cases have highlighted that the acute dangers associated with alcohol misuse were generally unknown to police. These included: the risk of death associated with Alcohol Withdrawal (or its most severe form, Delirium Tremens); the risk of acute alcohol poisoning and, of particular significance, the fact that commonly recognised symptoms of intoxication may in fact mask or mimic symptoms of more serious and potentially fatal medical conditions such as closed head injury or hypoglycaemia. The number of deaths in police custody as a consequence of closed head injury is particularly significant. There were eleven such cases. In a number of these, the deceased was thought to be intoxicated. It is essential that police training and instruction emphasise that a person who displays apparent signs of intoxication may not, in fact, be drunk but suffering some life-threatening illness (or perhaps suffering both conditions). The medical conditions which may be masked or mimicked by intoxication should be clearly spelt out and particular warning given against the possibility of head injury.

24.3.46 In the previous chapter, I pointed out the particular risks associated with alcohol withdrawal. There were a number of cases in which alcohol withdrawal was implicated in the death. In none of those cases were police aware of the significant risk of death associated with the condition (the evidence discloses a mortality rate in the range of 10-20% if the condition is left untreated) and were not trained to recognise the condition. Given the high number of persons taken into custody with chronic alcohol problems it is highly foreseeable that such persons may either be suffering from the condition at the time of arrest, or develop the condition whilst in custody. It is therefore essential that police be trained to recognise symptoms of the condition and to seek immediate medical attention for those who display them. I am aware that such an approach has been taken by the Northern Territory Police Service. Training on Alcohol Withdrawal Syndrome (Delirium Tremens) is now included at both recruit and in-service training levels. A circular issued to all officers by the Commissioner of Police indicates the high risk of death associated with the condition, provides a list of recognisable symptoms and instructs officers to seek medical treatment for persons found to be displaying such symptoms by very simple tests which can be performed by lay people.

24.3.47 One further rarely recognised fact was the danger associated with the detention of persons who are unconscious (that is, non-rousable) or faintly rousable. The Interim Report highlighted these dangers and I endorse the recommendation that unconscious or partially rousable persons receive immediate medical attention.¹⁹ There are a number of reasons why this should be the case: unconsciousness may be caused by the presence of a myriad of very serious and life-threatening medical conditions, including, acute alcohol intoxication, epilepsy, diabetes, drug overdose and head injuries. Experts in the area have indicated that it is possible to train police to distinguish between the varying levels of consciousness.

24.3.48 The identification of persons at risk through self-harm is an area which has received prominence in police training in very recent times. It must be said at the outset, however, that identifying those persons who may be at risk through self-harm is a very difficult task, even for those with training and expertise in this area. Where training in this area has been offered in the past, it has tended to

focus on factors such as obvious depressive tendencies. I noted in the previous chapter that there are three factors, in particular, which have been identified from the cases involving self-inflicted deaths which appear to have been largely ignored in training in this area in the past and which may assist in the identification of those at risk in the future. These are: alcoholic intoxication; previous threats or actual attempts to commit an act of self-harm, and the significance of anger, aggression and emotional disturbance. It is important that these factors be emphasised in training in this area.

24.3.49 There have been many positive developments in the training of police officers in the area of custodial care throughout the course of this Commission. I believe that most police recruit training courses now include a component (and in some States, a very significant component) on custodial care issues. This instruction is augmented in many States by in-service training. Thus, serving officers are given the opportunity to update their skills on these topics. In Western Australia, the Police Department has developed a comprehensive custodial care course which incorporates training in basic life support, resuscitation training and general procedures for the care of prisoners. The course comprises six hours of instruction and a detailed written Manual has been produced. The Department proposes to offer the course to all operational police. Some 61% of officers have already completed the course.²⁰ I have earlier referred to the custodial care program which was introduced in New South Wales in 1990 to coincide with the introduction of the new prisoner assessment form.

24.3.50 These developments all reflect a greater commitment to custodial care by the authorities. Additionally, I have personally noticed a greater commitment to care by individual police officers. It is important that this commitment continues to develop once the Commission ceases.

24.3.51 There was a further factor which was noted throughout the hearings which is related to the training of officers and that is the significance of attitudes. It was noted by Commissioners in a number of cases that the attitudes of some officers towards those in their care were deplorable, and in some cases it was found that those attitudes were a contributing factor in the deaths in that they may have exacerbated feelings of distress or anger felt by those who took their own lives. I think it is essential that training both at recruit and in-service levels should instil in officers the importance of positive attitudes towards prisoners at all times and attempt to eradicate the practise of stereotyping certain classes of persons.

24.3.52 The New South Wales Police Department has emphasised this factor in its Custodial Care Manual:

The officer should be able to reasonably foresee what might happen when certain signs and symptoms exist. Tune in to the obvious and sometimes subtle signals which every prisoner reveals. Failure to do this, due to lack of time, is no excuse; it is a matter of conditioning one's observational facilities. Changes in the attitudes of some officers are needed before they can be effectively tuned in.

Officers who allow their biases and prejudices to cloud their thinking regarding the handling of certain prisoners are less likely to detect the signs and symptoms of potential suicide exhibited by those prisoners. This is particularly true when prisoners of racial minorities sense existing prejudices on the part of custody officers.

*Good communications between officers and prisoners is considered one of the most important factors in suicide prevention.*²¹

24.3.53 It is my view that police instructions should require officers to act in a humane and courteous manner towards prisoners and that it should be considered to be a serious breach of discipline for an officer to speak to a prisoner in a deliberately hurtful or provocative way. Senior officers must recognise the importance of their role in this regard. They must set a good example for officers under their charge and constantly reinforce the importance of positive attitudes.

SUPERVISION AND MONITORING ISSUES

24.3.54 The adequacy of supervision and monitoring of prisoners and detainees, particularly in police custody, were issues which arose consistently throughout the Commission's investigations into individual deaths. In the overwhelming majority of cases, Commissioners found that existing practices and procedures for the supervision of inmates were inadequate. Inadequate practices were, in many cases, exacerbated by the physical layout of the lockups which limited both visual and oral contact between inmates and their custodians, and the absence of any means for inmates to raise the alarm in an emergency. This latter point was one of particular concern to Commissioners, given that at many police stations outside metropolitan areas, staff resources are generally such that it is not possible to provide Staff at the lockups on a 24-hour basis. This results in lockups being left unattended for many hours with prisoners detained in custody having no means to raise the alarm.

The Nature and Frequency of Cell Checks

24.3.55 An examination of the deaths investigated in each State and the Territory reveals a very obvious need for clear instructions and training to be provided to custodial staff regarding the frequency with which physical checks on prisoners should be conducted and the nature of those checks. In relation to those deaths occurring in police custody, the checks conducted throughout the period of detention almost invariably amounted to no more than a head count: that is, with a view to establishing only that no prisoner had escaped custody. Time and time again, officers failed to recognise the signs of serious illness or injury until too late due to either the very cursory or infrequent nature of checks.

24.3.56 The importance of frequent and thorough checking of prisoners cannot be overstated. This point is illustrated by the case of Harrison Day, in which the deceased was arrested by police on the morning of his death and placed in the Echuca police lockup. He was found suffering an epileptic fit approximately six hours later and was conveyed to hospital. No checks were made of the deceased's physical condition during the intervening period despite the fact that, at least to some officers, he was known to suffer from epilepsy. Commissioner Wootten found in that case that, had the deceased been visited more frequently during his period of detention, his condition may have been discovered earlier and his death avoided.

24.3.57 The Interim Report of the Commission emphasised the need for close supervision of detainees, particularly for the first six hours of detention. Subsequent investigations by the Commission have certainly reinforced this view, particularly for those taken into police custody. A statistical analysis of the Royal Commission cases by the Criminology Research Unit has shown that, of the deaths which occurred in police-custody, 33 of a total of 63 deaths (i.e. 52%) occurred within the first six hours.²²

24.3.58 Of more significance, however, is the fact that one-third of these deaths (21 out of a total of 63) occurred within two hours or less. Indeed, as earlier indicated in Chapter 3, the substantial majority of deaths by hanging in police cells occurred within two hours of the person entering into custody. Clearly then, the first hours of custody are the most critical: training of, and instructions to, custodial staff must reflect this fact.

24.3.59 It seems that in very few jurisdictions are specific guidelines provided to custodial staff regarding the nature or frequency with which physical checks on prisoners should be conducted. In those jurisdictions where some guidance is given it is more often than not couched in non-specific terms.

24.3.60 Commissioner O'Dea has noted that current Police Routine Orders in Western Australia do not specify the frequency with which checks should be conducted, although the Custodial Care Manual stresses the importance of 'regular' cell checks, at half-hourly intervals (or less, if possible), and the need for continuous supervision of prisoners showing signs of distress.²³ I believe that the Police Service intends to amend the Routine Orders in line with these instructions.

24.3.61 In South Australia, Police General Orders provide that cell checks should be conducted at 'frequent' and 'irregular' intervals, which are to be 'more frequent if a prisoner shows any indication of being ill, violent, suicidal or likely to escape'.²⁴ There is no requirement under these Orders as to the frequency or method of the checks, although my inquiries have ascertained that, at some police stations, local instructions supplement the General Orders and, in some instances, specify the frequency of checks to be made. In New South Wales, current police instructions direct that checks be made with sufficient frequency to ensure the well-being of the person involved. In the case of prisoners assessed to be at risk, checks are required to be made every ten to fifteen minutes. There is no minimum time set for checks of those who are not considered to be 'at risk'.

24.3.62 The cases investigated have certainly illustrated that non-specific instructions are insufficient. As Commissioner Wootten noted in the Lloyd Boney report, the then New South Wales police instruction, which required checks to be made 'when practicable', was treated by police to mean that prisoners were to be inspected only when this did not conflict with other duties.²⁵ Supervision of prisoners was not, therefore, viewed as a priority: such a view should not be allowed to prevail. It is hoped that such views will be corrected by the new instruction and training of police in its requirements.

24.3.63 It is my view that instructions should require that careful and regular checks must be made of prisoners and should specify the minimum period within which such checks should be conducted. Given the findings of the Commission in relation to the time frame within which deaths occurred, it is obvious that very careful surveillance is required for the first six hours of detention, but particularly for the first two hours. It is my view that, for the first two hours, checks should be conducted at intervals of not greater than fifteen minutes and that, thereafter, checks should be conducted at no greater than sixty minute intervals. For prisoners who are assessed as 'at risk', checking should be far more frequent. Indeed, in some cases such as where a prisoner has made an attempt, or threatened, to injure himself or herself, supervision should be continuous until that person has been medically assessed. I note that these requirements are more specific than was recommended in the *Interim Report* (see Recommendation 15), but the cases investigated have clearly illustrated the need for specific guidance to be given in this area.

24.3.64 The issue of compliance with instructions is important in relation to cell checks. It was noted in a number of cases that, even where instructions regarding

the frequency of cell checks were provided, such instructions were not complied with by custodial staff. In the case of John Pilot, Police General Instructions required officers to conduct 'frequent' checks at irregular intervals but in no case to 'leave any prisoner without supervision for a longer interval than one hour'. This instruction was not complied with by officers responsible for the deceased's supervision on the night of his death. Indeed, Commissioner Wyvill found that the deceased was not inspected for a period of about six hours. I have commented earlier on the issue of compliance with, and enforceability of, instructions. The supervision of those in custody is an area to which particular attention should be paid.

24.3.65 It is equally essential that custodians be properly trained on what constitutes an adequate cell check. Mere visual surveillance from a distance should in no circumstances be considered as sufficient. Checking should be directed primarily towards protection of the health and well-being of prisoners, although as I noted in the case of the man who died in the Royal Darwin Hospital, different methods will need to be adopted during waking as opposed to sleeping hours.²⁶ When a prisoner is sleeping, it will be sufficient to establish he or she is breathing in the normal way, is in the coma position if drunk and is not showing obvious signs of distress or injury. At other times, I think it important that the checking include some active personal interaction by way of greeting and conversation, with some inquiry made as to the prisoner's health and needs. I think that the instructions to police regarding cell checks and supervision under the Northern Territory General Orders are good. General Order p. 12 paragraph 14.1 provides:

At a station where a member is on duty all prisoners must be regularly checked. Where prisoners are awake they should be spoken with and their response listened to. Sleeping prisoners should be checked to ensure that they are breathing comfortably and appear to be in good health. If the inspecting member has any reason to be concerned about the mental or physical well-being of the prisoners, they must be woken and checked. If time permits members should converse with prisoners and attempt to allay any fears or concerns the prisoners may express about their present or future circumstances.

24.3.66 The Order goes on to emphasise the importance of officers conversing with prisoners 'in a manner which conveys a caring and concerned attitude'. This emphasis on the human element of contact with persons in custody is, in my view, of utmost importance. Given the introduction of electronic surveillance equipment in many police lockups throughout the country it is important that the requirement for personal contact be emphasised. I raise one final matter. It was noted during a number of hearings that police were instructed, for reasons of security and safety, not to enter cells alone. Where entry to a cell cannot be effected immediately for this reason, efforts must be made by the officer performing the check to ensure prompt and safe entry into the cell.

Watchhouse Records

24.3.67 One further matter arising in the context of the supervision of those in custody is the importance of the maintenance of accurate records. Many of the cases investigated disclosed a lack of care in the making of detailed entries in appropriate station records regarding matters such as cell checks; the provision (or offer) of medical assistance and/or medication to prisoners; behaviour and other matters relevant to the well-being of prisoners. There are a number of reasons why

accurate records should be kept, one of which is the protection of individual officers against allegations of carelessness or misconduct. But more importantly, it acts as a permanent record to ensure that officers on subsequent shifts are apprised of all relevant information regarding the condition of those in custody. The judgments made by officers on subsequent shifts may be critically affected by their knowledge of a person's previous behaviour, complaints or apparent condition. It is therefore important for such records to accurately record events relevant to the health and welfare of those in custody: non-specific comments such as 'All appeared correct' should be avoided (except in cases where there is no particular concern about any particular detainee and a proper check indicated that all did appear correct). Such information should be recorded as soon as possible after the event.

24.3.68 I have referred earlier to the prisoner screening forms which have been introduced in recent times at police lockups. Both the New South Wales and Western Australian forms provide space for the recording of details such as the time of cell checks, observations of the prisoner, medication and medical treatment.²⁷ I am not convinced that individual entries on the screening form as opposed to single appropriate entries in an occurrence book or other journal is required following a check of a multiple number of prisoners, but it is certainly an interesting development which can be monitored for its effects. If such forms are used, it is important that those officers responsible for the care and supervision of prisoners are under an obligation to acquaint themselves with the information contained in them. Additionally, as I have commented above, the officer-in-charge of the outgoing shift should be responsible for drawing the attention of officers on the incoming shift to all matters relevant to the well-being of prisoners.

Electronic Surveillance Equipment

24.3.69 In recent years, police departments across Australia have responded to criticisms regarding inadequate surveillance procedures by the installation of electronic surveillance equipment in police cells. The equipment has usually been in the form of closed circuit television. It is the opinion of myself and other Commissioners (which I add, appears to be in accordance with the views held by others, including police and corrections authorities both in Australia and overseas) that such equipment should only be used as a monitoring aid and never as a substitute for human interaction between custodial staff and prisoners.²⁸ The emphasis in any consideration of proper systems for surveillance must be on human interaction rather than on high technology.

24.3.70 Apart from the very substantial costs associated with the installation of electronic surveillance equipment, the cost in human terms must not be forgotten. Dr Reser has commented that

*such a system further reduces staff/detainee contact and interaction, exacerbating the problem of sensed isolation thought to be an important factor in the suicides.*²⁹

24.3.71 One additional factor to be borne in mind is that, where such equipment is in use, it requires the involvement of at least one staff member to monitor the video screens, so in terms of freeing up officers for operational duties, no substantial benefit is gained. At Elliott in the Northern Territory, surveillance cameras have been installed in the recently constructed police cells which continuously monitor those in custody. The station, however, is not staffed on a 24-hour basis. Thus, the equipment is of little use except when there is an officer on duty who is able to monitor the system.

24.3.72 Apart from the issue of staffing, some commentators have suggested

that the use of such equipment can breed complacency. There is also some indication that where electronic surveillance equipment has been installed, it has not been particularly effective and has not greatly improved the facilities for the supervision of prisoners. I would add, however, that the equipment has facilitated early intervention in self-harming attempts by prisoners at some locations.

24.3.73 Clearly, questions of the privacy of those in custody arise in relation to the use of such equipment. I expressed the view in the Joyce Egan report that a quite intolerable invasion of privacy would result from the use of camera surveillance in those cells which contain toilet facilities which are not fully or partially screened from public view. It is my view that caution should be shown by police authorities in this area. I mention also the installation of audio surveillance equipment. I am aware that an intercom system has been installed in the cells at one of Adelaide's large metropolitan police lockups in conjunction with television surveillance equipment. The intercom system enables the sergeant in charge to hear noise from the cell area. Thus, if a detainee makes a call for assistance this can be heard. I understand that the dual system, although having some limitations, has enabled the early detection of self-harm attempts in the cells.

24.3.74 I am firmly of the view that the emphasis should be on human rather than electronic surveillance and that all new police complexes should be designed to maximise direct visual and oral surveillance. Until all police lockups can reflect this standard of design, electronic surveillance equipment may act as a useful monitoring aid. However, it is essential that where such equipment is installed, police orders and instructions should require regular personal cell checks to be maintained and stress the importance of human interaction.

Communication Facilities between Prisoners and Their Custodians

24.3.75 It was noted by Commissioners that, in a number of police lockups across the country, particularly those outside the metropolitan areas, the means by which prisoners could communicate with their custodians was inadequate. In very few lockups (apart from the more recently constructed facilities) were prisoners provided with a reliable mechanism, such as intercom or alarm facilities, to promptly raise the alarm in medical emergencies and for routine needs. In many instances, it was noted that the only means of prisoners communicating with their custodians in such circumstances was by calling out loudly in the hope that they would attract attention to themselves. Communication in this way was invariably hampered by the remoteness of lockups from the general administration area, thus making it difficult for prisoners to be heard and by the fact that, in many locations, the station is left unattended for many hours during the night.

24.3.76 *The Interim Report* recommended the installation of alarm and intercom systems in cells, with a priority given to police lockups in more remote areas where the opportunity for visual surveillance is limited. All Commissioners endorse that recommendation with one qualification. It is unnecessary for cells to contain both alarm and intercom facilities. The installation of one or the other will be dictated to some extent by local circumstances. The intercom system does have some obvious limitations.

24.3.77 As a general principle, no prisoner should be placed in a position of being unable to raise the alarm in the case of an emergency. It is of considerable concern that there are still police lockups used for overnight detention where this fundamental requirement is being ignored. This situation should not be tolerated. Efforts should be made, as a matter of priority, for police lockups to be fitted with appropriate alarm facilities to enable prisoners to communicate instantly with their custodians. Such facilities should be accessible to prisoners at all times and should be regularly maintained and tested. It should be the responsibility for

custodians to instruct prisoners in the use of such equipment and the procedures to be adopted in an emergency.

24.3.78 In making this recommendation, I am aware of the argument raised by some against the installation of alarms on the basis of their potential for abuse by prisoners. Whilst I am told this has been a problem in some locations, this has not been the experience across the board. It is certainly an area which requires the co-operation of police and detainees and one about which I think the benefits to those detained in cells positively outweigh the disadvantages. It may be that some prisoners can be involved in the policing of the use of the alarm. Indeed, Commissioner Dodson informs me that in Northam, Western Australia, the alarm system was operated by a trustee prisoner.

Staffing of Police Lockups

24.3.79 In a number of reports I have proffered the suggestion that many of the problems arising in relation to supervision and monitoring of prisoners might be addressed by the introduction of specialist cell guards or lockup keepers who have been specially trained in the assessment, supervision and management of prisoners. In a number of cases, it was noted by Commissioners that those officers assigned to cell guard duties were often of junior rank with no experience or training in prisoner health and welfare. This point is well illustrated by the deaths which occurred in some remote Queensland Aboriginal communities where Aboriginal Community Police, who had no training whatsoever regarding the assessment or supervision of prisoners, were placed in charge of lockups.

24.3.80 Watchguard duties were viewed by many officers, and in some instances portrayed by senior management, as menial and as a 'punishment'. Commonly, it was noted that no particular officer was actually assigned to cell guard duties, and that they were shared by those on duty and performed when time permitted. Additionally, it was noted that cell guard duties were coupled with additional administrative duties such as the answering of telephones and responding to public enquiries--duties which were not well matched to guard duties, in that they would draw the officer's attention away from the lockup.

24.3.81 Specialist or dedicated cell guard schemes are operating to a limited degree in some States, including South Australia, and I am told that, at least in that State, there are plans to extend the scheme.³⁰ One very obvious benefit of such a scheme is that, provided adequate training is provided, the identification and management of 'at risk' prisoners would be substantially enhanced. An example of the very positive role such officers can play was provided to me when I visited the Port Adelaide Police Station at which the cell guard scheme is operating. Shortly prior to my visit, an attempted suicide by a prisoner in the lockup had been averted by a young cell guard through responsible and professional checking.

24.3.82 In Western Australia, permanent lockup keepers are attached to three police stations in the metropolitan area. The duty of these officers is to take part in the day to day running of the lockup. In March 1988, a welfare officer position was also created at the East Perth Lockup. The duty of the welfare officer is to assess each prisoner who enters the lockup and to ensure that the needs of the prisoner are met. It is understood that the Western Australian Police Department is considering extending the appointment of welfare officers to other larger regional centres.

24.3.83 In my view, such schemes have much to commend them, including the saving of already well-stretched funds in the area of training of all police. Those responsible for the design of these schemes should ensure that the position of cell guard is enhanced. But, more importantly, these officers should be provided with

specialist training in the area of custodial care. This does not appear to be a feature of the schemes which are currently operating. Of course, one of the advantages of such schemes is that they have the potential for saving funds by limiting the need for the training of all officers.

24.3.84 I mention one further important development which has taken place in Queensland. At the present time, negotiations are underway for the Queensland Corrective Services Commission to assume control of police lockups in the metropolitan area and other larger provincial centres in that State.³¹ The Commission has also been informed that a 'Prisoner Staging Unit' has been recently established at the Brisbane City Watchhouse which is staffed by Corrective Services officers. It is envisaged that all male prisoner receptions in south-eastern Queensland will be processed through this Unit and that all prisoners serving sentences of four weeks or less will be held there for their entire period of sentence.³²

24.3.85 I note two recommendations received from the Police Federation of Australia and New Zealand relating to lockup staffing arrangements. These are:

Custodial police stations be provided with sufficient staff and resources so as to ensure there are a minimum of two persons directly involved in the supervision and care of persons in custody at all times.

All custodial police stations to have a designated position of Watch-house Keeper whose responsibility is the care and supervision of persons in custody with sufficient seniority, aptitude, fitness and support to carry out the duties required.

24.3.86 Given that the range of custodial facilities and circumstances are so great, I do not feel that I could support these propositions as they are written without qualification; however, I wholly support the proposition that all police lockups should be adequately staffed.

Country Lockups

24.3.87 The use of police lockups in some country areas for overnight detention is a matter of concern. A number of police stations outside the metropolitan areas are not staffed around the clock and are left unattended for many hours, particularly at night. It is still the practice in many such stations for prisoners to be detained in custody overnight, notwithstanding the absence of staff and, in some locations, notwithstanding the lack of an effective means for prisoners to raise the alarm in an emergency. It is my view, and the view of other Commissioners, that no person should be left without regular human surveillance. This will obviously have a very major impact on many country lockups, given that in most instances the staff commitment is such that it would not be possible, without an enormous financial commitment by government, to staff all lockups on a 24-hour basis.³³ A number of possible options are these:

- the rostering of additional staff on duty on a needs basis;
- the provision of additional police staff at all country police stations or larger regional centres, to enable a 24-hour service to be achieved;
- the appointment of permanent lockup keepers;
- the employment of civilian staff or others on a full-time or casual basis to undertake the supervision of prisoners; the transfer of all prisoners who are to be detained overnight to
- 24-hour facilities;

- the granting of bail.

24.3.88 I believe that in at least three States, Victoria, New South Wales and Tasmania, procedures are now in place to transfer all prisoners who require overnight detention to 24 hour police facilities so that they can be properly supervised. I think this is a very sensible arrangement. I have one reservation about it. I will discuss later the negative impact of imprisonment on Aboriginal people and the importance of ensuring that those in custody maintain contact with friends and family. The problem of under-staffing of police lockups is more acute in remote areas. The diversion of Aboriginal prisoners from remote areas to police lockups in larger centres removes them from their kin and country. The impact of this policy on Aboriginal people must be given careful thought. In more remote areas, other forms of supervision may be considered to be more appropriate, such as using lay staff on a contract basis. Some innovative schemes have been proposed in this area.

24.3.89 The Special Government Committee on Aboriginal, Police and Community Relations in Western Australia has proposed that security firms be contracted to provide lockup attendants at those times when stations are not staffed by police personnel. In the alternative, the Committee proposed the appointment of lockup attendants for all police lockups: in areas with high Aboriginal population, it was hoped that Aboriginal lockup keepers would be appointed.³⁴

24.3.90 The employment of civilian lockup keepers has received some consideration in the Northern Territory.³⁵ Mr Owston, Secretary of the Department of Correctional Services, has advised me that discussions are underway with the Police Service concerning the development of a scheme whereby specially trained custodial officers would be available on a needs basis to supervise prisoners in some remote communities.³⁶ Another innovative scheme is that which is currently operating at Elliott. An agreement has been reached between the Elliott police and the Gurungu Association (the representative organisation of the Aboriginal community at Elliott) whereby the Association, as a regular part of its night patrols to Aboriginal town camps, calls in at the police lockup and checks on prisoners. The arrangement is reported to be operating to the satisfaction of both the Aboriginal community and the local police. While I was in Ali-Curung, a member of the community council was staying at the lockup over night. These are dedicated efforts.

24.3.91 In Cherbourg, Queensland, a permanent watch-house keeper has been appointed to supervise prisoners detained in the local watchhouse. The watch-house keeper, who is a full-time Aboriginal policeman, performs ordinary police duties when no-one is in the watch-house. When someone is arrested, and he is on duty, he then stays in the watchhouse in full-time supervision of the prisoner. When the watch-house keeper is not on duty, another member of the Aboriginal police performs his role.³⁷ Thus, no prisoner is detained in the lockup without supervision.

24.3.92 There would appear to be considerable advantages in the introduction of such schemes in remote areas. The employment of civilians to undertake this task would have the effect of freeing up police personnel for general police duties, facilitating community involvement and interest in policing and providing a less costly alternative to the employment of additional police personnel on a full-time basis. However, the success of such schemes will depend to a large extent on the training which is provided to the participants. As the cases investigated by the Commission have shown, the lack of adequate training in the assessment and management of 'at risk' prisoners has played a significant role in the deaths.

Without proper training, avoidable deaths will not be averted.

MANAGEMENT OF THOSE AT RISK

Protocols For Dealing With Those At Risk

24.3.93 In order to reduce the number of clearly preventable deaths in custody, it is my view that protocols should be developed for police to assist and guide them in dealing with those who are potentially at risk. During the hearings, some very constructive and practical advice was received from a variety of medical experts and others as to the appropriate care and management of persons who are intoxicated, those with a known history of epilepsy or diabetes, those who have made some attempt to harm themselves and others who by virtue of their physical or mental condition are otherwise at risk. It is important that officers are given clear guidelines as to the action that should be taken by them when they are confronted by such persons. These guidelines or protocols should be developed in consultation with Aboriginal and government health and medical agencies and specialists. I list below some areas in relation to which the development of protocols would be beneficial. This list is not intended to be exhaustive. I again stress that whilst I consider the development of protocols to be important, they will be of only limited use without the benefit of practical training and instruction on their importance and application.

Intoxicated Persons

24.3.94 Guidelines should be established regarding the management of highly intoxicated persons. They should outline the circumstances in which medical assistance should be obtained. Where medical assistance is not required, the guidelines should detail those practical measures which should be taken, such as: the need to place the person in the coma position (this measure is necessary to reduce the risk that the person may choke on his/her own vomit); the need for regular checking to ensure that they are breathing normally and remain in the coma position; the need to monitor their state of consciousness over the period of detention. It should be emphasised that police lockups are not appropriate facilities for the care of intoxicated persons and that efforts should be made, where possible, to transfer the person to an alternative facility where proper supervision can be provided.

Epileptics, Diabetics etc.

24.3.95 Clear guidelines should be provided as to the management of persons who have a known history of diabetes, epilepsy, heart disease or hypoglycaemic reactions. It has been suggested by some experts that persons with a history of such illnesses should not be placed in a cell alone. Evidence was given during a number of hearings of the frequency with which persons detained suffer from epileptic seizures. It was apparent that such seizures were viewed by many police officers as being of only minor concern. However, the Commission's investigations indicate otherwise. As noted earlier in this report, in three cases investigated by the Commission the deceased person died as a result of an epileptic seizure.

Previous attempt or threats to engage in acts of self-harm

24.3.96 There were a few cases in which a failed attempt to commit an act of self-harm, or a threat to do so, was not taken seriously enough by police. Officers should be guided as to the steps to be taken in such circumstances. The evidence before the Commission clearly establishes that any person who makes an attempt

to commit an act of self-harm or who threatens to do so should be presumed to be at risk. For those who make an actual attempt to harm themselves, medical attention should be sought immediately. It is equally important that threats to engage in acts of self-harm should also be treated seriously, whatever the circumstances. The point has been raised that there are many prisoners who threaten to harm themselves but who clearly have no intention of doing so; their threats being merely an attention seeking and manipulative device. That may well be the case, but I am clearly of the view that medically untrained persons such as police and prison officers are not in a position to distinguish between threats or attempts which are genuine and those that are spurious: no attempt or threat to engage in acts of self-harm should be dismissed out of hand.

24.3.97 The evidence also indicates that persons who have demonstrated a desire to harm themselves, or have behaved violently or irrationally, should be presumed to be at risk and kept under constant visual surveillance until medically assessed. In practical terms, this may mean removal to an area which allows for the continual and unobstructed observation of the person or the placement of an officer with the person. But above all, their supervision should involve as much human interaction as is possible. Where proper supervision is not possible, the person should be diverted to a facility which can provide the appropriate level of care. In no circumstances should a person demonstrating such behaviour be left unsupervised. In cases where persons have made any threat to harm themselves, they should also be assumed to be at risk and closely supervised. All such threats should be treated seriously. If possible, they should be placed in a cell with another person (who is reasonably sober). In any event, a close watch should be kept on them. If the person cannot be adequately supervised, he/she should be diverted to a facility where proper supervision can be provided.

A n Impaired State of Consciousness

24.3.98 Guidelines should be developed as to the identification and care of persons who exhibit an impaired state of consciousness. The South Australian Police have drafted an instruction for officers on this topic which I think is useful. General Order 5750, para. 8.2 places a positive obligation on police to obtain medical assistance when a person has 'an impaired state of consciousness from whatever cause'. The Order goes on to define the term, 'impaired state of consciousness', as: 'when a person is incapable of rational conversation, is persistently or intermittently drowsy/sleepy, does not respond to verbal commands and body stimulation, and is unable to walk or stand unassisted'. It instructs officers finding a person with an impaired state of consciousness or who is having difficulty breathing not to leave him/her unattended and to seek medical assistance without delay. Persons found 'unresponsive, immobile or unconscious' are to be placed in a 'supervised coma position' and an ambulance called. The instruction concludes: 'The health of the person in custody is paramount and no police investigation will take precedence over it'.

Angry, Aggressive or otherwise disturbed persons.

24.3.99 It is important that guidelines be given to officers regarding the management of persons who appear angry, aggressive or otherwise disturbed. Evidence given during the various hearings establishes that there are certain risks associated with placing angry or aggressive persons alone in cells because of the possibility that they may turn their anger in upon themselves.³⁸ The *Interim Report* highlighted the importance of this issue when it recommended that all angry and aggressive detainees should be treated as potentially suicidal.³⁹ I might add that I do not think Commissioner Muirhead meant to recommend that all persons

displaying such behaviour should be constantly supervised, rather I think he was highlighting the point that I made above; that is, that it must be recognised by custodial officers that angry or aggressive persons are potentially at risk. This factor has tended to be overlooked in the past. It is obvious that many persons taken into custody will display signs of anger or aggression, particularly if they are under the influence of liquor. In practical terms what is required is that, where persons exhibit signs of anger and aggression, they should be kept under reasonably close supervision.

24.3.100 It must also be borne in mind that the expression of anger may be a symptom of some type of mental disorder. In the cases of Christine Jones and Benjamin Morrison, the deceased exhibited aggressive behaviour at the time of being placed in the lockup. In each case, the deceased was found to be suffering from an organic brain disorder--with Benjamin Morrison it was 'mania a potu', a condition characterised by aggressive outbursts when intoxicated followed by total amnesia, and with Christine Jones it was alcoholic psychosis.

Those requiring or in possession of medication

24.3.101 Police General Orders are generally silent on procedures for dealing with prisoner medication other than allowing a prisoner access to it. It appears, however, that practices regarding access vary from one location to another. In Tasmania, I believe that no prisoner will be provided with medication without the authority of a medical practitioner. In other locations, this safeguard is not in place. In some South Australian cases it was noted that police would provide a prisoner with medication but not supervise its consumption. I think it is important that some consideration be given to developing guidelines for police regarding the provision of medication to prisoners. In developing such guidelines, consideration should be given to the need for medical confirmation regarding the provision of medication and the need for strict supervision.

Padded Cells

24.3.102 The use of padded cells as a way of managing persons who pose an immediate threat to their own lives and/or to others is not an issue which has arisen directly from any of the cases investigated. However, it is an issue which, I believe, calls for comment. I have noted the inclusion of such cells in draft plans of new police complexes which I have had the opportunity to peruse during the hearings and have personally viewed such cells in some police lockups that I have visited. They are generally cells which are devoid of all furniture and fixtures and the walls and floor are padded.

24.3.103 The use of padded cells in police facilities is an issue raised by Dr Joseph Reser in his paper *The Design of Safe and Humane Police Cells*, prepared at the request of the Commission. In that paper, Dr Reser commented that such cells 'can act as a sensory deprivation chamber, and can markedly increase distress, reactance and experienced isolation' (p.33). He noted that the use of 'seclusion' rooms in psychiatric facilities are only used on the authorisation of, and with the continued supervision of a mental health professional and under strict written guidelines, but that no formal policy guidelines appear to be in existence in relation to the use of padded cells in police facilities. He concluded that the use of padded cells in the police lockups, without the presence and involvement of an appropriately qualified person, was ill-advised.

24.3.104 I am aware that the Northern Territory Police Service has considered the removal of padded cells from its police lockups. Indeed, following the receipt of a report which the Commission obtained from Dr Reser on the Katherine cells, it was decided by the Service to remove the padded cell from the then newly

constructed Katherine Police Station. I am not aware of the practices relating to the use of padded cells in other States. It is my view that the installation and use of padded cells in police lockups should be discontinued immediately.

24.3.105 I would add, however, that I think that there is a need for police lockups to contain one cell which could be utilised to accommodate those prisoners requiring special monitoring. It has been suggested that such a cell could be situated close to the general administration area to facilitate continual surveillance by those officers stationed in the area and prompt intervention.⁴⁰ The design of such a cell would require careful consideration.

Feeding Intoxicated Persons

24.3.106 It became apparent during the hearings that it is the practice in some States and the Territory for persons detained for protective custody on the basis of public intoxication not to be provided with meals during the period of detention. In South Australia, for example, I have been informed that Station Sergeants have been specifically instructed not to provide meals to persons who are detained for intoxication under the; *Public Intoxication Act 1984* (SA). Both myself and Commissioner O'Dea have strongly criticised this policy in individual case reports.⁴¹ I wish to reiterate my concern regarding this practice. The benefits which flow from the feeding of persons who are under the influence of alcohol are obvious, but I wish to make the point that, given the relationship between alcohol misuse and other illnesses such as diabetes, hypoglycaemia and malnutrition, there is a foreseeable risk that the withholding of food from those who are intoxicated may increase the risk of danger to the well-being of those detained. When one considers the lengthy periods of time for which intoxicated persons can be legally detained in those jurisdictions where public intoxication is no longer a criminal offence (in South Australia, the period is up to ten hours and in the Northern Territory, six hours (although there is provision for this period to be considerably extended), such a practice is clearly abominable.

24.3.107 Whilst efforts should be made to provide alternative accommodation for the detention of intoxicated persons, it is essential that those persons who are held in police cells whilst intoxicated be fed. In my view, the policy of not feeding intoxicated persons who have been detained in custody cannot be justified. All persons taken into custody must be supplied with a meal at regular meal times.

Cell Placement

24.3.108 In all but two cases of hanging consummated in police cells the deceased was alone at the time of death. The exceptions to this were the cases of Bernard McGrath and Alistair Riversleigh. In the McGrath case, the deceased was placed in the lockup with a number of others. He apparently voiced the intention of hanging himself and was helped to fashion a noose by one of them. Alistair Riversleigh was placed in a cell with another prisoner who, at the time, had 'passed out' due to intoxication.

24.3.109 The *Interim Report* of the Commission expressed the view that cell sharing may help to reduce the number of deaths in custody. It was recommended that, as a general principle, Aboriginal detainees should not be confined alone in cells. In some States, this recommendation has been embodied in local police instructions and in many other places it has become part of police practice.⁴² In order to accommodate this practice, arrangements have been made in some locations for prisoners to share common exercise areas, with the doors to single cells being left open. I think that it is a very sensible and desirable practice. Throughout the hearings, this practice has received much support from Aboriginal

people. The benefits are plain. To have the company and support of others may ease the sense of isolation and despondency which must be felt by many who are taken into custody. For many, being isolated from family and friends can be devastating. The austere nature of many lockups, the poor lighting and the absence of natural light and air, must certainly increase the sense of isolation. As I have stated earlier, human interaction is one of the most useful tools in suicide prevention. Being able to talk to someone about one's feelings, or merely having the company of another, may help to relieve some of the despair and desperation felt.

24.3.110 Clearly, however, the question must be approached in a common-sense way. Not all Aboriginal people will feel comfortable being placed in the same cell with other Aboriginal, or non-Aboriginal, people. It may be the case that traditional familial or social obligations mean that it is culturally unacceptable for two Aboriginal persons to share the same cell. To avoid such conflicts, the persons involved should be consulted as to whether they have any objection to being accommodated together. Obviously, in those cases where a prisoner shows a tendency to aggression or violence great care must be taken. The problems that can arise in these circumstances are well illustrated by the case of Fay Yarrie. In that case Fay, who was arrested for drunkenness, was placed in a cell with two other women, one of whom had earlier been noted to act in an aggressive way. The cell into which the three prisoners were placed was not visible from the watch-house charge counter and cell checks were infrequent. Fay was later found unconscious in the cell as a result of injuries she had sustained as a consequence of being beaten by the other prisoner and from which she later died. I think this case clearly illustrates the point that police must recognise that the placing of prisoners in shared cells does not abrogate or diminish their responsibility to conduct regular and thorough cell checks. It is obvious that the placing of prisoners together in cells may increase the risk of assault and possible intimidation. However, the incidence of single cell deaths in the cases investigated by the Commission, in my view, justifies the use of such measures for Aboriginal persons taken into police custody, and is one which has been consistently supported by Aboriginal people throughout the hearings.

Access to Family, Friends, Visitors

24.3.111 The Interim Report recognised the importance for Aboriginal prisoners to have access to outside support whilst in custody, whether they be friends, family members or visitors.⁴³ Amongst other matters he recommended that Aboriginal visitors schemes be established throughout Australia in consultation with the Aboriginal community to service police lockups (Recommendation 22). In response to this recommendation, Aboriginal Visitors Schemes (AVSs) have been established in a number of States. At the time that the Interim Report was released, there were already two such schemes operating; one in the Northern Territory and the other in Western Australia. However, since this time, schemes have commenced operating in South Australia and Victoria.

24.3.112 In New South Wales, a cell visitors scheme (known as the 'Lay Visitors Scheme') has been established. However, this scheme differs considerably from those operating in other jurisdictions. It is not a scheme specifically directed at Aboriginal prisoners, although it does operate in a number of towns with a high Aboriginal population. The main objective of the scheme is directed towards improving the public's perception of police and their treatment of prisoners. The lay visitor visits the police lockup at random, without prior notice, to monitor the treatment of persons in custody. By contrast, the main objective of the AVSs is to reduce the incidence of deaths in custody by providing a support mechanism for

Aboriginal persons taken into custody. The support is provided by Aboriginal 'visitors' who are entitled to visit Aboriginal prisoners detained in police lockups at all hours of the day and night.

24.3.113 It would appear that the success of each AVS has varied to some extent according to the resources available and the extent of Aboriginal involvement in, and support for, the schemes. Community involvement varies considerably from State to State. In South Australia, the AVS was set up using funds provided by the Commonwealth Government to implement the Interim Report recommendations. It is currently operating in the Adelaide metropolitan area and in some country areas. The scheme is co-ordinated by State Aboriginal Affairs but is administered by local 'Aboriginal Host Organisations'. In country areas, these Host Organisations are invariably local Aboriginal community organisations. They are not only responsible for the administration of the scheme but are also responsible for nominating the 'visitors' from the local Aboriginal community. Visitors meet regularly with a local support group consisting of a member of the Host Organisation and the local police to discuss the progress of the scheme. I understand that the scheme is operating well.

24.3.114 In Western Australia, the responsibility for the establishment and administration of the scheme is in the hands of the State Minister for Aboriginal Affairs through the Aboriginal Affairs Planning Authority (AAPA). Aboriginal organisations are involved in the scheme to the extent that they may nominate visitors for appointment. However, their selection and appointment is the responsibility of the AAPA. In the Territory, the scheme is administered by the Police Service. Pursuant to Police General Orders, it is the responsibility of the officer in charge to establish and monitor Cell Visitors Schemes in local areas. The responsibility extends to the selection of members of the community to act as visitors. I mention that in Queensland, a pilot cell-visitors scheme has recently been announced for commencement in Brisbane and other major regional centres. It is proposed that funds be made available for community organisations, both Aboriginal and non-Aboriginal, to establish such schemes. The organisations are being encouraged to develop proposals appropriate to their own local circumstances, and it would appear that there is considerable scope for community involvement and participation in the management of the schemes.

24.3.115 In my view, consultation with, and the involvement of, the Aboriginal community in the administration of such schemes is absolutely essential to ensure their success. The scheme must have the support and confidence of the local Aboriginal community.

24.3.116 It is equally important that such schemes receive the full support of the police. It has been found that, in some jurisdictions, police were either unaware of the existence of the scheme or did not actively encourage the attendance of visitors. Police must be clearly instructed on these matters but, more particularly, helped to appreciate that this is in the public good.

24.3.117 A visitor should be entitled to stay with the prisoner for as long as is necessary. Most schemes have stipulated that free access to the police lockups be granted at any hour and for any length of time, provided that the visit does not interfere with the efficient running of the police station. The officer in charge should nevertheless endeavour to make his or her best efforts to facilitate a visitor's attendance, particularly if it has been requested by the prisoner. Police participation and support for the scheme can mean the difference between success and failure. I am impressed by the Support Group concept operating in South Australia. It seems to me that this is a very effective means for bringing together the police, members of the Aboriginal community and visitors and ensure that all participants have a voice and a forum within which to set out any

difficulties which might arise and to lend mutual support. It also has the effect of demonstrating to both sides that good will and co-operation is not the property of one group. The visitors can better understand the legitimate interests of the police and vice versa.

24.3.118 The training of visitors is also important. In Western Australia, all newly appointed visitors are required to undertake a training program which includes components on crisis intervention, aspects of police procedures relevant to the detainment of prisoners, legal issues, basic first aid and stress management. Additionally, visitors are required to complete monthly training sessions to update their skills. Clearly, visitors cannot be expected to fulfil their role without proper training in recognising and counselling those in distress, in police procedures and prisoner's rights. Of equal importance, however, is that the visitors receive adequate recompense in recognition of the very important service they provide.

24.3.119 The 'visitors' involved in the schemes have indicated a desire for training and appropriate support agencies to assist them to cope with stress. Both Commissioners Dodson and O'Dea have reported a high 'burn-out' rate amongst Aboriginal visitors in Western Australia.⁴⁴ One of the Geraldton visitors estimated that there had been a resignation rate of about 50% because of stress. As a response, a support panel comprising doctors, psychologists and social workers has been established for members of the Geraldton visitors scheme. Obviously, it would not be possible to establish similar panels in every region, and, indeed, it may not be an issue in other locations. I think the problem is probably related to the number of Aboriginal persons in custody. Where the numbers are small and relations with police are satisfactory or better, the stress factor would be much less. It is a factor to which due consideration should be given by those responsible for the operation of such schemes.

24.3.120 In my view, AVSs are a very valuable initiative and one which I have no doubt will help to reduce the number of Aboriginal deaths in custody. Consideration should be given to expanding the scheme to other regions where there is a need or expressed interest by Aboriginal persons. The schemes currently operating should be carefully monitored and evaluated in light of experience in other jurisdictions. It is essential that the schemes receive the continued commitment by government in terms of funding and resources. It is my view, however, that the schemes should be regarded as part of an ongoing process of improving police and Aboriginal understanding and relationships which may well lead to other schemes having a wider focus of operation.

24.3.121 Whilst I have concentrated on cell visitors schemes in this section, I think it is equally important for access to family and friends to be both facilitated and encouraged by police. This should be the case, irrespective of whether or not a cell visitors scheme is in operation at the location. It is also important that police watch-houses be designed to provide adequate space and facilities for persons visiting detainees and that, where possible, provision is made for contact visits. In some remote communities, detention arrangements have been modified to allow for greater contact between prisoners and their family and friends. In Ngukurr, Northern Territory, the gates to the compound surrounding the cells and exercise yards are left open at all times to allow residents of the community to visit and talk with prisoners in the exercise yard, including at night when I was told that some of the locals may come along with their musical instruments and have a singsong. There have been no deaths in the Ngukurr lockup.

24.3.122 I raise one final matter regarding contact with a detainee's family and friends. It was apparent in a number of cases that police did not make any, or any immediate, attempt to contact the detainee's relatives when he/she fell ill or was transferred to hospital. It is my view that this issue should be addressed in police

General or Standing Orders. There should be a positive obligation on police to notify a person's family as soon as practicable upon that person being regarded at risk or being transferred to hospital.

THE PHYSICAL ENVIRONMENT

Cell Design

When dealing with deaths in custody, the design of lockups is only one of the considerations. The other components are the police procedures and practices, the individuals' physical and mental health, and attitudes of the community. It is essential that these other components also be addressed if the physical modifications are to be effective.⁴⁵

24.3.123 The police custody deaths which have been investigated have highlighted the very urgent need for the upgrading of police custodial facilities. Some police lockups in which the deaths occurred were absolutely appalling and unfit for human habitation; others were of substandard quality. Some contained vestiges of primitive custodial practices. I personally visited the old Katherine police lockup in the Territory where the sergeant in charge made many helpful comments and pointed to iron rings set into the floor of some cells to which Aboriginal prisoners, in the not so distant past, were chained. Some lockups have since been totally replaced or upgraded. Others remain, and continue to be used, in substandard and unacceptable condition.

The watch-house at Wujal Wujal stands in an open unshaded depression about 100 metres from the centre of the community. It is a square concrete building with a galvanised iron roof and metal doors. It comprises two small cells neither of which is fitted with an effective observation window. In each cell there are two small windows: one in the rear wall, the other in the cell door. Each is set so high that none but the tallest inmate could ever glimpse the world outside.

The watch-house has a concrete floor, no exercise yard, no sanitary provisions other than a bucket, no running water, no internal lighting and no furniture or other fittings. The Coroner who conducted the inquest into the death aptly described the watch-house as nothing more than a 'primitive dungeon'.⁴⁶

The Lockhart River watch-house is a desolate looking rectangular building of concrete blocks and steel bars and an iron roof measuring about 17 metres by 6 metres. The building and its facilities show all the signs of frequent use and little or no maintenance.

The building is in an isolated position some 500 metres from and out of sight of the police station. The nearest residence is 55 metres away... There is no means by which anyone in the watch-house can communicate with a person outside except, of course, by shouting out. As the place, when it is in use, is mostly occupied by

*intoxicated people, the likelihood that anyone would heed a cry for assistance from the watch-house is as remote as the building itself.*⁴⁷

24.3.124 Of particular concern are those lockups which are gazetted as 'police prisons'. I have referred earlier to the fact that the gazettal of a lockup as a police prison enables it to be used for holding prisoners for up to thirty-one days in some States. A number of these 'prisons' are of substandard quality. Many have poor lighting, no natural light or ventilation, no ablution or toilet facilities, no reticulated water and no adequate exercise areas. Given that many of these facilities also have insufficient staff to provide proper levels of supervision of prisoners, the use of such facilities for long-term detention is a matter of serious concern. It is a problem, however, that is not likely to be easily resolved, given the current problem of overcrowding of many of the country's corrections facilities. It is an area which requires review by the appropriate authorities.

24.3.125 From an early stage in the Commission's investigations, the poor standard of lockup facilities was one of the most immediately recognisable features of the deaths in police custody. It was an issue which featured in the Commission's *Interim Report* wherein it was recommended that, not only should all police cells be modified to screen hanging points, but that a task force be established on a national basis to develop a standard and program for the upgrading of police cells 'to a level where the opportunity for death by suicide is substantially reduced by appropriate cell design and equipment'.⁴⁸ To date, no national task force has been established, although, since the release of the *Interim Report*, most Police Departments across the country have individually conducted reviews of existing police lockup facilities and taken measures to upgrade (and in some cases completely replace) them. Considerable sums of money have been spent in this area.⁴⁹ Whilst not wishing to criticise the measures that have been taken (indeed, most--if not all--were necessary and long overdue), one is left with the impression that, in some locations, the concentration of government spending has been on upgrading custodial facilities rather than on programs to keep people out of custody. Prevention of deaths cannot be achieved by physical design modifications alone. What is required is a more determined effort by governments to reduce the numbers of Aboriginal people who are taken into custody in the first place by developing diversionary programs and facilities. This, in my view, should be the area of primary concern and attention.

24.3.126 Before proceeding to discuss the various aspects of cell design, I think it appropriate to comment that, whilst much of what follows focuses on the impact of the physical environment on the prisoner, of equal importance is the impact that it has on those who work in these facilities. It seems to me that one cannot expect police officers to have a positive attitude towards prisoner care, if they are required to carry out their duties in substandard and degrading conditions.

24.3.127 The cell surveys which have been conducted have concentrated to a large extent on the identification and removal of 'anchorage' points and any other obvious design feature which may increase the opportunity for suicide. The major strategy has been the complete removal or screening of obvious points, the latter being achieved by the installation of a fine mesh material, mainly over exposed bars. The experience of most police authorities in relation to the screening of suspension points in this way is summed up in the following passage from the submission of the Queensland Police Service:

[W]hile a certain measure of success may be claimed, this had the undesirable effects of reducing the entry of natural light and ventilation. It also restricted the view of

inmates thereby giving rise to the well-founded proposition that this alone may have an adverse psychological effect on some persons.

There is an obvious need to strike the proper balance between prisoner security/safety, as well as comfort needs.⁵⁰

24.3.128 It appears to be generally accepted that no cell can be made totally safe without the removal of all fittings. Plainly, sensible precautions to remove obvious anchor points are essential. However, the physical means employed to limit the opportunity for suicide may ultimately result in a physical environment which is so oppressive that suicide attempts are in fact more likely. Dr Reser comments:

Environments which are designed to be totally controlling ... are experienced very negatively. This is because they elicit feelings of threatened individual freedom and control. The human response to threatened freedom of action is known as 'reactance', whereby an individual attempts to restore this freedom by engaging in a behaviour which is contrary to the directive he or she has been given. This behavioural response can be violent and destructive, depending on context and message... and can include self-destructive acts.

Reactance can enter into this [watch-house] equation in the form of obvious 'suicide proofing' of the cell environment, the removal of clothing, bedding, or belt... These 'messages' can elicit profound reactance and anger, and lead to a particular form of self fulfilling prophesy, whereby the expectation and denial of freedom conveyed by the physical environment and situation can lead to attempted suicide.⁵¹

24.3.129 Thus, striking a balance between minimising the opportunity for a prisoner to cause harm to himself and exacerbating the stress and isolation which a person may experience in custody requires a considerable degree of thought.

Cultural Factors in Design

24.3.130 It is the view of Dr Reser and others that there are important cultural differences between Aboriginal and non-Aboriginal detainees for which accommodation can, and should, be made in the context of custodial procedures and cell design. These differences include:

the perception of the police and the lockup situation, the state of the individual when arrested, the effect of being arrested and placed in custody, the impact of being alone, the effect of confinement, the nature of Aboriginal kinship systems and avoidance relations, the nature of support relationships between Aboriginal individuals and extended family, the nature of traditionally-oriented Aboriginal emotional expression and coping responses, the ways in which drugs and alcohol are used and experienced, the community and cultural context of suicide, the cultural institution of self-injury, the nature of traditionally-oriented anxieties and fears, and the general

*physical health of Aboriginal detainees.*⁵²

24.3.131 Dr Paul Memmot comments that 'people of different cultures may use and respond to environments in distinctly different ways. Successful architectural design necessitates an understanding of the salient aspects of such culturally specific responses'.⁵³ He argues that, given that Aboriginal people in most remote communities maintain an 'externally-oriented lifestyle', it is important that this attribute receive special consideration in the design of police holding facilities in those communities.

[T]he ideal environment in many remote communities would be an outdoor one with access to shade, wind protection, ground fires and social interaction with some kinspeople.

24.3.132 It would appear that little research has been conducted generally in this area, and, more particularly, little or no effort has been made (except in more recent times) to consult with individual communities about their needs and requirements in relation to the design of police lockups.

*The submissions which have been considered, and the discussions held, have helped to identify many of the needs and requirements of police staff, and some of the needs and requirements of those in custody. There is not, however, a clear picture of just what the needs and requirements of Aboriginal detainees are, or how these might differ geographically. Design solutions which work require genuine consultation. It is difficult for anyone who has not experienced incarceration in a police cell or watch-house, from an Aboriginal perspective, to identify or prioritise needs.*⁵⁴

24.3.133 Police authorities in at least two States, Queensland and Northern Territory, have indicated their intentions to consult with Aboriginal people in the future design of police lockups on Aboriginal communities. In the Territory, the Police Service has described the input of the Aboriginal community at Alyangula (Groote Eylandt) in the design of the new lockup as 'valuable'. I understand that the final plan of the cell complex was changed to accommodate the community's request for a visitors room and an outdoor exercise area, in addition to 'basic lecture facilities which will enable Aboriginal elders to provide lessons to their young people on traditional and spiritual values'.⁵⁵ Discussions have also been held in other locations in the Territory where new police facilities are proposed to be constructed in the near future. In South Australia I am aware that efforts were made to consult with community groups, both Aboriginal and non-Aboriginal, in the Ceduna area regarding the construction of a new police complex in the town. These discussions, and subsequent discussions with the Aboriginal Legal Rights Movement and staff of the Commission, resulted in a revision of the original plan which incorporated a number of improvements put forward by the various parties during those discussions. I hope that similar efforts will be made for future proposals in other locations.

24.3.134 The Special Government Working Party established in Western Australia in January 1988 to investigate the design of police lockups has recognised that 'the ethnicity of the culture of the majority of the detainees' is one factor which should be taken into account. It is not clear how this is to be achieved. There is no express reference to the need to consult with local communities about what they see as relevant design features.

24.3.135 Many Aboriginal people have expressed the view throughout the hearings that there should be greater efforts made to obtain, and take into account, their views on lockup design. It is my view that negotiation is a necessary element of the design process. I do not confine my comments to negotiation with members of the Aboriginal community. Discussions with other interested groups (including local police officers) are equally important. But in those areas where Aboriginal people comprise the majority of detainees there is simply no justification for the relevant authorities not making a special effort to discuss the proposal with the local Aboriginal population.

24.3.136 I would make one comment about the negotiation process. In some locations, the process of negotiation has been to seek input from the community only when the plans have reached the completed stage. It is my view that negotiation at this late stage is almost useless for at least two reasons. The first is that there is a degree of reluctance to change a plan which has the mark of finality. Secondly, the average person is likely to be completely overwhelmed by a very complex and detailed plan: the likelihood of eliciting any constructive and meaningful response is substantially reduced. It would be a far more constructive negotiative process if discussions were held with the community at an early stage of the design process. Negotiation must be seen to be, and in fact be, more than mere token gesture.

Specific Design Considerations

24.3.137 There are certain design considerations which were raised during the course of the Commission's inquiries. Many of these have been addressed by Dr Reser in his research paper. It is my hope, as was Dr Reser's, that his paper will serve to encourage input and discussion from Aboriginal and non-Aboriginal organisations and individuals on future cell design and to influence the formulation of acceptable standards and policy guidelines. It is my view that each of the issues raised in his paper are worthy of further investigation. I do not intend to deal with each of them in this section, but only to highlight those that I think are of particular importance.

(i) Allowance for visitors: The importance of providing appropriate areas for family and friends to visit those in custody has been emphasised throughout the hearings and in the various submissions received. The South Australian Aboriginal Issues Unit has reported to me that the cells at one location were considered by the community as 'being too dark and too small' and that 'people wanted a more open design which would give access to their relatives and friends so they would not feel so isolated'.

Dr Reser has stressed the importance of 'physical proximity and touching' for Aboriginal people, particularly in times of stress.⁵⁷ This factor has been recognised in the Report of the Working Party on the Design of Police Lockups in Western Australia. It was recommended that, in relation to lockups in both remote and country areas:

There should be grassed fenced areas for visitors that allow them to sit with detainees/prisoners or to have access through the exercise yard fence. The grassed areas should have trees or shelters with a tap for water. The purpose of the visiting area is to allow families to visit and support detainees and prisoners whilst maintaining some level of security.

By contrast, the draft report for the Victoria Police on 'Standard Police Cell Block Design', whilst recognising that all facilities should contain a cell visitor area,

describes the purpose and layout of the area:

This space must allow visitors (including legal consultants, relatives and friends) to see and speak to detainees without physical contact.

The space should cater for a maximum of two visitors, seated at a bench and glazed screen separating the detainee. [My emphasis]

It is my view that police facilities must make genuine provision for visitors. Visiting areas should be designed to facilitate meaningful visits and interactions and take into account the different cultural realities which exist for Aboriginal detainees and their families and friends.

- (ii) Spatial relation of cells to other functional areas: The standard design of many police lockups does not allow for direct visual or oral monitoring of inmates. In many cases, the cells are physically separate and quite a distance from the police station building itself. In my view it is important that lockups be designed to maximise direct visual and oral monitoring of inmates. This will obviate the need for electronic surveillance equipment, increase prisoner/custodian interaction and reduce the sense of isolation commonly felt by those taken into custody.
- (iii) Visual and sensory access to outside environment: Dr Reser comments that, 'It is very likely that the cutting off of access to the outdoor environment is more keenly felt by Aboriginal detainees, for whom the continual monitoring of information in their natural environment is directly keyed to feelings of security. Design provision for visual access to the outside from cells is probably one of the simplest and most psychologically beneficial things that could be done to these watch-house settings'

Whilst I understand that provision for physical access to outside areas would have implications in terms of security, I believe that attempts must be made to strike a balance between security on the one hand and the psychological effects of a closed environment, particularly on traditionally oriented Aboriginal people.

- (iv) Padded Cells: I have questioned earlier the need for 'padded cells' in police facilities, although I think there is justification for at least one cell which would accommodate prisoners requiring special observation in the short term. Such a cell might be best placed in close proximity to the general administrative area to facilitate close monitoring. As Dr Reser has pointed out, the design features of such a cell requires very careful consideration.
- (v) Electronic surveillance equipment/Alarm and Intercom facilities: These matters have been dealt with earlier. I would like to stress again that it is my view that the emphasis in prisoner supervision should be on human interaction and not on high technology surveillance.
- (vi) Shared Cells: I have discussed earlier the impact of isolation on Aboriginal detainees and the need for Aboriginal detainees, where possible, to be placed together. It is my view that the design of new lockups should incorporate single and shared cell accommodation. Dr Reser has suggested 'a twin-cell design with a securable connecting door' as a 'dual-purpose cell'.

It is obvious that no one lockup design will be appropriate for all locations. What may be appropriate for a metropolitan lockup may be completely inappropriate for a remote area lockup. The design will be dictated by geographic and climatic conditions, the purpose of the facility and, most importantly, the categories of users (e.g. sentenced prisoners, fine defaulters, intoxicated persons, remand prisoners). Each facility must be viewed individually, and be designed to meet the needs of the community it is to serve.

24.3.138 Much greater efforts must be made to humanise and 'soften' police lockups. A number of suggestions have been put forward such as allowing prisoners access to radios, magazines etc., the painting of cells to reduce their generally drab and austere nature. I urge governments to take these matters into consideration. I think it is too easily forgotten that many of those detained in police lockups have not been dealt with by the Courts, are awaiting bail or serving time on fine default for minor offences. Obviously, some provision will have to be made for violent/aggressive detainees and others who provide some threat to security. But, it is my view, that the necessary security measures for these classes of prisoners should not dictate the standards for all prisoners.

24.3.139 Simple commonsense thinking can often be much more effective than the spending of considerable sums of money. I illustrate this by a story which Commissioner Dodson told me. In Norseman, Western Australia, where the detainees are predominantly Aboriginal, the cells were regularly being defaced by the detainees who obviously found them distasteful. The local sergeant thought of the idea of getting some of the local Aboriginal artists to decorate the cells with Aboriginal paintings. The sergeant himself raised the money for the materials. The artists volunteered their labour for the work. The cells were thereafter respected. They were obviously found to be less upsetting to those detained.

24.3.140 I raise one final point. The cost of upgrading all police lockups to an acceptable standard would be considerable. As I discussed earlier, there have been moves in some States recently to rationalise the use of police lockups so that only those that have adequate provision for surveillance are used for overnight detention. Thus, upgrading costs can be reduced by concentrating spending on fewer lockups. I would stress again that, whilst I think this is a sensible initiative, its impact on Aboriginal people, particularly outside metropolitan areas, must not be overlooked.

Flexible Custody Arrangements

24.3.141 As a response to the substandard level of accommodation at some police lockups and in recognition of the adverse effects on Aboriginal prisoners of being isolated from family and friends, police in some remote locations have adopted what has been described as 'flexible detention arrangements'. These arrangements generally involve 'trusted prisoners' having access to the police station grounds during the daylight hours and being secured in the cell complex at night. They are able to sit with family and friends and talk. At Wiluna in Western Australia, detainees are entitled to visit the local shop or nursing post provided the permission of the officer in charge is first obtained. I understand it is also the practice for police to take a number of trusted prisoners out into the bush on camping trips of a weekend. They are generally left to their own devices but are checked on from time to time. I record Commissioner O'Dea's comments in relation to the scheme:

It is worth noting that there was no evidence that any prisoner had ever breached the trust placed in him by the police officers. It is worth noting the positive aspects... of restoring pride and prestige to the prisoners themselves, while allowing them to live in accordance with their tribal traditions.⁵⁹

24.3.142 A similar arrangement operates at Oodnadatta in South Australia's far north. Detainees are given free access to the police station grounds during the day and may sit there and talk with family and friends. I was told that, often, detainees would ask to be given odd jobs to do around the station to keep them occupied. As

in Wiluna, the privilege has not been abused during its period of operation, and of significance is the fact that there have been no suicide attempts at the lockup.

24.3.143 Whilst these practices are not positively discouraged by police senior management, there appears to be no formal recognition of the practice. Police instructions (at least in South Australia) in fact require prisoners to be secured in cells at all times, and when the station is left unattended, prisoners are required to be secured in individual cells. It would appear that in many places this latter instruction is not complied with in recognition of the appalling cell conditions and the potentially adverse effects of isolation on prisoners. Where such practices operate, officers could potentially be made the subject of disciplinary proceedings for failure to comply with police instructions.

24.3.144 It is my view that it would be a retrograde step for such practices to be discontinued. Positive encouragement should be given to officers to employ such humane practices. Not only do they have the potential for minimising a prisoner's isolation; they also give prisoners access to the open air, provide a suitable environment for visits and contact with family and friends and might well enhance relations between prisoners, police and the community.

Recommendation 125:

That in all jurisdictions a screening form be introduced as a routine element in the reception of persons into police custody. The effectiveness of such forms and of procedures adopted with respect to the completion of such should be evaluated in the light of the experience of the use of such forms in other jurisdictions.

Recommendation 126:

That in every case of a person being taken into custody, and immediately before that person is placed in a cell, a screening form should be completed and a risk assessment made by a police officer or such other person, not being a police officer, who is trained and designated as the person responsible for the completion of such forms and the assessment of prisoners. The assessment of a detainee and other procedures relating to the completion of the screening form should be completed with care and thoroughness.

Recommendation 127:

That Police Services should move immediately in negotiation with Aboriginal Health Services and government health and medical agencies to examine the delivery of medical services to persons in police custody. Such examination should include, but not be limited to, the following:

- a. The introduction of a regular medical or nursing presence in all principal watch-houses in capital cities and in such other major centres as have substantial numbers detained;***
- b. In other locations, the establishment of arrangements to have medical practitioners or trained nurses readily available to attend police watch-houses for the purpose of identifying those prisoners who are at risk through illness, injury or self-harm at the time of reception;***
- c. The involvement of Aboriginal Health Services in the provision of health and medical advice, assistance and care with respect to Aboriginal detainees and the funding arrangements necessary***

for them to facilitate their greater involvement;

- d. The establishment of locally based protocols between police, medical and para-medical agencies to facilitate the provision of medical assistance to all persons in police custody where the need arises;*
- e. The establishment of proper systems of liaison between Aboriginal Health Services and police so as to ensure the transfer of information relevant to the health, medical needs and risk status of Aboriginal persons taken into police custody; and*
- f. The development of protocols for the care and management of Aboriginal prisoners at risk, with attention to be given to the specific action to be taken by officers with respect to the management of:*

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- i. intoxicated persons;*
 - ii. persons who are known to suffer from illnesses such as epilepsy, diabetes or heart disease or other serious medical conditions;*
 - iii. persons who make any attempt to harm themselves or who exhibit a tendency to violent, irrational or potentially self-injurious behaviour;*
 - iv. persons with an impaired state of consciousness;*
 - v. angry, aggressive or otherwise disturbed persons;*
 - vi. persons suffering from mental illness;*
 - vii. other serious medical conditions;*
 - viii. persons in possession of, or requiring access to, medication; and*
 - ix. such other persons or situations as agreed.*
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Recommendation 128:

That where persons are held in police watch-houses on behalf of a Corrective Services authority, that authority arrange, in consultation with Police Services, for medical services (and as far as possible other services) to be provided not less adequate than those that are provided in correctional institutions.

Recommendation 129:

That the use of breath analysis equipment to test the blood alcohol levels at the time of reception of persons taken into custody be thoroughly evaluated by Police Services in consultation with Aboriginal Legal Services, Aboriginal Health Services, health departments and relevant agencies.

Recommendation 130:

That:

- a. Protocols be established for the transfer between Police and Corrective Services of information about the physical or mental*

condition of an Aboriginal person which may create or increase the risks of death or injury to that person when in custody;

- b. In developing such protocols, Police Services, Corrective Services and health authorities with Aboriginal Legal Services and Aboriginal Health Services should establish procedures for the transfer of such information and establish necessary safe-guards to protect the rights of privacy and confidentiality of individual prisoners to the extent compatible with adequate care; and*
 - c. Such protocols should be subject to relevant ministerial approval.*
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Recommendation 131:

That where police officers in charge of prisoners acquire information relating to the medical condition of a prisoner, either because they observe that condition or because the information is voluntarily disclosed to them, such information should be recorded where it may be accessed by any other police officer charged with the supervision of that prisoner. Such information should be added to the screening form referred to in Recommendation 126 or filed in association with it.

Recommendation 132:

That:

- a. Police instructions should require that the officer in charge of an outgoing shift draw to the attention of the officer in charge of the incoming shift any information relating to the well being of any prisoner or detainee and, in particular, any medical attention required by any prisoner or detainee;*
 - b. A written check list should be devised setting out those matters which should be addressed, both in writing and orally, at the time of any such handover of shift; and*
 - c. Police services should assess the need for an appropriate form or process of record keeping to be devised to ensure adequate and appropriate notation of such matters.*
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Recommendation 133:

That:

- a. All police officers should receive training at both recruit and in-service levels to enable them to identify persons in distress or at risk of death or injury through illness, injury or self-harm;*
- b. Such training should include information as to the general health status of the Aboriginal population, the dangers and misconceptions associated with intoxication, the dangers associated with detaining unconscious or semi-rousable persons and the specific action to be taken by officers in relation to those matters which are to be the subject of protocols referred to in Recommendation 127;*
- c. In designing and delivering such training programs, custodial authorities should seek the advice and assistance of Aboriginal*

Health Services and Aboriginal Legal Services; and

- d. **Where a police officer or other person is designated or recognised by a police service as being a person whose work is dedicated wholly or substantially to cell guard duties then such person should receive a more intensive and specialised training than would be appropriate for other officers.**
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Recommendation 134:

That police instructions should require that, at all times, police should interact with detainees in a manner which is both humane and courteous. Police authorities should regard it as a serious breach of discipline for an officer to speak to a detainee in a deliberately hurtful or provocative manner.

Recommendation 135:

In no case should a person be transported by police to a watch-house when that person is either unconscious or not easily roused. Such persons must be immediately taken to a hospital or medical practitioner or, if neither is available, to a nurse or other person qualified to assess their health.

Recommendation 136:

That a person found to be unconscious or not easily rousable whilst in a watch-house or cell must be immediately conveyed to a hospital, medical practitioner or a nurse. (Where quicker medical aid can be summoned to the watch-house or cell or there are reasons for believing that movement may be dangerous for the health of the detainee, such medical attendance should be sought.)

Recommendation 137:

That:

- a. **Police instructions and training should require that regular, careful and thorough checks of all detainees in police custody be made;**
- b. **During the first two hours of detention, a detainee should be checked at intervals of not greater than fifteen minutes and that thereafter checks should be conducted at intervals of no greater than one hour;**
- c. **Notwithstanding the provision of electronic surveillance equipment, the monitoring of such persons in the periods described above should at all times be made in person. Where a detainee is awake, the check should involve conversation with that person. Where the person is sleeping the officer checking should ensure that the person is breathing comfortably and is in a safe posture and otherwise appears not to be at risk. Where there is any reason for the inspecting officer to be concerned about the physical or mental condition of a detainee, that person should be woken and checked; and**
- d. **Where any detainee has been identified as, or is suspected to be, a prisoner at risk then the prisoner or detainee should be subject**

to checking which is closer and more frequent than the standard.

Recommendation 138:

That police instructions should require the adequate recording, in relevant journals, of observations and information regarding complaints, requests or behaviour relating to mental or physical health, medical attention offered and/or provided to detainees and any other matters relating to the well being of detainees. Instructions should also require the recording of all cell checks conducted.

Recommendation 139:

The Commission notes recent moves by Police Services to install TV monitoring devices in police cells. The Commission recommends that:

- a. The emphasis in any consideration of proper systems for surveillance of those in custody should be on human interaction rather than on high technology. The psychological impact of the use of such equipment on a detainee must be borne in mind, as should its impact on that person's privacy. It is preferable that police cells be designed to maximise direct visual surveillance. Where such equipment has been installed it should be used only as a monitoring aid and not as a substitute for human interaction between the detainee and his/her custodians; and*
 - b. Police instructions specifically direct that, even where electronic monitoring cameras are installed in police cells, personal cell checks be maintained.*
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Recommendation 140:

That as soon as practicable, all cells should be equipped with an alarm or intercom system which gives direct communication to custodians. This should be pursued as a matter of urgency at those police watch-houses where surveillance resources are limited.

Recommendation 141:

*That no person should be detained in a police cell unless a police officer is in attendance at the watchhouse and is able to perform duties **Of care and supervision** of the detainee. Where a person is detained in a police cell and a police officer is not so available then the watch-house should be attended by a person capable of providing care and supervision of persons detained.*

Recommendation 142:

That the installation and/or use of padded cells in police watch-houses for punitive purposes or for the management of those at risk should be discontinued immediately.

Recommendation 143:

All persons taken into custody, including those persons detained for intoxication, should be provided with a proper meal at regular meal times. The practice operating in some jurisdictions of excluding persons detained for intoxication from being provided with meals should be reviewed as a matter of priority.

Recommendation 144:

That in all cases, unless there are substantial grounds for believing that the well being of the detainee or other persons detained would be prejudiced, an Aboriginal detainee should not be placed alone in a police cell. Wherever possible an Aboriginal detainee should be accommodated with another Aboriginal person. The views of the Aboriginal detainee and such other detainee as may be affected should be sought. Where placement in a cell alone is the only alternative the detainee should thereafter be treated as a person who requires careful surveillance.

Recommendation 145:

That:

- a. *In consultation with Aboriginal communities and their organisations, cell visitor schemes (or schemes serving similar purposes) should be introduced to service police watch-houses wherever practicable;*
 - b. *Where such cell visitor schemes do not presently exist and where there is a need or an expressed interest by Aboriginal persons in the creation of such a scheme, government should undertake negotiations with local Aboriginal groups and organisations towards the establishment of such a scheme. The involvement of the Aboriginal community should be sought in the management and operation of the schemes. Adequate training should be provided to persons participating in such schemes. Governments should ensure that cell visitor schemes receive appropriate funding;*
 - c. *Where police cell visitor schemes are established it should be made clear to police officers performing duties as custodians of those detained in police cells that the operation of the cell visitor scheme does not lessen, to any degree, the duty of care owed by them to detainees; and*
 - d. *Aboriginal participants in cell visitor schemes should be those nominated or approved by appropriate Aboriginal communities and/or organisations as well as by any other person whose approval is required by local practice.*
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Recommendation 146:

That police should take all reasonable steps to both encourage and facilitate the visits by family and friends of persons detained in police custody.

Recommendation 147:

That police instructions should be amended to make it mandatory for police to immediately notify the relatives of a detainee who is regarded as being 'at risk', or who has been transferred to hospital

Recommendation 148:

That whilst there can be little doubt that some police cell accommodation is entirely substandard and must be improved over

time, expenditure on positive initiatives to reduce the number of Aboriginal people in custody discussed elsewhere in this report constitutes a more pressing priority as far as resources are concerned. Where cells of a higher standard are available at no great distance, these may be able to be used. More immediate attention must be given to programs diverting people from custody, to the provision of alternative accommodation to police cells for intoxicated persons, to bail procedures and to proceeding by way of summons or caution rather than by way of arrest. All these initiatives will reduce the call on outmoded cells. The highest priority is to reduce the numbers for whom cell accommodation is required. Where, however, it is determined that new cell accommodation must be provided in areas of high Aboriginal population, the views of the local Aboriginal community and organisations should be taken into account in the design of such accommodation. The design or redesign of any police cell should emphasise and facilitate personal interaction between custodial officers and detainees and between detainees and visitors.

Recommendation 149:

That Police Services should recognise, by appropriate instructions, the need to permit flexible custody arrangements which enable police to grant greater physical freedoms and practical liberties to Aboriginal detainees. The Commission recommends that the instructions acknowledge the fact that in appropriate circumstances it is consistent with the interest of the public and also the well being of detainees to permit some freedom of movement within or outside the confines of watch-houses.

24.4 PRISON CUSTODIAL PRACTICES AND PROCEDURES

24.4.1 I do not propose in this section to discuss all issues relating to imprisonment, but only those that relate to the health and safety of inmates which have been highlighted throughout the report as requiring immediate and special attention. I discuss the significance of the prison experience for Aboriginal prisoners in the following chapter.

PRISON HEALTH SERVICES

The whole health regime of prisoners in every prison system in Australia urgently needs to be re-examined. I have heard the view expressed by correctional authorities ... that inmates should have lesser, not greater, access to health services than the poor and the deprived in the outside world, and I have particularly heard this view expressed in the context of psychiatric services. But if the purpose of a health system is, as I believe, to deliver services where they are most needed, then the case for a general improvement of prison medical and psychiatric services is absolutely overwhelming.⁶⁰

24.4.2 The most prominent area of criticism in relation to those deaths which occurred in prison custody related to the Prison Medical Services (PMS). I do not intend in this section to conduct a general review of the quality of prison medical and psychiatric services such a review would go well beyond the terms of my

Inquiry. Instead, I propose in this section to highlight those specific issues which have been raised by the cases investigated pertaining to the operation and delivery of prison medical and health services to Aboriginal prisoners.

24.4.3 Before proceeding to discuss these issues, I think it appropriate to make some general comments about the provision of medical and health services to those in prison custody. In Chapter 3, I indicated that the duty of care owed by custodians to those in their care extends to the provision of proper medical care and assistance by virtue of the fact that, by being in custody, prisoners are deprived of access to normal medical care. The deaths investigated have highlighted glaring deficiencies, at least in the past, in the provision of this care. It is important that those responsible for the delivery of prison health and medical services recognise and understand the nature and extent of the duty that is owed.

24.4.4 It is generally recognised that the prison population has clearly distinct health needs:

Given that the correctional population is, in the majority, young adult males it is not unreasonable to expect that they would be low users of health services. This, as in most correctional systems, is not the case; institutions tend to be high users of health services.

The correctional population is not a cross-section of the community. They are, in fact, a highly selected group. There will be a higher than average incidence of psychiatric illness and substance abuse. There will also be a significant level of reactive depression and stress associated with their incarceration, especially in the earlier stages of imprisonment.

In addition, the environment of the prison can contribute to a high demand for health services. Boredom, frustration and powerlessness may lead to psychosomatic illness. The closed nature of imprisonment and the violent nature of many prisoners can also contribute to a high incidence of trauma.

An important feature of the demand for health services is that many prisoners will enter the prison system with pre-existing health problems. This, in part, will be a result of neglect and in part a lack of the ability to access health services.⁶¹

The effective delivery of prison health and medical care thus presents a real challenge for prison health administrators.

24.4.5 It is my view, that a comprehensive prison health and medical service will go a long way towards reducing the number of Aboriginal (and non-Aboriginal) deaths in custody. There have been substantial improvements made in this area in recent years. It is important that these efforts continue.

The Quality and Standard of Care

24.4.6 In 1978, the Nagle Royal Commission in New South Wales recommended that:

in all cases the appropriate test for the provision of medical and other health care should be whether it is necessary for the health of the prisoner. Prisoners should

*receive the same medical and health care as a private citizen. The cost of such a provision is no answer to necessity.*⁶²

24.4.7 A recurring theme throughout the hearings conducted, and in the many written submissions received, is the limited resources available in the area of prisoner medical and health care. It is only in recent years that efforts have been made to improve the quality and standard of health care available in our corrections institutions.

24.4.8 It is in relation to those deaths which occurred in the early part of the 1980s that the most serious inadequacies were found in the quality of health care. At the time of Gordon Semmens' death in 1980 and Malcolm Buzzacott's in 1982, both of which occurred at Port Augusta Gaol in South Australia, there was no permanent nursing presence. The only medical service provided was a visit by a local medical practitioner, once per week. Thus, in any emergencies, medical assistance had to be sought from outside the gaol and newly admitted prisoners had to wait until the doctor's weekly visit to be medically assessed. These inadequacies were exacerbated by the lack of proper training of corrections staff in identifying and managing those 'at risk' and in first aid and resuscitation techniques.

24.4.9 The death of Walter Barney at Townsville Prison in 1981 reflects similar inadequacies. At the time of this death, the Prison was serviced by a visiting medical officer who attended twice per week. The deceased was admitted four days before the doctor was next due to visit. The medical examination upon reception was conducted by a fellow prisoner who acted as medical orderly and whose only medical qualification was a First Aid Certificate obtained many years earlier. The orderly formed the opinion that the deceased was suffering from delirium tremens and gave him Melleril, a drug with sedative and anti-psychotic effects. He then assigned the deceased to an observation cell where he was checked only three times per day, due to insufficient staff numbers. This situation had apparently not greatly improved at the time of the deaths of Vincent Ryan in 1985 and Bernard Johnson in 1986. (I record that the Queensland Corrective Services Commission (QCSC) has advised that it intends to substantially upgrade services at Townsville Prison to include a doctor in attendance five half-days a week, a registered nurse on-call 24 hours per day and the appointment of a qualified pharmacist to oversee the prescription and administration of all drugs.)⁶³

24.4.10 Improved access to nursing and medical care has been observed in most locations throughout the country. In Queensland, following Kennedy's review of Corrective Services in 1988, significant changes have been made in the delivery of prisoner health care. The QCSC has advised that it is currently in the process of progressively employing additional qualified nurses on a full and part-time basis to ensure 24 hour medical cover in all Corrections Centres. It also plans to upgrade the physical facilities, develop comprehensive planning strategies for the delivery of medical services and conduct a review of the main specialist services required.⁶⁴

24.4.11 Sweeping changes have also taken place in the Northern Territory. In 1989, the Department of Correctional Services DCS (2) commissioned Stephen Kerr (the Manager of Corrections Health Service, Victoria) to conduct a review of health care delivery in NT prisons. Kerr commented:

Correctional institutions should have health care standards that are equal to those provided to the general public. Such health services should include medical, dental, psychiatric and allied health services and these

need to be provided by suitably qualified professional staff. In addition, such services 'should contribute directly and indirectly to the efforts of the inmates to rehabilitate themselves'.⁶⁵

24.4.12 Following that review, it was decided to restructure the administrative arrangements for the delivery of prison medical services in the Territory and to improve the quality of, and access to, those services. I have been advised that nursing and medical services are now (or are proposed to be) available 24 hours per day, seven days a week at all correctional institutions in the Territory. Additionally, I heard evidence of the substantial improvements effected at Berrimah (Darwin) Prison.

24.4.13 Although improvements have been made in the provision of health services to prisoners in many parts of Australia, there remain serious concerns and ongoing shortcomings. There are still some locations where 24 hour access to medical and nursing care is not available, despite the recommendation to this effect in the Interim Report. The major reason put forward for failure to implement this recommendation has been the significant cost involved. The DCS (2) in Western Australia has estimated that the cost of upgrading nursing facilities to all its corrections facilities would amount to \$1.8m per year. The cost of such a service in Victoria has been estimated at around \$2.5m per year.⁶⁶ The unavailability of medical and nursing care on a 24-hour basis has at least two important implications in terms of prisoner care: first, it may result in a delay in a person being thoroughly assessed at the time of reception (I discuss the importance of this below), and secondly, the responsibility for identifying and managing those 'at risk', is placed on corrections staff who lack sufficient training and experience in this area, and who should not be expected to carry out this task without appropriate professional backing. A number of other shortcomings have also been noted, particularly in the areas of mental health and drug and alcohol services. I deal with these below.

24.4.14 I think it important at this point to refer to the standards for prison medical services as stated in the United Nations' Standard Minimum Rules for Treatment of Prisoners (see particularly Rules 22-26).⁶⁷ The Rules require, *inter alia*, the availability of at least one qualified medical officer (with knowledge of psychiatry) at every institution, appropriate psychiatric services and services 'organised in close relationship to the general health administration of the community'. Whilst the enforceability of these Rules in Australia is questionable (see later discussion in Chapter 36 'Conforming with International Obligations'), it is in my view a matter of serious concern that some prison medical services in this country still do not comply with the guidelines set down.

24.4.15 I raise one final issue relating to the standard of prison health services, and that is, its focus on curative rather than educational and promotional health care. Dr Bockman, Medical Superintendent, Western Australian Department of Corrective Services, in a statement to the Commission, commented:

There are a limited number of resources for health education and preventative medicine for prisoners. Imprisonment theoretically provides an ideal opportunity to assist this undeveloped group in health care. However, in the Prison Health Service we are really only able to react to the acute situation with primary medical attention. Health education would require a much larger resource than we have.⁶⁸

24.4.16 It is my impression that, in other jurisdictions, little is provided in the

way of preventative health care programs to prison inmates. As will be seen in Chapter 31, there has been a shift in recent years in the general community towards preventative and promotional health care. If the standard of prison health care is to truly reflect that available in the general community, it is essential that prison health services be adequately resourced to provide a service which encompasses preventative health care programs. There is potential for good work in this field, and I think it likely that some prison medical staff are making individual efforts to improve the quality of care available. In the report of my inquiry into the death of Gordon Semmens I commented on the efforts of the nursing sisters at the Port Augusta Gaol in this area.

Mental Health Care

24.4.17 A review of those deaths occurring in prisons, particularly from self-inflicted injuries, reveals serious inadequacies in the availability and effectiveness of mental health services for prisoners, and particularly Aboriginal prisoners, in corrections institutions.

24.4.18 Prisoner mental health care appears to be an area which has received little attention and few resources over the years, despite the fact that a high proportion of the prison population suffer from some form of mental or behavioural disorder. The high incidence of suicide and self-inflicted harm in prisons is no doubt a reflection of this fact. (For further discussion on this latter point see earlier in Chapter 23.)

24.4.19 In the case of Malcolm Smith, Commissioner Wootten found serious deficiencies in the care of the deceased who had shown obvious signs of mental disturbance for some time, including attempts at self-injury. He found that the deceased's psychotic behaviour was never seriously assessed, diagnosed or treated, and that no plan was developed to manage or treat him. Similar deficiencies were found in the case of Peter Williams, a death at Grafton Gaol in 1987. At the time of the Darwin Prison death in 1985, the extent of psychiatric services to the prison was a one day visit by a psychiatrist from Adelaide, once every six weeks. That situation has been greatly improved in recent years with the establishment of a forensic unit within the Northern Territory Mental Health Service which provides a regular service to prisons in the Northern Territory.

24.4.20 I have received submissions from a number of corrections, and prison medical authorities across the country highlighting the limited resources available in the area of mental health care services in prisons and supporting the development of a more comprehensive service. The QCSC has expressed concern over the 'enormous need for psychiatric servicing', however, the shortage of psychiatrists in that State was seen as a major obstacle to the provision of such a service.⁶⁹ The Western Australian Department of Corrections has also advised that its efforts to recruit psychiatrists have been unsuccessful because of an under supply of psychiatrists.⁷⁰ It would appear, however, that the problem is far more acute in country areas where access to mental health professionals is even more limited. In the face of these constraints, it has been suggested that alternative means are required to provide the support and treatment required. The QCSC has proposed a number of alternatives which include better training for staff in recognising and managing prisoners 'at risk'; greater use of traditional healers; maximum use of psychologists and other mental health professionals and a more programmed case management approach.⁷¹ A similar approach has been suggested for South Australia by Dr C. Liew, the Director of the Prison Medical Service in that State, who supports the establishment of clearly defined protocols for the screening and management of 'at risk' inmates linked to a clear network of

mental health referral services.⁷²

24.4.21 Whilst availability of such services is important, Dr Liew raises a further issue which needs to be addressed by corrections and prison medical authorities:

Even when the services [psychiatric and psychological] are available, the attitude of the prison management towards the utilisation of these 'soft' services is pivotal in determining whether these supports become accessible to the prisoner. So both availability and accessibility are important factors in designing these services.⁷³

24.4.22 I have commented in Chapter 23, that a great deal of care must be taken by mental health professionals in attempting to diagnose and treat mental illness in the Aboriginal population. As stated by Dr G. P. Smith, Director of Psychiatric Services in the Western Australian Department of Health, in relation to the death of Paul Farmer:

The case of Mr Farmer highlights the problem of psychiatry in relation to the treatment of Aboriginal persons. Without a clear understanding of cultural factors or beliefs, mental illness can be misinterpreted; or alternatively, cultural beliefs can be wrongly diagnosed as mental illness. Psychiatry relies heavily on a cultural understanding of the client?⁴

24.4.23 Such an approach is equally applicable to the provision of mental health services to Aboriginal prisoners. It is my view that those authorities who are responsible for the development and delivery of mental health programs in corrections institutions should pay due regard to this issue. To this end, the expertise of specialist mental health agencies such as the Mental Health Network for Aboriginal people (AMHN)⁷⁵ and Aboriginal Medical Services (AMs) could be utilised more effectively, provided those organisations are given sufficient resources to meet this need. It is important that corrections authorities recognise the very valuable input which organisations such as the AMHN can have in the delivery of prisoner health care.

24.4.24 Whilst some improvements have been made in recent years in this area, it is clear that there is still much room for improvement. One area of particular importance which has been highlighted in many of the submissions received is the lack of appropriate facilities for prisoners who exhibit particularly bizarre behaviour but who are not suffering from any diagnosable mental illness requiring treatment in a secure hospital. I think this is an area to which governments should give particular attention.

Drug and Alcohol Services

24.4.25 I have noted elsewhere that alcohol has played a significant role in many of the deaths investigated. This is equally true of the police and prison custody deaths. Many of those who entered prison had significant problems with alcohol. In very few instances were appropriate treatment facilities or rehabilitation programs available. This is despite the fact that a number of the deceased persons had been imprisoned repeatedly for alcohol-related offences.

24.4.26 Some progress is being made in the area of prison drug and alcohol treatment programs. The National Campaign against Drug Abuse has funded pilot programs of case identification, education and treatment of prisoners with alcohol-related problems. However, as I note later in Chapter 32, there has been no evaluative overview of these programs to date. I understand that in Western

Australia, substance abuse team programs are available to prisoners in metropolitan, and some regional, prisons and that an Aboriginal Alcohol Education course is also available at some locations.⁷⁶

24.4.27 There is some evidence that the level of participation by Aboriginal prisoners in some of these programs is low. In South Australia, for example, I understand that the Prison Drug Unit proposed to appoint an Aboriginal case worker to the Unit in an attempt to increase the number of Aboriginal prisoners using the service. The Sansbury Association in South Australia, in its response to *the Interim Report* of this Commission, has called for Aboriginal counselling for drug and alcohol-related problems to be available to all Aboriginal prisoners in all prisons in South Australia. In the survey conducted by the National Aboriginal and Islander Legal Services Secretariat (NAILSS) of Aboriginal prisoners in New South Wales gaols in 1989, it was found that only 20% of those interviewed had had any contact with prison drug and alcohol counsellors. Over 80% of them had stated that they were under the influence of alcohol and/or other drugs at the time of the commission of their offence. Some 49% of respondents stated that their crime was committed in order to support a drug or alcohol problem. The relatively low use of drug and alcohol counsellors suggests the inadequacy or inappropriateness of the present service offered.⁷⁷ Evidence presented in the course of the Corrective Services Conference held in Sydney emphasises the importance of Aboriginal drug and alcohol counsellors for Aboriginal prisoners. As one participant observed, without an Aboriginal drug and alcohol worker, you cannot expect the prisoners to 'sit there and just spill their guts about really personal and private things'. The New South Wales DCS has recognised the need for culturally appropriate drug and alcohol services for Aboriginal people in its recently released 'Aboriginal policy'. I think this is another area where the expertise of Aboriginal Health and Medical Services could be employed. Indeed, I believe that in some locations, drug and alcohol counsellors employed by Aboriginal Health Services already provide a service to Aboriginal prisoners.

24.4.28 Given that a significant proportion of Aboriginal offenders are imprisoned for alcohol-related offences or have chronic alcohol problems, it is important that prison drug and alcohol services be both accessible, and appropriate, to Aboriginal people. Clearly, prisons provide a good opportunity for intervention in the cycle of drug and alcohol abuse, in the areas of treatment, rehabilitation and preventative education for those with alcohol-related problems. A culturally sensitive approach where drug and alcohol services emphasise personal development and life skills training is needed. Aboriginal drug and alcohol use and misuse cannot be confronted only through non-Aboriginal health and medical approaches but must utilise resources of Aboriginal social and cultural development provided by Aboriginal organisations, communities and individuals. I think that a higher priority should be given to this area of need.

Independence of Prison Health Services

24.4.29 The administrative arrangements which exist for the delivery of health and medical services in prisons vary from one State to another. In some States, the prison medical service is operated quite independently from the corrections authority; in others, it is not. In South Australia, New South Wales and the Australian Capital Territory, prisoner health care is administered by their respective Departments of Health (or equivalent). In Queensland, basic health services are provided to prisoners by staff employed by the QCSC, whilst hospital and specialist services (including psychiatric services) are provided by the Health Department. In Western Australia, prison medical care is provided by the PMS which is under the administrative control of the DCS (2). In Tasmania, prisoner

health care is divided between the Department of Health--who employ medical officers and psychiatric professionals--and the Department of Community Services, who employ the prison nursing staff. A very different arrangement is now operating in both Victoria and the Northern Territory. In both locations, a 'Corrections Health Board' administers prisoner health care. The Board comprises representatives of both Health and Corrections Departments and is responsible for determining policy in relation to prison health services, ensuring appropriate resourcing, resolving major operational problems and determining priorities and strategies. In Victoria, medical and psychiatric staff are employed by the Department of Health, whilst psychology staff are employed by the Office of Corrections. Thus, both agencies share the responsibility of prisoner health care.

24.4.30 *The Interim Report* raised the issue of independence of prison health services, and concluded that it was essential that such services be completely independent of Departments of Corrections (*Interim Report: Recommendation 37*). However, this proposition has not received support from all quarters, and, as noted above, there are still jurisdictions in which the delivery of health care is in the hands of corrections authorities.

24.4.31 The DCS (2) in Western Australia has expressed the view that prison health services must remain under its control so as to ensure that it is able to carry out its 'mandated responsibilities for the management, control and security of all prisoners and the welfare of all prisoners as set out in section 7 of the Prisons Act'.⁷⁸ The issue was also raised in the 1988 Report of the Commission of Review into Corrective Services in Queensland (the Kennedy Commission). Kennedy recommended that the Corrective Services Commission should retain the overall responsibility for the provision of basic health services but that the Health Department should take over the provision of psychiatric counselling and prison hospital services. This recommendation appears to have been based on three factors: geographical considerations; the costs associated with transferring health services to the Health Department and perceived difficulties in establishing 'a suitable commission-client relationship between the two organisations'.⁷⁹

24.4.32 Those who advocate the independence of prison health services highlight the differing, and potentially conflicting, interests of health and custodial authorities. For health professionals, the focus is on prisoner health and welfare: for custodians, security and confinement are the prime considerations. I think the primary bases for adopting the principle of independence of PMSs in the Interim Report were twofold. The first was that of prisoner support and confidence. The Report noted the reluctance of some prisoners to communicate with prison medical staff because of fears about confidentiality being compromised. The second was the issue of professional independence and accountability of the staff of the medical service. Whilst myself and my fellow Commissioners are of the view that these are both important considerations, we are not entirely convinced that they would be resolved by independence of prison medical services. We are therefore not prepared to state positively that complete independence of the DCS (2) should be pursued.

24.4.33 Whatever model is adopted, it is important that those who are in charge of the delivery of prison health services and those who are involved in prison administration should both have as an essential aim, the development of good relations between corrections staff and medical staff and others, such as welfare officers, education officers etc. There should be developed an effective forum for discussion, communication and resolution of issues particularly between medical and correctional services officers. Such a forum should not only be operating at senior management level, but also at the local level. Regular meetings should be held **at** individual institutions between prison management and medical staff to

discuss and attempt to resolve problems that arise at the local level.

Confidentiality

24.4.34 One of the most important practical implications for the non-medical control of prison health services is in the area of confidentiality of medical information. Subject to some exceptions, there are legal and ethical duties on medical practitioners not to disclose information obtained during the course of the professional relationship with their patients. A breach of confidence may give rise to a complaint of professional misconduct or provide grounds for a civil action for damages. In some States departmental guidelines have been issued which reflect this duty of confidence. In South Australia, for example, a prisoner's medical record remains the property of the PMS. Correctional Services officers do not have free access to these records. However, this prohibition is not absolute. Pursuant to departmental instructions, senior corrections staff are entitled to have access to information in a limited number of circumstances. These include: where the prisoner is suffering from AIDS, or an AIDS-related condition, or where the prisoner is at risk of self-injury. In all other circumstances, medical information can only be released with the consent of the prisoner. This information is revealed to other personnel on a strictly 'needs to know' basis. In other States, such as Tasmania, medical records are available to authorised medical staff, in addition to the Director of Corrective Services and the Chief Superintendent of Prisons. I understand in that State, that the Prisons Act provides penalties for the divulging of confidential information to unauthorised persons.

24.4.35 The issue of access by corrections staff to information relevant to a prisoner's health and welfare was one which arose in a number of the cases investigated and one which was a point of contention (and the cause of tension) between medical and corrections staff. In some cases it was found that information about a prisoner's mental or physical state which was vital to ensure their proper care was not passed to corrections staff by medical staff. By way of illustration, in the cases of Malcolm Smith and Tim Murray, corrections officers were unaware of previous attempts at self-injury, information that was known to prison medical staff. Thus, they were given no reason to suspect that the deceased persons were potentially at risk, or that they should be given any special attention. In the case of Max Saunders, it was revealed that corrections staff were unaware of the names of those prisoners who were on the methadone program. Shortly before his death, the deceased was observed by corrections officers having difficulty in walking. The officers assumed (incorrectly) that this incapacity was solely caused by methadone and decided, in any event, that such observable incapacity was not requiring of immediate medical attention. In the case of John Highfold, Commissioner Muirhead found that there was no system for alerting corrections officers to the fact that a prisoner suffered from a medical condition, such as epilepsy or diabetes; conditions which may have spontaneous consequences and which may require specific action.

24.4.36 There will clearly be some circumstances in which corrections officers will need to be informed about certain information relative to a prisoner's physical or mental condition to enable them to properly care for that prisoner. However, what if that information has been obtained by medical staff during the course of their professional relationship with the prisoner, that is, in confidence? I am of the view that a balance must be struck between confidentiality, on the one hand, and the proper care and protection of the individual prisoner on the other. There are the obvious cases where the information is of vital importance to the care of the prisoner, such as where the prisoner is at risk of self-injury, or suffers from some medical condition which constitutes a risk to life and requires special attention. It is

absolutely essential that these matters be resolved between corrections and medical staff. It is not only important that some agreement be reached as to the type of information which should be divulged, but also as regards the categories of persons to whom, and the circumstances in which, such information should be divulged, and any other appropriate safeguards. I think it would also be of benefit if the discussions conducted on this issue involve not only corrections and medical staff but also prisoner interest groups and other interested groups.

24.4.37 In New South Wales, I believe that the DCS (2) proposes to convene a Committee of Inquiry to consider the question of confidentiality of medical information within prisons. In discussions with the Commission, the Director of the Prison Medical Service, Dr McLeod, has stated that it is his view that the guiding principle on the release of information will operate on a 'needs to know' basis.⁵⁰ I think that this is a very desirable approach, but I would like to emphasise that it is essential that clear guidelines be set down so that each agency is fully informed about what is required of them.

Systems for Communication

24.4.38 A major deficiency noted in the cases investigated was the failure, or absence, of a system for communication of information relevant to the care of a prisoner, not only between medical and corrections staff (and I include here, communications from corrections to medical staff) but also between corrections staff. I mention three cases by way of illustration. In the case of Gordon Semmens, the officer in charge of the cell block in which the deceased was accommodated was unaware that, two days earlier, the deceased had been taken to a doctor who had assessed him as slightly concussed and who had prescribed medication for him; that he had been involved in a fight and suffered a blow to the head, prior to being taken into custody, and that he had been complaining of being ill. He had no basis for serious concern when he was called to the deceased's cell on the night of his death by another prisoner who complained that the deceased was shouting and banging the walls. At the time, there was no system in place for the recording of information like this or any other written instructions governing the passage of information between shifts. The case of Peter Williams illustrates what Commissioner Wootten described as a 'deplorable lack of co-operation between medical and custodial staff in relation to persons who are potentially suicidal. In that case, the deceased was a known suicide risk and had been treated as such by prison medical staff for some weeks before his death. Four days after the deceased was last diagnosed by medical staff as a suicide risk, he was transferred to a corrections institution whose facilities were totally inadequate for treating a prisoner such as the deceased. The superintendent of the institution was given to understand that the deceased had been cleared for return to a normal gaol environment and was given no basis for knowing that the deceased should be specially treated. On the night before his death, he was placed in an observation cell in which a prisoner had hanged himself some months before, but no steps had been taken since that time to render the cell safe. The deceased was found hanging the following morning by an exposed piece of electrical cord.

24.4.39 In the case of Malcolm Smith, serious deficiencies were found in the systems for communication of information within the PMS itself. Commissioner Wootten commented:

Quite apart from the inadequacy of psychiatric resources, which meant that Malcolm's extraordinary pattern of psychotic behaviour and self-injury over more than seven months was never seriously assessed, diagnosed and

treated, any lingering chance of averting his death was destroyed by the lack of efficient systems of record keeping and communication within the Prison Medical Service. During the fateful last month of Malcolm's life, critical observations and recommendations were made and committed to paper, but were never acted on and in some cases did not even reach those who might have acted on them.⁸¹

24.4.40 In a number of cases, myself and other Commissioners have highlighted the need for formal and reliable systems to be put into place to ensure that information relevant to a prisoner's care and protection is communicated to those who need to know. There must be mechanisms in place to ensure that information flows freely between those corrections staff who are involved in the day-to-day care of prisoners, senior corrections staff and medical staff. There is a need for clear written instructions to be provided to all staff, both corrections and medical, setting out their individual duties and responsibilities in this regard. The keeping of detailed records is equally important. This is particularly important in the area of suicide prevention. I mention the case of the man who died at Darwin Prison in which I suggested guidelines for the communication and recording of information relevant to prisoners identified as 'at risk'.

24.4.41 I have also had the opportunity of reading an instruction issued by the British Home Office in 1989 on suicide prevention in British Prisons. The instruction sets out very clearly and concisely the responsibilities of all staff members (both medical and custodial) regarding the identification and management of prisoners at risk through self-harm. It emphasises the important role of those corrections staff who are involved in the day-to-day care of prisoners in suicide prevention. They are required to carefully observe prisoners, to record anything of significance and refer those who exhibit any sign of being potentially at risk to senior corrections and/or medical staff. Additionally, they are instructed to provide support and maximum contact to those at risk and assist in the prisoner's management. Those in charge of cell blocks have the specific responsibility of ensuring that the relevant information is communicated between shifts and that the instructions of medical staff are recorded, understood by junior staff and carried out. The instruction also details the responsibilities of prison management to ensure that all staff understand their responsibilities, to carry out reviews regarding the operation of the instruction and to provide appropriate training. Medical and nursing staff are instructed to provide clear written instructions to corrections staff as to the management of those at risk and to ensure they understand them. I think that this instruction could serve as a model for other corrections institutions.

24.4.42 I wish to emphasise again at this point that good instructions are simply not enough. Training, both at recruit level and on the job, is required to ensure that all staff understand their responsibilities and act upon them.

Improving Access to Prison Health Services for Aboriginal Prisoners

24.4.43 It appears to be generally accepted that the prison population is a high health risk group. Many of those entering custody suffer from chronic ill health, which is very often associated with alcohol or drug dependence. As I noted in the previous chapter, for Aboriginal prisoners this risk is considerable. How well then do prison health services serve the Aboriginal prison population?

24.4.44 There is actually-very little empirical data relating to the utilisation of prison medical and health services by Aboriginal prisoners. A possible reason for this situation may be that no statistics are kept by the PMSs on Aboriginal prisoners. I know this to be the case in at least one State, South Australia. I think

this is an unfortunate state of affairs. As seen in the previous chapter, the spectrum of disease is different for the Aboriginal population compared with the non-Aboriginal population. Unless such statistics are maintained it is not possible to develop services which adequately reflect the needs of Aboriginal prisoners. It seems extraordinary that this is the case, given the high proportion of Aboriginal persons detained in prisons in this country.

24.4.45 Whilst little data is available in this area, a clear pattern seems to have emerged of under-utilisation or inadequate utilisation of prison medical, health and other services by Aboriginal prisoners. This situation mirrors the position of mainstream medical and health services by some Aboriginal people outside the prison system which I deal with in Chapter 31. A study conducted by the New South Wales DCS (2) in 1981 reported that fewer Aboriginal prisoners (as compared with non-Aboriginal prisoners) reported contact with various professional personnel in the prison system including doctors and psychologists.⁸² Dr C. Liew, in a submission to the Commission commented:

It is our experience that Aboriginal prisoners in general, tend to be less communicative about their health and emotional problems, and are less likely to make use of health and support services available to them in prison. They are also more likely to be less compliant to the treatment recommended to them. This is despite the fact that they often have multiple health problems.

He goes on to say:

Unless health care staff are aware of and understand these operative factors, it is easy to dismiss the situation simply as one of maladaptive behaviour, or simply the individual's indifference for his own health. As a consequence, the outstanding health problems would not be properly dealt with leading to an even greater sense of alienation in the individual concerned.⁸³

24.4.46 Clearly then, the provision of medical and health services which are attractive to, and can positively benefit, Aboriginal prisoners and thus have any impact on reducing the number of deaths in custody is a real challenge for any prison medical service.

24.4.47 There is a growing recognition by those responsible for the provision of prison health services of the need to develop initiatives to increase the accessibility and appropriateness of such services for Aboriginal prisoners. Many of the submissions received have highlighted this as an area where some progress has been made but where much more needs to be done. I mention some of these matters below.

Involvement of Aboriginal Medical Services

24.4.48 I mentioned earlier in relation to the delivery of medical services to those in police custody that many submissions have been received by the Commission supporting greater involvement of community based AMS in the delivery of primary health care to those in police custody. Similar submissions have been received regarding the involvement of such services in the delivery of health care to Aboriginal persons in prisons. This is an area in which some progress has been made in many States, although the arrangements vary considerably from one location to another. In Queensland, the Aboriginal and Islander Community Health Service (AICHS) attends at three Corrections centres

in the Brisbane metropolitan area, and the QCSC advises that it intends to progressively expand the presence of such services to all corrections facilities.⁸⁴ In New South Wales, a doctor from the AMS at Redfern attends the major metropolitan prisons on a regular (although infrequent) basis, and a drug and alcohol counsellor with the Service conducts visits on request. In the Northern Territory, an informal arrangement exists between the Central Australian Aboriginal Congress in Alice Springs and the Department of Correctional Services whereby doctors from the Congress are given access to their patients at Alice Springs Gaol on a needs basis. The DCS (2) in Western Australia has advised that, in Broome, the local AMS also undertakes the provision of medical services to prisoners at Broome Regional Prison. It would appear that most of these arrangements are of an informal nature only. In some States, this lack of formality has created difficulties. One doctor employed by an AMS in a metropolitan area informed the Commission that his access to prisoners depended on the attitude of the prison officer in charge at the time of the visit. Others felt powerless in terms of having no say in the ongoing care or management of prisoners who they have treated.

24.4.49 There has been a general expression of interest by those authorities responsible for the delivery of prison health services to increased involvement by AMSs in prison health care. However, my impression is that, whilst acknowledging the valuable contribution which these services could make, there has been little positive efforts made by the authorities to encourage the active involvement of the services. Where efforts have been made, one of the major obstacles to further involvement of the Medical Services has been the limited amount of resources available to extend their operations beyond current limits. In Western Australia, discussions were held between the DCS (2) and the Perth AMS with a view to the Service providing limited sessional services to metropolitan prisons. This proposal did not eventuate, however, because of lack of sufficient resources.⁸⁵

24.4.50 In my view, Aboriginal Medical and Health Services can make a very valuable contribution to the care of Aboriginal prisoners. The doctors, nurses, health workers and other professional staff who work with these services have a particular knowledge and experience of endemic Aboriginal health problems and perhaps more refined skills in communication than might be expected of those health professionals in the wider community. Given the current state of under-utilisation of prison medical services generally by Aboriginal people and their tendency not to make complaints about their health or actively seek out medical assistance, I think that much greater use could be made of their expertise. I think that Aboriginal Health Workers could play a particularly important role, quite apart from the doctors and other professionals. During my discussions in the town of Port Augusta late in 1988, I was told that there was an informal arrangement operating between the local Aboriginal Health Service and the Port Augusta Gaol, whereby health workers would be called upon by medical staff or the prison management to assist with Aboriginal prisoners. The involvement of the health workers was described to me as 'invaluable'. I have also been told of other areas of involvement of AMSs in the delivery of health care to Aboriginal inmates, such as health education programs and drug and alcohol counselling. There are, therefore, many areas in which AMSs can play an active role in the delivery of medical and health care to Aboriginal prisoners. Clearly, if they are to play a greater role, they will need to be provided with sufficient resources to enable them to extend their services to those in custody. Additionally, I think it is important that more formal relationships be developed between Aboriginal Health Services and prison authorities in recognition of the valuable input which such organisations can have in the delivery of prisoner health care.

Training of Prison Medical Staff in Aboriginal Culture and Health Issues

24.4.51 I intend to deal in a later chapter with the issue of training of medical and health care providers in the specific health needs of the Aboriginal population and in Aboriginal culture; however, I would like here to make some specific comments on this issue as it relates to staff of the PMS.

24.4.52 It would appear that in no jurisdiction do staff of the PMS receive any specific training on Aboriginal health or cultural issues, even in those areas with a high Aboriginal prison population. By contrast, many police and corrections authorities throughout the country have recognised the importance of training at least in the area of Aboriginal culture and life style for their officers and have included this as a component in recruit training courses. I discuss these initiatives in the chapters which follow. It seems to me that it is equally important for medical and health professionals to receive training in this area. As I stated earlier, it is clear that the pattern of Aboriginal mortality and morbidity is different from that of the non-Aboriginal population. Additionally, the fact that the prison health services already available are under-utilised by Aboriginal prisoners suggests that the system needs to be more sensitive to the specific needs of Aboriginal people in the provision of health care. Developing an understanding of these issues can only facilitate greater participation of Aboriginal prisoners in the services, and, consequently, result in an improvement in their health status.

24.4.53 In South Australia, I record that the Director of the Prison Medical Service has expressed interest in his staff receiving some orientation in Aboriginal cultural matters.⁸⁶ Indeed, I mention one initiative which has been suggested in that State which would involve an exchange of staff between the PMS and the AMS so that PMS staff could gain some practical experience in dealing with Aboriginal patients and AMS would gain experience in prisoner health care. I think that an initiative such as this has great potential in terms of improving the delivery of health services to certainly not new. In Katherine, Northern Territory, the hospital uses the local Aboriginal health service for orientation of nurses, medical students and doctors, to give them some practical understanding of the treatment of Aboriginal people.

24.4.54 In making the suggestion that greater efforts should be made to train medical staff in Aboriginal health issues, I do not wish to imply that there has been an unremitting failure by prison medical staff to display sensitivity to the cultural needs of Aboriginal prisoners. This is not so; but more remains to be done.

The Use of Traditional 'Healers'

24.4.53 I mention that in at least two States, corrections and prison medical staff have turned to members of the Aboriginal community outside the prison to assist them in dealing with Aboriginal prisoners who do not respond to western medicine techniques. In the case of Kim Polak, Commissioner O'Dea refers to the use of traditional Aboriginal healers or 'mabarn' men to assist in the care of Aboriginal prisoners. In fact, the deceased's prison records indicated that on at least two occasions when in prison custody he was treated successfully by mabarn men.

24.4.56 In its submission to the Commission, the QCSC has also indicated its support for the involvement of prominent members of the Aboriginal community to assist with Aboriginal prisoners who show signs of distress or psychological disturbance. It was submitted:

Both the medical system and our own system of corrections need to be able to recognise the traditional support networks available in the community. We know

and often call upon elders in the community to assist us. [T]raditional beliefs and practices hold great sway. These have been a strength and support to the community. Our systems for social welfare and even of medicine need to be capable of incorporating these practices and beliefs.

24.4.57 The QCSC went on to recommend that formal accreditation and salaries be given to elders and other individuals prominent in Aboriginal communities to enable them to continue to administer to their communities needs both in the community itself and also at Correctional Centres and police watch-houses.⁸⁷

24.4.58 In my view, these are very positive initiatives and should be encouraged. The recognition of the importance of traditional support networks and values in this way presents as a logical strategy for the sensitive management of inmates.

Interpreters

24.4.59 It is clear that for many Aboriginal people (like many other Australians), the English language is not their primary language. This is an important consideration in the provision of medical treatment. The inability to communicate in these circumstances can have very serious implications in terms of mis-diagnosis and incorrect treatment. But additionally, if the patient does not understand the nature of the condition or what is expected in terms of treatment and recovery, he/she cannot be expected to comply fully with medical instructions.

24.4.60 One doctor, employed by an Aboriginal Health Service, described the problem in this way:

*Poor information flow ... contributes to poor compliance, failure to attend follow-up and to the lateness and reluctance of [Aboriginal people] presenting with illness. Every week I have to explain to patients who have been seen at hospitals their treatments, investigations, operations etc. and often they have really very little understanding of these things. Often they have unnecessary fears about what is going to happen to them and they fail to get treatment as a result.*⁸⁸

24.4.61 From my own inquiries, I have gained the impression that the resort to interpreters has been done in an ad hoc way and generally only in circumstances where communication is an obvious problem. In many instances, a person may appear to have no difficulty in speaking English, but may have difficulty understanding what it being said to them. I think that it is important that this problem be recognised and that greater efforts be made to utilise interpreters to facilitate better communication and understanding.

Employment of Aboriginal Staff

24.4.62 Few, if any, PMSs employ Aboriginal staff. It is my view, that the employment of Aboriginal persons, particularly as nurses and health workers, would greatly enhance the acceptability of PMSs for Aboriginal prisoners. This is an area requiring specific attention.

RECEPTION PROCEDURES

24.4.63 I have noted earlier that it is generally accepted that the prison population is a high risk group, both from illness and disease and from self-injury. It

seems clear that the general state of health of Aboriginal prisoners is likely to be lower than the general body of prisoners. A thorough medical assessment of a prisoner at the time of reception into a prison is therefore extremely important to determine those who are at risk, whether through physical illness or self-injury. Indeed, the identification of persons at risk through self-injury during the reception process is particularly crucial because of the generally accepted principle that prisoners are especially vulnerable during the period immediately after their initial reception. Thus the swiftness and thoroughness with which reception assessments can be performed is critical.

24.4.64 Efforts have been made by corrections authorities in a number of locations to improve reception procedures. In most jurisdictions now, the medical assessment of a prisoner by a qualified medical practitioner at the time of, or shortly after, reception is a standard requirement. In those cases where medical screening is delayed, the prisoner is often assessed by a qualified nurse. Prisoner Screening or reception forms have been developed in most places to standardise the process.

24.4.65 In the Northern Territory, reception procedures have been structured so that all prisoners can be medically examined by a medical practitioner as part of the initial reception process at any time during the day or night, including weekends. Additionally, the prisoner is also assessed by a double certificate nurse (that is, medically and psychiatrically trained). Arrangements have also been made to have a mental health professional on call in case a person requires psychiatric assessment.

24.4.66 In Victoria, reception procedures have been structured so as to include an examination by a medical practitioner, a welfare officer and a psychiatric nurse. The involvement of a psychiatrically trained nurse is, from Professor Richard Harding's experience, 'the key component'⁸⁹ in the reception process. An additional feature of the Victorian reception process is the involvement of an Aboriginal Welfare Officer, employed by the Office of Corrections for all new Aboriginal prisoner admissions. I understand that it is the job of the welfare officer to interview the prisoner and advise on his placement and management. I am not aware of any similar procedure operating in other States although I record that the Director of the Department of Correctional Services in Northern Territory agreed that Aboriginal officers would assist in reception procedures for Aboriginal prisoners.

24.4.67 It is my view that prisoner assessment upon reception should be provided, where possible, by a medical practitioner. Where this is not possible immediately, the prisoner should be examined by a medical practitioner or trained nurse within 24 hours of reception. In those circumstances, where the assessment is conducted by a nurse, a doctor should also perform an examination within 72 hours. Psychiatric assistance should be readily available in the event that a prisoner requires such assessment.

24.4.68 As an additional measure, it is my view that the involvement of Aboriginal liaison or welfare officers may be of definite benefit during the reception process, including the medical assessment, given that the quality and ease of communication are essential components of the process.

Medical Records

24.4.69 The adequate assessment of a prisoner is highly dependant upon the information available at the time of assessment. Even the most thorough reception procedure is limited in the amount of time available for direct contact with the prisoner. Ambiguous signs may take on a clearer significance if placed in the

context of a history of medical or psychiatric illness. Access to a prisoner's medical history records, both from the prison medical service and from outside health agencies would, therefore, be of potentially enormous benefit at the time of assessment. However, access to records from outside agencies by corrections or prison medical staff would, in most instances, be limited by ethical considerations.

24.4.70 The man who died at the Darwin Prison had an established history of psychiatric illness. He had been treated at a major metropolitan hospital for depression, and his hospital file recorded a previous suicide attempt and the prescription of medication pending a further psychiatric consultation. The file was available to the prison's visiting medical officer, but he did not call for it. In the context of the medical officer's own examination of the deceased and other information conveyed by corrections staff to him, the information contained in the hospital file would have been important in the evaluation and treatment of the deceased who subsequently hanged himself. Whilst access to his hospital file presented no ethical problems for the medical officer in this case (at the time he was on the staff of the hospital and entitled to access to all clinical records), it is clear that access to such records will, in the majority of cases, prove problematic.

24.4.71 It seems to me that access to a prisoner's medical records, without their consent, is an issue which requires a balance to be struck between a private right and the public interest. The private right of the prisoner in maintaining the confidentiality of such information must be balanced against the public interest in corrections authorities being granted access to medical information which directly affects their ability to adequately discharge their duties towards the prisoner. This public duty of care may extend beyond the provision of adequate medical attention to the individual prisoner concerned. If a particular prisoner has a medical condition pre-disposing him or her to epileptic seizures or sudden outbursts of violence, such matter would potentially affect the well-being of other prisoners and prison officers. They would properly be taken into account in assigning work to that prisoner and in the general matters of classification and supervision.

24.4.72 The release of confidential medical information may, of course, be most simply addressed by requesting a written consent from the prisoner for the release of medical information. Indeed, this appears to be the current practice operating in most jurisdictions. However, a prisoner may decline to give his or her consent for the release of the information or decline themselves to volunteer the information. This obviously poses difficulties for corrective services and prison medical authorities.

24.4.73 I have been informed of an arrangement which has been reached between the Northern Territory Department of Correctional Service and the Department of Health and Community Services to facilitate access to information contained in records of the Darwin and Alice Springs Hospitals at the time of a prisoner's reception. Naturally, there were ethical concerns about releasing information on a patient to prison authorities. Agreement was reached on the supply of information on a 'need to know' basis. A list of prisoners is provided to the Department of Health and Community Services and this is immediately checked against the Darwin and Alice Springs Hospital records which are held on computer. If the prisoner has some life-threatening illness or has a history of self-injury, this information is flagged and the prison authorities alerted. In my view, this arrangement is both sensible and justifiable. I am aware, however, that not all States have public hospital records stored and linked up on computer. Obviously, the task of contacting individual public hospitals to illicit medical information for each prisoner on reception would be a time consuming and unjustifiable exercise. I do not think it appropriate for me to make any specific recommendation on this matter because I feel it is one which must be resolved between the various agencies. It is an issue which I think is one of great importance, and requires

definitive resolution for the proper guidance of health and correctional administrators.

24.4.74 One limitation of the Northern Territory arrangement, however, is that it only operates in relation to records held by public hospitals, and not those held by other health agencies such as Aboriginal health services. I think that this is a problem of particular acuteness given the predominant number of Aboriginal prisoners within the custodial system, many of whom come from remote communities. One possible solution may be for medical staff to make direct telephone contact with local health services at the time of reception to inquire as to whether the prisoner has any significant health risks. I believe that in some locations this is currently being done. It is an area which should be further explored by prison medical and Aboriginal health agencies. All that can be done to extend the medical background and coverage of Aboriginal prisoners must be explored. The greater involvement of Aboriginal health services in the delivery of prisoner health care would no doubt assist to this end.

24.4.75 I turn now to information already held within the prison system, particularly in prison medical service files. These are an obvious source of information to assist in the assessment process. In a number of cases investigated it was noted that there were delays in the physical transmission of a prisoner's medical file from one facility to another and deficiencies in the maintenance of medical records generally. It is important that systems be put in place to ensure that medical information contained in a prisoner's medical file which indicates that the prisoner has a significant health problem or otherwise requires special attention is available at the time of reception. I am advised that the DCS (2) in Western Australia has recently developed a computer based system (known as 'Medalert') which is designed to maintain concise medical information on prisoners and facilitate the prompt communication of important medical information upon a prisoner's transfer between prisons or upon re-entry of a person into the prison system. It allows for the recording of medical warnings such as 'asthma', 'epilepsy', 'psychiatric' or 'cardiac'. The severity of the condition is indicated by an 'urgency flag' which requires either advising the medical officer immediately, the next day or not at all (if the medical condition is not serious). The DCS (2) is currently involved in extending Medalert to all corrections institutions in Western Australia. In the meantime, I understand that the practice is for nursing staff to fax or convey by telephone relevant medical information to the institution to which a prisoner is being transferred. I think these are very sensible arrangements.

TRAINING

24.4.76 I have referred in section 24.3 to the need for recruit and in-service training of police officers to better enable them to identify those at risk of death or harm through illness, injury or self-destructive behaviour. The comments I have made in that section are equally applicable to the training of corrections officers, although some areas, such as training on the dangers associated with intoxication would not be as relevant to corrections officers as it is to the police. I note that most corrections officer recruit training courses now contain a module on suicide prevention. It is important, however, that the skills learned during recruit training be updated during on-the-job training programs. Professor Richard Harding has suggested that training for corrections officers in identifying those at risk would be more effective if carried out on the job when officers have had direct experience of prisons and prisoners. He describes it as an area 'where one needs to do the job to be trained effectively, whilst one needs to be trained effectively to do the job'.⁹⁰

24.4.77 As I have earlier recommended, it is important that training on the vulnerabilities of Aboriginal prisoners and on suicide prevention should involve

positive input from Aboriginal medical services.

MANAGEMENT OF THOSE AT RISK

24.4.78 I have discussed earlier the very real need for proper training of officers in the identification of those 'at risk' through self-harm. However, once a person is identified as at risk, the question arises as to what is the appropriate response in dealing with these prisoners. Almost all those cases involving death by self-inflicted injury in prisons have highlighted the need for better systems of response to those identified as 'at risk'. In some cases, officers lacked adequate training in crisis intervention and management of those persons who posed an immediate threat to themselves and others. In those cases where the prisoner did not pose a threat in the immediate sense, but had previously been identified as 'at risk', there was shown to be a need for a more co-ordinated approach between medical and corrections staff towards the management of such persons. The cases which illustrated this latter point, plainly showed a breakdown in the system (and in some cases, no system) of communication between medical and corrections staff. All cases highlight the inappropriateness of leaving the management of persons at risk in the hands of persons with no training or experience in dealing with such persons and the importance of providing a system which ensures prompt access by prison staff to appropriate medical and psychiatric support services.

Prisoners Posing an Immediate Threat

24.4.79 There is no doubt that prisoners whose behaviour constitutes an immediate threat to themselves or others pose very difficult problems for prison management. In dealing with such persons, a balance must be struck between factors relevant to restoration of the status quo (the immediate removal of the threat) and ensuring that the measures taken are not unduly repressive.

24.4.80 There were four cases in which the deceased posed an immediate and serious threat to himself and others which required immediate intervention. These were the cases of Paul Farmer, Graham Walley, Charles Michael and Robert Walker. In all four cases, the deaths might well have been prevented had the officers involved had some training in the management of such persons. The cases of Paul Farmer and Graham Walley were strikingly similar. In both cases, the deceased had earlier behaved in a violent and aggressive manner, barricaded himself in a cell and threatened to kill himself. The situation was diffused by staff, in both cases, skilfully. The primary level response in one case (Farmer) was to place the deceased in an observation cell. The observation cell was located in a section of the prison which was isolated from other cell areas. There was no alarm or intercom system to enable a prisoner locked in the cell to communicate with other parts of the prison. The requirement for surveillance at that time was for prisoner's in observation to be checked at irregular intervals, although no minimum interval was stated. The deceased was found dead, having cut his throat with a razor (concealed within the waistband of his trousers and not detected during a strip search), within three hours of his being placed in the cell. He was checked on only three occasions during the intervening period. In the case of Graham Walley, the management response was to confine the deceased to his cell and subject him to 'checks at thirty minute intervals. He was found hanging by his belt within one and a half hours of being placed in his cell.

24.4.81 In both, cases it is clear that the officers involved were unaware of the risks associated with leaving a person exhibiting such behaviour without proper supervision. It is essential that officers be trained to recognise and identify those at risk, and that they be given clear instructions as to the procedures to be adopted

once a person is so identified. It should be a requirement that any person who, by their behaviour; poses a risk to themselves or others should be constantly supervised until a medical or psychiatric opinion is sought as to their condition and appropriate management.

24.4.82 It may be appropriate to use an observation type cell in such circumstances, but such a measure should only be taken in the short term. By observation cell, I mean one whose fixtures and fittings have been modified to reduce the opportunity for self-injury and, at least in some cases, so situated as to allow more frequent observation than other cells. As a practical measure it is important that the person be searched and items such as belts, shoelaces etc. removed. This must be done in a very sensitive and careful way so as not to add to the person's distress. In Western Australia, I understand that persons who attempt to injure themselves are isolated, searched, and issued with new clothing. This is a sensible approach.

24.4.83 I note that the use of observation or isolation cells is not universally accepted as an appropriate response to persons identified as at risk. In a recent review of literature conducted by Lloyd in the United Kingdom on 'Suicide and Self-Injury in Prison', the author makes the following comments regarding the use of such cells:

- that research has generally shown that suicide is more common in segregation or isolation cells;
- that commentators disagree as to the use of isolation for suicidal prisoners but that the majority reject the use of any form of isolation for potentially suicidal inmates;
- most commentators believe that the prisoner should be housed in ward or dormitory type accommodation under intensive supervision; and finally
- if isolation is recommended, commentators stress the importance of interactive supervision rather than passive observation.⁹¹

24.4.84 I think the final point is an extremely important one. It must be soul destroying for a person who is already in a state of extreme distress to be placed in a cell, cut off from all human contact. Human interaction must be recognised as one of the most powerful tools to reduce deaths. In my view, persons who show signs of emotional distress or disturbance should not be left alone. Attempts should be made to seek immediate medical (or psychiatric) assessment. Until a medical opinion indicates to the contrary, the person should be held under constant visual supervision with as much personal interaction as is possible.

24.4.85 I raise one further point in relation to the use of observation cells. The proper supervision of Paul Farmer was made almost impossible as a result of the geographical isolation of the cell into which he was placed and staff shortages which meant that there was no staff member in the vicinity of the cell. There have been other cases also in which it was found that the system for surveillance of prisoners held in observation cells was clearly deplorable. It is almost inconceivable that a person who is deemed to be sufficiently at risk to require placement in a special cell should not receive special attention or have the means for attracting attention to him/herself. Such a state of affairs is completely unacceptable. I understand that in some correctional institutions, observation cells have been located and designed in such a way that the person who is detained therein can be kept under almost constant visual surveillance.

24.4.86 I have earlier stated, and I stress again, that I do not think that custodial officers are in a position to differentiate between genuine suicide attempts and those that are not. In the Darwin Prison case, I stated:

Prison administrators, prison officers, prison medical staff

other than doctors cannot possibly be expected to be able to reach a decision that a person is in the category either of an attempter or one who might consummate suicide, except perhaps in the most obvious of cases. What they are required to do is observe behaviour which might indicate risk, record and report it and to act on the basis of possibilities of risk, rather than on the basis of a diagnosis which they are not equipped to make and should not be called on to make.⁹²

24.4.87 I note that in a recent survey conducted by Dr T.O. Clark of suicides in New South Wales prisons it was recommended by the author that when prison staff are alerted to a suicide risk, the prisoner should be referred to a psychiatrist for assessment.⁹³ Professor Richard Harding in his review of suicides and suicide attempts in Victorian corrections institutions has taken that suggestion a step further. He advocates the introduction of a system whereby a professional staff member (possibly a psychologist) be identified as having the responsibility, once a prisoner has been identified as 'at risk', of developing a case management plan for that prisoner and co-ordinating its implementation.⁹⁴ In my view, this is a proposal worthy of consideration.

Long-Term Management of Prisoners At Risk

24.4.88 I have discussed earlier, the need for better systems of communication between corrections officers and medical staff to facilitate the flow of information relevant to the health, welfare and safety of inmates. The cases also indicate the need for a more co-ordinated approach between medical, psychiatric, correctional and other staff involved in the care of inmates regarding the management of those prisoners who do not pose a threat to themselves or others in the immediate sense, but who have been previously identified as 'at risk' and therefore require a special management regime. Commissioner Wootten has commented:

For 15 months [the Prison Medical Service] had been aware from its own investigations, superficial as they were, that Malcolm was suffering acute psychotic episodes in which he was a danger to himself. Yet no attempt was made to develop a plan of management or treatment. Each episode was treated separately. A proper plan of management of a prisoner in such a condition should have not only laid down some strategy for the medical staff, but should have involved the prison officers responsible for his day to day security, and others like the occupational therapist working with him. These people could have contributed their observations, and, if alerted to the dangers, could have been on the look-out for indications of deterioration and for situations of risk, or of opportunity for self-injury.⁹⁵

24.4.89 As noted above, Professor Harding has suggested the introduction of 'Case Management Plans' to address this problem with the appointment of a member of staff to develop and co-ordinate the implementation of such plans. I think that the role that corrections officers can play in the management of those at risk should not be overlooked. Of greater importance, however, is the role that members of the inmate's family could play. As I will discuss further in Chapter 25, allegiance to the family has particular significance for Aboriginal people. It is thus important that efforts be made to encourage the involvement of the families of

Aboriginal prisoners in the management of those at risk.

Recommendation 150:

That the health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public. Services provided to inmates of correctional institutions should include medical, dental, mental health, drug and alcohol services provided either within the correctional institution or made available by ready access to community facilities and services. Health services provided within correctional institutions should be adequately resourced and be staffed by appropriately qualified and competent personnel. Such services should be both accessible and appropriate to Aboriginal prisoners. Correctional institutions should provide 24 hour a day access to medical practitioners and nursing staff who are either available on the premises, or on call.

Recommendation 151:

That, wherever possible, Aboriginal prisoners or detainees requiring psychiatric assessment or treatment should be referred to a psychiatrist with knowledge and experience of Aboriginal persons. The Commission recognises that there are limited numbers of psychiatrists with such experience. The Commission notes that, in many instances, medical practitioners who are or have been employed by Aboriginal Health Services are not specialists in psychiatry, but have experience and knowledge which would benefit inmates requiring psychiatric assessment or care.

Recommendation 152:

That Corrective Services in conjunction with Aboriginal Health Services and such other bodies as may be appropriate should review the provision of health services to Aboriginal prisoners in correctional institutions and have regard to, and report upon, the following matters together with other matters thought appropriate:

- a. The standard of general and mental health care available to Aboriginal prisoners in each correctional institution;*
- b. The extent to which services provided are culturally appropriate for and are used by Aboriginal inmates. Particular attention should be given to drug and alcohol treatment, rehabilitative and preventative education and counselling programs for Aboriginal prisoners. Such programs should be provided, where possible, by Aboriginal people;*
- c. The involvement of Aboriginal Health Services in the provision of general and mental health care to Aboriginal prisoners;*
- d. The development of appropriate facilities for the behaviourally disturbed;*
- e. The exchange of relevant information between prison medical staff and external health and medical agencies,' including Aboriginal Health Services, as to risk factors in the detention of any Aboriginal inmate, and as to the protection of the rights of privacy and confidentiality of such inmates so far as is consistent with their proper care;*

- f. The establishment of detailed guidelines governing the exchange of information between prison medical staff, corrections officers and corrections administrators with respect to the health and safety of prisoners. Such guidelines must recognise both the rights of prisoners to confidentiality and privacy and the responsibilities of corrections officers for the informed care of prisoners. Such guidelines must also be public and be available to prisoners; and**
- g. The development of protocols detailing the specific action to be taken by officers with respect to the care and management of:**
 - i. persons identified at the screening assessment on reception as being at risk or requiring any special consideration for whatever reason;**
 - ii. intoxicated or drug affected persons, or persons with drug or alcohol related conditions;**
 - iii. persons who are known to suffer from any serious illnesses or conditions such as epilepsy, diabetes or heart disease;**
 - iv. persons who have made any attempt to harm themselves or who exhibit, or are believed to have exhibited, a tendency to violent, irrational or potentially self-injurious behaviour;**
 - v. apparently angry, aggressive or disturbed persons;**
 - vi. persons suffering from mental illness;**
 - vii. other serious medical conditions;**
 - viii. persons on medication; and**
 - ix. such other persons or situations as agreed.**

24.4.90 The Commission notes recommendation 37 of the *Interim Report* which requires governments to ensure that 'Prison Medical Services are completely independent of Departments of Correction'. The principal bases for this recommendation were the importance of maintaining a confidential relationship between prisoners and prison medical staff, the issue of professional independence and accountability and the relationship between prison medical staff and corrections officers. Since the release of the *Interim Report*, reviews have been conducted in some jurisdictions regarding the delivery of health care in correctional institutions. Some of these reviews have not fully supported the complete independence of Prison Medical Services. The Commission is not convinced that those issues have been fully resolved, but neither is it in a position to state that it is necessary for such services to be completely independent.

Recommendation 153:

That:

- a. *Prison Medical Services should be the subject of ongoing review in the light of experiences in all jurisdictions;***
- b. *The issue of confidentiality between prison medical staff and prisoners should be addressed by the relevant bodies, including***

prisoner groups; and

- c. Whatever administrative model for the delivery of prison medical services is adopted, it is essential that medical staff should be responsible to professional medical officers rather than to prison administrators.*
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Recommendation 154:

That:

- a. All staff of Prison Medical Services should receive training to ensure that they have an understanding and appreciation of those issues which relate to Aboriginal health, including Aboriginal history, culture and life-style so as to assist them in their dealings with Aboriginal people;*
- b. Prison Medical Services consult with Aboriginal Health Services as to the information and training which would be appropriate for staff of Prison Medical Services in their dealings with Aboriginal people; and*
- c. Those agencies responsible for the delivery of health services in correctional institutions should endeavour to employ Aboriginal persons in those services.*
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Recommendation 155:

That recruit and in-service training of prison officers should include information as to the general health status of Aboriginal people and be designed to alert such officers to the foreseeable risk of Aboriginal people in their care suffering from those illnesses and conditions endemic to the Aboriginal population. Officers should also be trained to better enable them to identify persons in distress or at risk of death or harm through illness, injury or self-harm. Such training should also include training in the specific action to be taken in relation to the matters which are to be the subject of protocols referred to in Recommendation 152 (g).

Recommendation 156:

That upon initial reception at a prison all Aboriginal prisoners should be subject to a thorough medical assessment with a view to determining whether the prisoner is at risk of injury, illness or self-harm. Such assessment on initial reception should be provided, wherever possible, by a medical practitioner. Where this is not possible, it should be performed within 24 hours by a medical practitioner or trained nurse. Where such assessment is performed by a trained nurse rather than a medical practitioner then examination by a medical practitioner should be provided within 72 hours of reception or at such earlier time as is requested by the trained nurse who performed such earlier assessment, or by the prisoner. Where upon assessment by a medical practitioner, trained nurse or such-other person as performs an assessment within 72 hours of prisoners' reception it is believed that psychiatric assessment is required then the Prison Medical Service should ensure that the prisoner is examined by a psychiatrist at the earliest possible opportunity. In this case, the matters referred to in Recommendation 151 should be taken

into account.

Recommendation 157:

That, as part of the assessment procedure outlined in Recommendation 156, efforts must be made by the Prison Medical Service to obtain a comprehensive medical history for the prisoner including medical records from a previous occasion of imprisonment, and where necessary, prior treatment records from hospitals and health services. In order to facilitate this process, procedures should be established to ensure that a prisoner's medical history files accompany the prisoner on transfer to other institutions and upon re-admission and that negotiations are undertaken between prison medical, hospital and health services to establish guidelines for the transfer of such information.

24.5 PARTICULAR MATTERS APPLICABLE TO BOTH POLICE AND PRISON CUSTODY

24.5.1 There are four issues, in particular, which were common to both the police and prison custody deaths which I propose to comment upon in this section. These are: the training of police and prison officers in emergency response procedures (including resuscitation training) and restraint techniques; training of officers in the safe use of firearms, and the policies of some Police and Corrective Services authorities for the laying of charges against a person in relation to an act of self-injury.

EMERGENCY RESPONSE PROCEDURES AND TRAINING

24.5.2 The deaths in both prison and police custody revealed very serious deficiencies in the training of custodial officers to respond in medical emergencies.

Resuscitation Training

24.5.3 In very few of the cases investigated was any attempt made by custodial staff to resuscitate the deceased person upon their discovery. Indeed, in only twenty-three cases was resuscitation actually attempted, and some of these involved attempts by fellow prisoners alone. I would record, however, that in at least three cases in which resuscitation was attempted (Jambajimba, Michael Gollan and John Highfold), Commissioners commended the valiant attempts made.

24.5.4 Expert evidence given during the Commission's hearings indicates that, in order for competence in resuscitation techniques to be maintained, regular training is required, with additional specialist training in the use of mechanical resuscitation aids. Indeed, one expert has recommended that, in order to ensure proficiency in Cardio Pulmonary Resuscitation (CPR), refresher training should be conducted at least annually, and where mechanical aids are to be used, at six monthly intervals.⁹⁶ Currently, first aid and resuscitation training is provided to all police and corrections officers throughout Australia during their respective recruit-training programs. In many instances, the attainment of a Senior First Aid Certificate is required as a pre-requisite to the successful completion of the recruit-training course. The availability of refresher courses in such techniques varies, however, from one jurisdiction to another.

24.5.5 For police officers, Western Australia appears to be the only State in which efforts have been made to provide refresher training in resuscitation

techniques. In 1989, the Western Australia Police Department introduced a resuscitation refresher training program state wide. Such training was part of the six hour custodial care course, referred to earlier, of which the resuscitation component was three hours. I think that there is a good argument for requiring all officers who are engaged in custodial duties to be provided with regular refresher training. For these officers, the use of such skills may arise more frequently. Until the skills of these officers have been updated, it is my view that, at the very least, on every shift there should be at least one officer who is proficient in the use of such skills.

24.5.6 One matter upon which officers must be clearly instructed is the circumstances in which resuscitation should be commenced. In a number of cases, officers failed to attempt resuscitation because they felt that, given the absence of vital signs, the person was beyond resuscitation. (I add, that this was despite the fact that, in a number of instances, the deceased was seen alive only minutes before.) Evidence given during many of the hearings indicates that the absence of vital signs (pulse, breathing, heart beat) should not preclude resuscitation attempts. As commented by one expert:

Medical reports have documented that even poorly performed CPR carries a better survival rate than no CPR. The risks to the patient of not performing CPR on a person with no detectable pulse and absent respiration are that the patient has no possible chance of life, when if any form of CPR, however bad, had been attempted, there may have been some chance.⁹⁷

24.5.7 It is my view that officers should be instructed to commence resuscitation in all but the clearest cases. It should be assumed that resuscitation may be effective until decided otherwise by a person with medical training. Commonsense will have to be employed. Obviously, the existence of certain factors, such as dismemberment or rigor mortis, will indicate that any resuscitation attempt may be futile. Coldness to touch might be another point leading one to suspect death, although many experts have indicated that it is notoriously difficult on occasions to distinguish death from hypothermia (low body temperature).

Resuscitation Aids

24.5.8 Access to appropriate resuscitation aids is equally important. In the Craig Karpany report, I commented that no officer should be expected 'to perform mouth to mouth resuscitation without access to resuscitation aids which would substantially minimise or remove the risk of infection. In addition, officers must be trained properly in the use of such aids. In recent years, police lockups and prisons across Australia have been supplied with prophylactic aids such as masks and air viva resuscitators. There is some disagreement between experts as to the efficiency of the various resuscitation aids which are currently available. In my view, it would be inappropriate for the Commission to make any recommendations as to the type of equipment which should be made available. This is an area which could be easily resolved through discussions with the relevant authorities. I mention, however, that in South Australia and Western Australia, police departments have distributed the 'Laerdal' pocket mask. These masks are made of disposable plastic and are reasonably small in size. The mask fits over the patient's nose and mouth and has a hole in the top, into which the rescuer blows air. The benefits of the mask are that it is relatively inexpensive (approximately \$15-\$20 per unit), is easy to use and can be adapted to more complex equipment such as breathing bag or flow of oxygen.⁹⁸

24.5.9 In a number of prisons, air viva equipment has been made available. I believe that the use of this equipment requires specialist training, skill and currency in its use. Such equipment may be appropriate for use in correctional institutions where there are medically qualified persons available to operate it. It would obviously not be appropriate for use in police lockups. In this respect, I depart from the recommendation in the *Interim Report* requiring the availability of 'automatic resuscitation equipment' in all police stations and prisons. Myself and my brother Commissioners have had the benefit of more detailed evidence on this topic than was available at the time of release of the *Interim Report*. The use of automatic resuscitation equipment requires special training and skill, something which most custodial officers do not and should not be required to have.

24.5.10 Where such equipment is supplied, it must be readily accessible to those who may have cause to use it. In the case of the man who died at the Geraldton Police Station, it was found that, despite two deaths at that station within a six-month period, officers on duty at the time of the death did not know of the location of the resuscitation masks. Similarly, in Craig Karpany's case, the resuscitation mask which had been supplied to the police station was not located in the place in which it should have been kept. It is important that such equipment be stored in a place which is readily accessible and that all officers be informed as to its location.

Emergency Response Training

24.5.11 I referred earlier to the deficiencies found by some Commissioners in the general procedures operating in some police lockups and prisons for dealing with medical emergencies. In the case of Nita Blankett, there was a delay of about thirty minutes between the time that the decision was taken by the authorities to take the deceased for medical treatment and the time that the decision was acted upon. The delay was found to be due to a number of factors, including a dispute regarding the number of officers required to constitute an escort having regard to the deceased's security rating; problems in obtaining a functional wheelchair and delays in obtaining necessary keys. Delays in accessing cells due to the lack of immediate access to keys were also found in Perry Noble and Craig Karpany. In a number of the prison deaths, corrections staff did not have access to cell keys, particularly during night shift, for reasons of safety and security. Clearly, immediate availability to keys would enhance the timely response of staff to emergencies but, obviously, considerations of safety and security will otherwise dictate. Where custodial officers do not have immediate access to cell keys, it is important that systems be put in place to ensure that assistance can be quickly obtained. I note that at least in one Western Australian prison all night staff have been issued with two-way radios to facilitate a more timely response by all staff to emergencies. I think that this is positive initiative.

24.5.12 It is important that custodial staff are well versed in medical emergency procedures. As a practical measure, I would suggest that regular drill-type training in emergency procedures should be introduced to ensure that officers develop a sense of confidence to respond in these circumstances. I think it would also be of some benefit to officers if formal emergency protocols were drawn up. They should set out such things as the steps to be taken when a hanging is discovered, who should be notified etc.

24.5.13 But an important point to emphasise is that preservation of life is the primary consideration. Other considerations such as the preservation of the scene in the interests of forensic investigation are secondary. This point is well illustrated by the Darwin Prison death in 1985. In that case, the officer who discovered the deceased hanging in his cell checked initially for vital signs and on finding none,

called for the senior officer. A camera was obtained and photographs were taken of the body whilst still suspended. The body was cut down after the photographs had been taken. As indicated by the pathologist, Dr Lee, the procedure adopted was the worst of both worlds: no attempt at resuscitation was made and the body and scene were not left undisturbed to ensure proper forensic examination.

24.5.14 I mention one final matter in relation to resuscitation. In a number of cases, the question arose whether the duty of care owed by custodians to persons in their care extended to the resuscitation. Indeed, in one Western Australian case (Donald Chatungalgi) it was submitted on behalf of the deceased's family that the conduct of police officers in not attempting to resuscitate the deceased amounted to criminal negligence. Commissioner O'Dea found, however, that there was no evidence to establish criminal negligence based on this omission.

24.5.15 I note that the Vincent Committee in Western Australia commented in its report that the duty of care did extend to the provision of first aid and resuscitation where this is necessary and recommended that this duty be reflected in police routine orders.⁹⁹

24.5.16 I stated in Chapter 3 that I do not think it the task of this Commission to determine the nature or extent of the duty of care. Certainly, it is my understanding that there is, as yet, no judicial pronouncement on whether the duty extends to resuscitation. It is an extremely difficult issue and one upon which there are many opposing views. I think it inappropriate for me to make any comment on the issue, but to say that I am firmly of the view that it would be totally unreasonable to expect officers to attempt resuscitation without adequate training in resuscitation techniques and access to, and training in the use of, resuscitation aids.

RESTRAINT TRAINING

24.5.17 In the cases of Charles Michael and Robert Walker it was found that the lack of training of corrections officers in restraint techniques and the unavailability of appropriate restraint aids were factors in the deaths. In Robert Walker's case, the deceased had been exhibiting signs of mental disturbance for a number of hours before his death, including cutting his wrists. In the course of his removal from his cell to another part of the prison he became aggressive and was pinned to the ground by prison officers in an attempt to restrain him. He died of asphyxia as a result of the struggle. In Charles Michael's case, the deceased died of heart failure following a struggle with officers during which his hands and feet were secured together.

24.5.18 The Interim Report recommended that both police and prison officers should receive regular training in restraint techniques, including the application of restraint equipment (Recommendation 30). I agree with this recommendation; however, in endorsing it, I would like to stress that training in the management of violent, angry or distressed prisoners should *positively discourage the* use of physical restraint methods, other than in circumstances where the use of force is unavoidable. Restraint aids should be used only as a last resort. Emphasis should instead be placed on other more humane and passive methods of persuasion to control the situation. Indeed, I note that, following the deaths of Charles Michael and Robert Walker, the Western Australian DCS (2) amended the Fremantle Prison Standing Orders relevant to the management of emotionally disturbed prisoners to discourage the use of physical contact and encourage conversation and passive contact.

USE OF FIREARMS

24.5.19 Four of the ninety-nine deaths investigated by the Commission were

the result of gun shot wounds following the discharge of firearms by police or prison officers.

24.5.20 Two of the four deaths involved the shooting of prisoners who were attempting to escape from correctional institutions (Ricci Vicenti and Daniel Lorroway). In both cases, questions arose as to the appropriateness of such a measure.

24.5.21 In his *Report of Inquiry into the Death of Ricci Vicenti*, Commissioner O'Dea provides a very succinct and useful discussion on the legal and moral arguments pertaining to the use of firearms in relation to escaping prisoners. I do not think it necessary to restate those arguments but would indicate my agreement with the comments that he makes about the issue. However, one comment that I think has significant force is the following:

IT]he case raises as an underlying issue whether it can ever, in a civilised society, be justified to kill, cause grievous bodily harm, or to risk either of these by shooting an escaping prisoner not actually causing or threatening to cause serious harm to some other person. It is necessary to balance protection of the public against the rights which prisoners of whatever race enjoy as citizens of Australia.¹⁰⁰

24.5.22 Whilst I consider this issue to be outside the scope of my terms of reference, I would also impress upon governments the need for a review of policy in this area. In my view, there are very strong moral grounds upon which the shooting of a prisoner attempting to escape cannot be justified simply as a matter of course. This is well illustrated by Vicenti's case. At the time of his death, Ricci was being held on remand awaiting sentence in relation to charges of breaking, entering and stealing.

24.5.23 The two cases of death as a result of gunshot wounds in police custody both highlighted deficiencies in police training in the use of firearms.

24.5.24 In my *Report of Inquiry into the Death of Jabanardi at Ti Tree*, I commented that the use of any weapons by police can only be justified 'in circumstances of the upmost gravity'.¹¹⁰ There is a need for training on the use of weapons. Such training should emphasise that the resort to weapons is a serious issue and should only happen in exceptional circumstances. The policies and rules governing the use and issue of weapons should be clear.

24.5.25 Similarly, Commissioner Wootten found in his *Report of Inquiry into the Death of David Gundy*, serious deficiencies in the training of the Special Weapons Operations Section in New South Wales whose members conducted the raid in which David Gundy was fatally wounded. The officer whose gun discharged had been trained to retain his weapon at all costs, but he had not been trained how to do it with the minimum of risk to a person seeking to take it from him.

CHARGES FOLLOWING ACT OF SELF-INFLICTED INJURY

24.5.26 I raise one further issue which, although not raised directly by the deaths investigated, seems to me to be one requiring some comment. It concerns that laying of charges against a person in relation to an act of self-inflicted injury and is not limited to prisons, but extends to police custody also. The issue was raised by the Commission's Criminology Research Unit in Research Paper number 16, which looked at the incidence of self-inflicted harm in Australian prisons and police lockups between 1 April 1989 and 30 September 1989. It was noted by the authors that in some States and Territories, there are charges associated with the

act of self-inflicted injury. These charges include: attempted suicide;¹⁰² property damage and other offences under correction's legislation and regulations.

24.5.27 In the study conducted by the Research Unit, it was shown that charges were laid in connection with the act of self-inflicted injury in 12% (eighteen) of cases for which such information was provided (that is 146 of a total of 375 cases). There were 8 such cases in Victoria; 5 in South Australia; 3 in New South Wales and 2 in Western Australia.¹⁰³

24.5.28 Professor Richard Harding, in his review of suicides in Victorian prisons, has commented that the laying of disciplinary charges in relation to a para-suicide incident cannot be justified in any circumstances.¹⁰⁴ I too am of the view that the laying of charges in association with an act of self-injury is futile, insensitive and counter-productive. Its futility is best illustrated by the death by hanging of a 24-year-old Aboriginal man in the Rockhampton Correctional Centre in April 1990. The death fell outside the Commission's Terms of Reference, having occurred after the 31 May 1989 cut off date. I am given to understand that about two weeks prior to his death, the man was sentenced to a term of six months imprisonment for destroying a blanket which he had torn into strips in an earlier attempt to hang himself at a police watchhouse. In my view, this case serves to illustrate a lack of empathy towards those who attempt self-injury. The only possible effect of the laying of such charges would be to heighten the distress already felt by the person. It is my view that great care should be taken in the laying of charges against persons in association with acts of self-injury occurring in custody. Where any harm to the prisoner has resulted from the action, no such charges should be laid except where there is clear evidence that the harm was occasioned for the purpose of gaining some secondary advantage.

Recommendation 158:

That, while recognising the importance of preserving the scene of a death in custody for forensic examination, the first priority for officers finding a person, apparently dead, should be to attempt resuscitation and to seek medical assistance.

Recommendation 159:

That all prisons and police watch-houses should have resuscitation equipment of the safest and most effective type readily available in the event of emergency and staff who are trained in the use of such equipment.

Recommendation 160:

That:

- a. All police and prison officers should receive basic training at recruit level in resuscitative measures, including mouth to mouth and cardiac massage, and should be trained to know when it is appropriate to attempt resuscitation; and***
 - b. Annual refresher courses in first aid be provided to all prison officers, and to those police officers who routinely have the care of persons in custody.***
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Recommendation 161:

That police and prison officers should be instructed to immediately seek medical attention if any doubt arises as to a detainee's condition.

Recommendation 162:

That governments give careful consideration to laws and standing orders or instructions relating to the circumstances in which police or prison officers may discharge firearms to effect arrests or to prevent escapes or otherwise. All officers who use firearms should be trained in methods of weapons retention that minimise the risk of accidental discharge.

Recommendation 163:

That police and prison officers should receive regular training in restraint techniques, including the application of restraint equipment. The Commission further recommends that the training of prison and police officers in the use of restraint techniques should be complemented with training which positively discourages the use of physical restraint methods except in circumstances where the use of force is unavoidable. Restraint aids should only be used as a last resort.

Recommendation 164:

The Commission has noted that research has revealed that in a significant number of cases detainees or prisoners who had inflicted self-harm were subsequently charged with an offence arising from the incident. The Commission recommends that great care be exercised in laying any charges arising out of incidents of attempted self-harm and further recommends that no such charges be laid, at all, where self-harm actually results from the action of the prisoner or detainee (subject to a possible exception where there is clear evidence that the harm was occasioned for the purpose of gaining some secondary advantage).

Recommendation 165:

The Commission notes that prisons and police stations may contain equipment which is essential for the provision of services within the institution but which may also be capable, if misused, of causing harm or self-harm to a prisoner or detainee. The Commission notes that in one case death resulted from the inhalation of fumes from a fire extinguisher. Whilst recognising the difficulties of eliminating all such items which may be potentially dangerous the Commission recommends that Police and Corrective Services authorities should carefully scrutinise equipment and facilities provided at institutions with a view to eliminating and/or reducing the potential for harm. Similarly, steps should be taken to screen hanging points in police and prison cells.

Recommendation 166:

That machinery should be put in place for the exchange, between Police and Corrective Services authorities, of information relating to the care of prisoners.

CENTRES

24.6.1 Elsewhere in this report, I have dealt with issues relating to Aboriginal youth generally, and their interaction with police and other criminal justice agencies. In this section, I propose to discuss briefly, the care and supervision of Aboriginal youth in juvenile detention centres.

24.6.2 Three of the deaths investigated by the Commission occurred in juvenile detention centres. These were the deaths of Michael Gollan, 17 years, at a Youth Training Centre in South Australia, Karen O'Rourke, 14 years, at a children's home in Queensland, and Thomas Carr, 17 years, at a juvenile remand centre in New South Wales. The circumstances of these three deaths are quite distinct. (I have briefly outlined the facts surrounding each death in Chapter 3.) Two were self-inflicted (Michael Gollan, by hanging and Karen O'Rourke, as a consequence of a fire which she had deliberately lit) and the other youth died as a result of a heart condition. But whilst the circumstances of each death are different, they all highlight similar issues relating to the identification and care of those at risk as were highlighted by the adult deaths which occurred in prisons. These include: the need for close and careful supervision, particularly for those identified as at risk; the need for proper training of careworkers to identify and care for those 'at risk'; the need for a safe physical environment; the importance of human interaction between careworkers and detainees; the need of adequate support systems for detainees, and particularly access to family and friends and the need for ready access to proper medical and psychiatric care. However, in view of the limited amount of evidence that was taken on these issues and more generally on the question of reducing the dangers of custody in juvenile detention centres, I do not think that it would be appropriate for me to make any specific recommendations in this area. I am satisfied, however, that the broad thrust of the recommendations which have been made relative to prisons (both in this chapter and the chapter which follows) have relevance for juvenile detention centres.

Recommendation 167:

That the practices and procedures operating in juvenile detention centres be reviewed in light of the principles underlying the recommendations relating to police and prison custody in this report, with a view to ensuring that no lesser standards of care are applied in such centres.

24.7 CONCLUSION

24.7.1 An examination of the ninety-nine deaths which occurred has revealed some clear lessons for the future in terms of reducing the dangers for Aboriginal people (and non-Aboriginals), in custody. Of course, it is not possible to entirely eliminate deaths occurring in custody, but there are certain steps which can and should be taken to avert those deaths which are or may be preventable. As a starting point, there is a need for a better understanding of the duty of care owed by both custodial authorities and the individuals who are employed by them to persons in their care. It is essential that this duty be recognised and understood, because it is against this duty that the standard of custodial care and individual actions are measured. But, more importantly, there is a need for individual officers to be committed to providing a professional level of care to those in their custody. For police officers, in particular, the importance of the custodial care role did not, at least in the past, receive the recognition and support that was warranted.

24.7.2 One very prominent feature of all the deaths investigated was the failure of custodial authorities to learn from past incidents. There was noted a

considerable reluctance by the authorities to critically analyse their practices and procedures and the actions of individual officers following a death. Thus, deficiencies went unnoticed and unresolved, and deaths which were or may have been preventable continued to occur. It is of vital importance that procedures be established to enable poor practices and procedures to be readily identified and rectified.

24.7.3 For those deaths which occurred in police custody a number of specific danger areas were demonstrated. One such area was the ability of officers to identify those persons who by their physical or mental condition were at risk of death either at the time of reception or during the period of detention. It is important that custodial officers have some knowledge of the vulnerabilities of Aboriginal people generally, and particularly those who are received into custody. The risks associated with detaining an intoxicated person in a police lockup must be recognised, as well as the serious nature of unconsciousness (or non-arousability). It is equally important that training include instruction on the identification and management of those at risk through self-harm. Proper training in these areas is of particular importance for those officers who routinely perform cell guard duties. Officers are not being asked to act as if they had medical training. What they are being asked to do is to make a preliminary assessment of the detainees' physical and mental condition based on information known to them and upon their own observations of the person, and if they have any doubts whatsoever about the ability of that person to withstand a period of detention, then they should seek medical assistance immediately. Above all, they must exercise caution, commonsense and reasonable care. It is absolutely essential that officers have ready access to medical assistance and that they feel confident to call upon it at all times of the day or night. Of equal importance are systems for the recording of information relative to the health of detainees and their propensity to commit acts of self-harm.

24.7.4 The question of proper surveillance and monitoring of those in custody is another requiring attention. Surveillance practices must be upgraded. Emphasis must be placed on the importance of regular and thorough checking and of human interaction. In order to facilitate this, cell design should incorporate features which allow for direct visual surveillance.

24.7.5 As a fundamental principle, no person should be left confined in a lockup which is unattended. There should be a police officer on duty for the entire period that a person is detained in a lockup. Consideration must be given to alternative lockup staffing arrangements, such as the employment of civilian staff on a contract basis, where police staff are limited. There should be available for detainees a reliable means for communicating with custodians in cases of emergency or for regular needs. The reviewing of cells with a view to highlighting and eliminating potential dangers should continue, but, in doing so, it must be recognised that emphasis on physical measures alone will not significantly reduce the risk of deaths occurring. A balance must be struck between eliminating risks and creating an environment which is so dehumanising that the risk of self-injury is heightened rather than reduced.

24.7.6 Those police lockups which are used for long-term detention as prisons raise special problems. Police cells were not designed for long-term accommodation. Many of these lockups are substandard, with inadequate exercise areas, no toilet or ablution facilities, no or limited access to fresh air and natural light. Given the current level of prison overcrowding, the use of police prisons is very likely to continue in the future. It is important that the position of police prisoners be reviewed and that, as far as possible, they be provided with a similar level of care and services as are available in correctional institutions.

24.7.7 The most significant deficiency noted in relation to those deaths which occurred in prisons related to the quality and standard of prisoner health and medical care, particularly mental health care. Many problems stemmed from the absence of reliable systems for the exchange of information relevant to the health and safety of individual prisoners between corrections officers, prison medical staff and corrections administrators. This is a difficult issue involving questions of privacy and confidentiality.

24.7.8 The accessibility and appropriateness of current prison medical services to Aboriginal prisoners is also an area requiring immediate attention. There have been numerous requests for the greater involvement of Aboriginal Medical Services in the delivery of health care to Aboriginal prisoners. It is my view that the experience and expertise of the staff of these Services, the doctors, nurses and health workers, in dealing with Aboriginal people has been under-utilised in the past and that more determined efforts to secure their participation in prison health care should be made for the future. It is essential, however, *that* these Services be provided with sufficient resources to help them meet the increased demand on their services. There is also a need for prison medical staff to be trained in Aboriginal culture and special needs of Aboriginal prisoners. Efforts should also be made to recruit Aboriginal staff to prison medical services at all levels.

24.7.9 Other areas of danger were also revealed. These include the need for more comprehensive reception procedures to identify more quickly those who may be at risk and the training of corrections officers to better enable them to identify and manage 'at risk' prisoners.

24.7.10 In relation to deaths in both police and prison custody, there were some obvious deficiencies found in the areas of training in emergency response measures, including resuscitation training, in restraint techniques and in the use of firearms.

24.7.11 There have been great efforts made in recent times by custodial authorities to reduce the dangers for persons in both police and prison custody. The Commission has provided both the focus and impetus for such change. There is a greater recognition by custodians of their duties towards those in their care and, by police, of the importance of their custodial care role. There is a growing commitment at all levels of the custodial agencies, from departmental heads and senior management, through to those officers who have the day-to-day responsibility for the care of those in custody. There must also be a commitment by government to the provision of sufficient resources in terms of funds and expertise to enable more effective systems to be established to reduce the risk of custodial deaths. This commitment to achieve more effective custodial practices and procedures and the eradication of misguided attitudes must continue. But I stress again that the first priority for any strategy to reduce the number of deaths in custody is to reduce the number of Aboriginal people coming into custody in the first place.

1 J.H. Muirhead, *Interim Report*, AGPS, Canberra, 1988, p. 1

2 I am using the word 'instruction' to cover all those orders and directives emanating from the Commissioners of Police and Prison Superintendents which bind the members of the particular services. Such instructions are referred to by different names in each jurisdiction.

3 D.J. O'Dea, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia*, RCIADIC, AGPS, 1991, pp. 552-4

4 L.F. Wyvill, *Report of the Inquiry into the Death of Muriel Gwenda Catheryn Binks*, RCIADIC QAA, AGPS, Canberra, 1991, p. 125

5 Wyvill, *Muriel Gwenda Catheryn Binks*, p. 128

6 I note that the Working Party established by the WA Police Department (the Webster Committee) has recommended the appointment of an 'assessment officer' at major police lockups on all drifts who would be responsible for the assessment of all prisoners and who has specialist training in assessment procedures. The appointment of 'assessment officers' has

- been adopted at some lockups, although Commissioner O'Dea has reported that these officers do not receive specialist training (O'Dea, *Regional Report*, p. 492)
- 7 I am advised that the Victoria police are currently in the process of designing a prisoner screening form. In the interim, a 'Prisoner Medical Checklist' is being used during the reception procedure. The Checklist requires both a visual assessment of the prisoner to be made in addition to asking a series of questions of the prisoner pertaining to such matters as illnesses suffered and medication requirements. (Letter from Chief Inspector I. Baker, Victoria Police, to RCIADIC dated 7.1.91)
- 8 Muirhead, *Interim Report*, p. 54
- 9 D.J. O'Dea, *Report of the Inquiry into the Death of Misel Waigana*, RCIADIC W14, AGPS, Canberra, 1990, p. 17
- 10 Statement of Dr David Wells. Office of Forensic Medicine, Victoria, 1990
- 11 The Commission has received some submissions supporting the establishment of independent police medical services. The AMA in its submission to the Commission has recommended the establishment of an 'independent, professional medical service' for persons in police custody, and has indicated its support for the input of Aboriginal health services into such services. The Webster Committee in Western Australia has also called for the establishment of a state-wide on-call medical/nursing service to support police in that State.
- 12 O'Dea, *Regional Report*, p. 775-9
- 13 Queensland Police Service, RCIADIC Submission, 1990, p. 4
- 14 Commissioner Wootten has noted in his *Report of the Inquiry into the Death of Glenn Allan Clarke*, RCIADIC T1, AGPS, Canberra, 1990, p. 111, that a system has been introduced in Tasmania to record prisoners considered to be at risk of suicide at central records, although it is unknown whether this information will be accessible via computer or by some other means.
- 15 L.F. Wyvill, *Report of the Inquiry into the Death of Patrick Thomas Booth*, RCIADIC QV, AGPS, Canberra, 1990, p. 33
- 16 Queensland Police Service, RCIADIC Submission, 1990, p. 4
- 17 Western Australia. [Vincent Committee], *Report of the Interim Inquiry into Aboriginal Deaths in Custody in Western Australia*, P. Vincent, Chairman, 1988, p. 43.
- 18 Western Australian Police Department, RCIADIC Submission, 1990, p. 13
- 19 Muirhead, *Interim Report*, Recommendation 12
- 20 Western Australian Police Department, p. 14
- 21 NSW Police Service, *Custody Manual*, RCIADIC General Exhibit GENSW39, 1990, p. 9
- 22 D. Biles and others, *The Royal Commission Cases: A Statistical Description*, RCIADIC Criminology Research Unit. Research Paper No. 21, Canberra, 1990, pp. 29-30
- 23 O'Dea, *Regional Report*, p. 533ff
- 24 Police General Order 5750, paragraph 7.6
- 25 J.H. Wootten. *Report of the Inquiry into the Death of Lloyd James Boney*. RCIADIC N16, AGPS, Canberra, 1990, p. 178
- 26 E. Johnston, *Report of the Inquiry into the Death of the man who died in the Royal Darwin Hospital*. RCIADIC NT10, AGPS. Canberra, 1991, p. 46
- 27 I note that an order has been recently issued by the Commissioner of Police in Western Australia requiring officers conducting cell checks to 'record the time of each check and their observations of each prisoner' (O'Dea, *Regional Report*. p. 540)
- 28 See Queensland Police Service, RCIADIC Submission (*Letter dated 3/10/90 to the RCIADIC*); Western Australian Police Department, RCIADIC Submission, p. 18; Northern Territory. Deputy Commissioner of Police. *Letter dated 7/2/90, commenting on RCIADIC Criminology Research Unit Research Paper No. 9*, RCIADIC Exhibit NT/5/G6
- 29 J. Reser, *The Design of Safe and Humane Police Cells*, RCIADIC Criminology Research Unit, Research Paper No. 9, Canberra, 1989, p. 33
- 30 Minute from Superintendent. Management Support Group, SA Police Department dated 8/11/90 indicates that at the time of writing, Fifteen police personnel had been recruited as dedicated cell guards and placed at lockups in both the metropolitan area and some country areas. It was indicated that thirty additional dedicated cell guard positions would be created in 1991-1992
- 31 Queensland Police Service, p. 3
- 32 Queensland Police Service, *letter dated 20/11/90 to RCIADIC*
- 33 It has been estimated by the Western Australian Police Department that the cost of ensuring that all country police stations in that State are provided with a 24 hour police service is \$280.5mil. See O'Dea, *Regional Report*, p. 537
- 34 O'Dea, *Regional Report*, pp. 548-50
- 35 A similar scheme was introduced in New Zealand Police prisons in September 1987. The scheme was introduced as a temporary measure only, to provide relief for police personnel in the face of considerable prison overcrowding. The scheme provided for the recruitment of temporary members of police for the purpose of 'processing, guarding, and transporting' of prisoners on a needs basis. It appears that appointees were to be chosen on the basis of previous custodial experience (eg. retired police and prison officers and nursing staff with experience in secure institutions) and it was not envisaged that these officers would undergo

any training. (NZ Police Commissioner's Circular dated 28/9/87 contained in paper prepared by Senior Sergeant Jon Tunks, SA Police Department. 'Police Prisoners-A Working Officer's view')
3 6 RCIADIC Transcript. Perth, 23/3/90, p. 68
37 L.F. Wyvill, *Report of the Inquiry into the Death of Edward Stanley West*, RCIADIC QG, AGPS, Canberra, 1990, p. 37
38 See E. Johnston, *Report of the Inquiry into the Death of Craig Douglas Karpany*, RCIADIC S/12, AGPS, Canberra, 1990, p. 21
39 Muirhead, *Interim Report*, Recommendation 16
40 **Reser, p. 33**
41 Commissioner O'Dea refers to the practice operating in the Northern Territory in his *Report of the Inquiry into the Death of the Young Man who Died at Elliott on 21 March 1985*, RCIADIC NT/6, AGPS, Canberra, 1990, and I refer to the practice in South Australia in my *Report of the Inquiry into the Death of the Woman who Died at Ceduna on 18 February 1983*, RCIADIC S/7, AGPS, Canberra, 1990.
42 I note that, at the Police Ministers Conference in 1988, it was recommended that 'where possible. Aborigines should be placed in multi-prisoner cells preferably with other Aborigines unless there is an identified threat from the move.' The Vincent Committee also recommended that, where 'practicable and culturally appropriate', Aboriginal prisoners should be accommodated with other Aboriginal prisoners (Rec.5(ii))
43 Muirhead, *Interim Report*, p. 37
44 O'Dea, *Regional Report*, p. 602; P. Dodson, *Regional Report of Inquiry into Underlying Issues in Western Australia*, AGPS, Canberra, 1991, p. 301
45 L. Roberts, Chadbourne, R. & R. Murray, *Aboriginal/Police Relations in the Pilbara: a Study of Perceptions*, Australian Criminology Research Council & Western Australian Special Cabinet Committee on Aboriginal Police and Community Relations, Perth, 1986
46 L.F. Wyvill, *Report of the Inquiry on the Death of the Young Man who Died at Wujal Wujal on 29 March 1987*, RCIADIC QC, AGPS, Canberra, 1990, p. 11
47 L.F. Wyvill, *Report of the Inquiry on the Death of Deidre Abigail Short*, RCIADIC QX, AGPS, Canberra, 1990, pp. 28-9
48 Muirhead, *Interim Report*, Recommendation 25
49 In NSW, \$1.3m was spent on upgrading police lockups in areas with a high Aboriginal population. In South Australia, the State Government has pledged more than \$5m to the upgrading of police stations. Other States have also spent considerable sums on cell upgrading and replacement.
50 Queensland Police Service, RCIADIC Submission, [*Response to Underlying Issues*]
51 Reser, pp. 25-7
52 Reser, p. 17
53 P. Memmot, *Report to the Royal Commission into Aboriginal Deaths in Custody on the Architectural Design of Holding Cells with Special Reference to Wujal Wujal*, Research paper prepared for RCIADIC, 1989, p. 17
54 Reser, p.38
55 Letter from Deputy Commissioner of Police, NT Police Service, dated 8/2/90 to NT Dept of Law
56 R. Hammond and others, South Australian Aboriginal Issues Unit, *Report*, 1990, p. 148
57 Reser, p. 32
58 J. Reser, *Report to the RCIADIC; Behavioural Design Considerations Relating to the Watchhouse Facilities at Katherine and Berrimah*, Research paper prepared for RCIADIC, 1989, p. 7
59 D. J. O'Dea, *Report of the Inquiry into the Death of Robert Anderson*, RCIADIC W/16, AGPS, Canberra, 1990, p. 39
60 R. Harding, *Overview Evidence as it affects Northern Territory Correctional Services*, in Northern Territory Correctional Services, RCIADIC Submission, 1990, p. 175
61 S. Kerr, *Health Services to Correctional Services in the Northern Territory*, Northern Territory, Department of Correctional Services, 1989, p. 3
62 J.F. Nagle, *Report of Royal Commission into NSW Prisons*, 1978, NSW Government Printer, Recommendation 10
63 L.F. Wyvill, *Report of the Inquiry into Death of Bernard Matthew Johnson*, RCIADIC QN, AGPS, Canberra, 1990, p. 32
64 Queensland Corrective Services Commission (QCSC), RCIADIC Submission. p. 28
65 Kerr, p. 6
66 R. Harding, *Review of Suicide and Suicide Attempts by Prisoners in the Custody of the Office for Corrections, Victoria*, Victoria, Office of Corrections, 1990, p. 27
67 Australian Corrections authorities have adopted a modified version of the UN standard called 'Minimum Standard Guidelines for Corrections in Australia and New Zealand' (1987)
68 Statement of Dr Bockman, Prison Medical Superintendent, Western Australian Department of Corrective Services, RCIADIC Exhibit W/1/55
69 QCSC, p. 28
70 Western Australia. Department of Corrective Services, *Answers to Questions from the RCIADIC*, p. 59

- 71 QCSC, p. 29
- 72 C. Liew, RCIADIC Submission, 1990, p. 3
- 73 Liew, p. 3
- 74 J.H. Muirhead, *Report of the Inquiry into the Death of Paul Farmer*, RCIADIC W/5, AGPS, Canberra, 1989, p. 80
- 75 The AMHN is an Aboriginal community controlled mental health service, the only one of its kind in Australia, established in 1987 in Melbourne. It is associated with the Victorian Aboriginal Health Service.
- 76 Research undertaken in 1987 by the Department of Corrective Services showed that between 65%-70% of the prisoner population (Aboriginal and non-Aboriginal) had significant substance abuse problems (O'Dea, *Regional Report*, p. 648)
- 77 NAILSS, *Preliminary Results of Interviews with Aboriginal Prisoners in NSW Gaols*, RCIADIC Submission, 1990, pp. 38-9
- 78 Western Australia. Department of Corrective Services, *Answers to Questions from the RCIADIC*, p. 53
- 79 Report of the Commission of Review into Corrective Services in Queensland, 1988, p. 172
- 80 RCIADIC Transcript, Sydney, Corrective Services Conference, 1990, p. 94
- 81 J.H. Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith*, RCIADIC N2, AGPS, Canberra, 1989, p. 59
- 82 New South Wales. Department of Corrective Services, *Aborigines: Treatment in Prison 1981, 1982*, Research Publication No. 6
- 83 Liew
- 84 QCSC; Queensland, Aboriginal and Islander Community Health Service (AICHS), *Initiatives Undertaken in the Medical Area as a Result of the Kennedy Commission and Since the Appointment of a Director of Health and Medical Services in Apr. 1989*, RCIADIC Exhibit QQ 55(a)
- 85 Western Australia. Department of Corrective Services, *Answers to Questions from the RCIADIC*, p. 55
- 86 C. Liew, *Correspondence to the RCIADIC*, dated 12/7/90
- 87 QCSC, p. 30 88
- 88 J. Ogg, RCIADIC Submission, 1990
- 89 RCIADIC Transcript, Perth, 23/3/90 p. 135
- 90 R. Harding, *Review of Suicides, Victoria*, p. 41
- 91 C. Lloyd. *Suicide and Self-Injury in Prison: A Literature Review*, Home Office Research and Planning Unit Report Study No.115, Her Majesty's Stationary Office, London, 1990, pp. 39-42
- 92 E. Johnston, *Report of the Inquiry into the Death of the Aboriginal Man who Died in the Darwin Prison on 5 July 1985*, RCIADIC NT/7, AGPS, Canberra, 1990, p. 48
- 93 T.O. Clark, *Survey of Suicides in NSW Prisons: Jan - Dec 1989*, 1990, p. 16
- 94 Harding, *Review of Suicides, Victoria*, pp. 33ff
- 95 Wootten, *Malcolm Charles Smith*, pp. 60-1
- 96 Statement of Dr H.F. Oxer, RCIADIC Exhibit S/12/B3, p. 4
- 97 Statement of Dr H.F. Oxer, p. 2
- 98 Statement of Dr J.E. Gilligan, RCIADIC Exhibit NT/5/23B. I note that another expert, Dr. H.F. Oxer, recommends the use of a 'face shield' as the most cost effective resuscitation aid for the occasional user (the cost is approximately \$1.00 per item). See Statement of Dr Oxer, p. 14
- 99 Western Australia. [Vincent Committee], Recommendation 12 (a)
- 100 D.J. O'Dea, *Report of the Inquiry into the death of Ricci John Vicenti*. RCIADIC W/27, AGPS, Canberra, 1990, p. 3
- 101 E. Johnston, *Report of the Inquiry into the Death of Jabanardi (at Ti Tree)*, RCIADIC NT/2, AGPS, Canberra, p. 35
- 102 I note that in a number of jurisdictions it is no longer an offence to commit or attempt to commit suicide. I mention South Australia as one example. In that State, an amendment was passed to the *Criminal Law Consolidation Act 1935* in 1983 providing that it was no longer an offence to commit or attempt to commit suicide (s.13a)
- 103 J. Fleming and others, *Self-Inflicted Harm in Custody*, RCIADIC Criminology Research Unit Research Paper No.16, Canberra, 1990, p. 29
- 104 Harding, *Review of Suicides, Victoria*, p. 30

Chapter 25 THE PRISON EXPERIENCE

Of the ninety-nine deaths in custody which have fallen within the Commission's Terms of Reference thirty-three deaths occurred in prisons or in circumstances where a prison or correctional authority was responsible for the deceased. A considerable number of the other deceased had experienced prisons at various times throughout their lives. While the emphasis of strategies designed to reduce the risk of death in prison custody must be on the diversion of offenders away from

prison, as discussed in Chapter 21, and on the provision of adequate care, supervision and assistance, as discussed in Chapter 24, the evidence placed before me strongly indicates the significance of the prison experience for an adequate explanation of Aboriginal deaths in custody.

The cases investigated by this Commission suggest that the experience of prison is linked to the phenomenon of deaths in custody in two ways. First, the evidence indicates that the conditions encountered by prisoners in general, and Aboriginal prisoners in particular, contribute to the disproportionate representation of Aboriginal people in Australian prisons. Second, certain dimensions of the prison experience appear to contribute to the premature death of many Aboriginal prisoners and, more particularly, are related to a propensity for self harm and self-inflicted death.

25.1 THE DISPROPORTIONATE REPRESENTATION OF ABORIGINAL PEOPLE IN PRISONS

25.1.1 The extent of the over-representation of Aboriginal people in Australian prisons has been documented earlier in this report. In Chapter 7, I observed that whereas Aboriginal people constituted just under 1.1% of the total adult population they comprise no less than 14.3% of the total prison population as at 30 June 1989. In Chapter 9, I explained that after certain statistical refinements are applied to this data it can be shown that in comparison with non-Aboriginal adults the level of Aboriginal over-representation was a factor of 15.1. Thus, as at 30 June 1989 an Aboriginal adult was over 15 times as likely to be in prison as a non-Aboriginal adult. Given that, as identified in Chapter 8, Aboriginal prisoners tend to receive shorter prison sentences than do non-Aboriginal prisoners, rite 'flow' as distinct from simply the 'stock' of prisoners at any given time reveals an even greater level of over-representation.

25.1.2 Elsewhere in this report I have discussed many factors which contribute to the disproportionate representation of Aboriginal people in prison as well as in police cells. Many of those factors operate outside of custody and must be confronted if the disproportionate representation is to be reduced. Nevertheless, the evidence placed before this Commission indicates that the Aboriginal experience of imprisonment is itself also directly related to the level of Aboriginal imprisonment. The prison experience is both an *immediate* experience in the sense of defining a prisoner's day-to-day living environment, as well as often becoming a *life style* experience in the sense of becoming the typical social environment for many people throughout their lives.

25.1.3 Most importantly, the prison experience is an experience of institutionalisation in an artificial environment. That environment, as experienced by those who died in custody., fails to facilitate the reintegration of offenders into their community and the society more generally.

25.1.4 In a number of cases Commissioners have been presented with evidence as to the failure of the prison system to keep Aboriginal people out of prison. In his report of the inquiry into the death of Malcolm Smith, Commissioner Wootten reviewed a long history of the deceased's institutionalisation and referred to the development in Malcolm Smith of 'a reckless indifference to returning to gaol'. The expert evidence of a psychiatrist who reviewed Smith's history for the Commission identifies a dual process inherent in institutionalisation: the extent of Smith's experience of prison influenced his own socialisation and capacity to form relationships as well as facilitating his learning certain types of criminal behaviour. For Malcolm Smith, the prison experience alienated him from social life outside of institutions and simultaneously socialised him into a prison life style to the point

that 'he saw gaol as the place where his friendships and social life were located'.¹

25.1.5 Similarly, Commissioner Wyvill in reference to the life and death of Daniel Lacey observed that the Queensland correctional services system 'failed to facilitate Lacey's social reintegration'. I have discussed Daniel Lacey's institutionalisation in Chapter 14. Daniel Lacey was never out of a correctional institution for more than a few months from the time he was fourteen until his death at age forty.²

25.1.6 For some the artificial environment of correctional institutions becomes a replacement for the family and community environment denied the prisoner. Reflecting on the extensive institutionalisation of Paul Farmer, a distant relative and long-term friend of the deceased stated in evidence before the Commission:

I only saw him from time to time ... because of his periods in institutions. This was his problem ... he became institutionalised. They became his life.

I formed this opinion because on one occasion when he was out he said 'I am only out for a holiday then I will be going back home'.

*I think he felt safe and secure in prison and that the outside world frightened him because a lot had changed outside while he was in there.*³

25.1.7 The gradual erosion of the personal capacity to cope with social life outside of correctional institutions attributable to institutionalisation was also adverted to by psychologist Dr Joseph Reser who, in reviewing the history of institutionalisation of Vincent Ryan, observed that:

*Such an institutional existence allowed no opportunity for normal socialisation and interaction or the acquiring of more viable coping and problem solving skills and social adjustment strategies. [It] provided no alternative role models or experiences of competence or success, nor were there any reasonable periods of time when not under some form of institutional control when enduring and meaningful human relationships could be formed.*⁴

25.1.8 The evidence presented in very many cases before this Commission indicates that there is a nexus between the actual experience of prison, an inability to cope with life outside prison, a propensity to re-offend and reincarceration. Referring to the cases of Malcolm Smith and Max Saunders, Commissioner Wootten observed that:

*In neither case do the institutions appear to have achieved anything other than a continuation of commitment to institutions for the rest of the life of the person involved.*⁵

25.1.9 The administration and operation of correctional institutions throughout Australia and the Aboriginal experience of those institutions clearly demands considered attention.

25.2 THE EXPERIENCE OF PRISON AND PREMATURE DEATH

25.2.1 The evidence placed before the Commission also indicates possible

connections between the circumstances of imprisonment, poor physical and/or psychological health, a propensity for acts of self harm and premature death. The prison environment is an inherently stressful environment. While the implications for the standard of physical health of prisoners and the provision of health and medical services has been addressed in Chapter 24, the psychological implications of imprisonment have emerged from the cases as most significant also. In my report of the inquiry into the Aboriginal man who died in the Darwin Prison on 5 July 1985 I observed that:

*Prisons are places of great stress and that all or at least a great many prisoners are subject to various risks of different kinds associated with the nature of their predicament and the nature of their environment both physical and psychological. It was recognised by all doctors who have given psychiatric evidence before me that people having any tendency towards suicidal ideation are generally at greater risk in a prison than outside prison.*⁶

25.2.2 During the Corrective Services Conference held in Sydney in June 1990 one Aboriginal participant who had spent many years in prison, Kevin Williams, argued that 'gaol is a place of conflict, it is a place of suppression, racism, every negative thing you can think of' .⁷

25.2.3 The trauma and stress associated with the prison experience may well have an added effect on those who endure a long history of institutionalisation and, given what seems to be very high rates of recidivism amongst Aboriginal offenders, may be considered as self-perpetuating. The study of recidivism rates amongst Aboriginal people in Western Australia conducted by Broadhurst and Mailer suggests something of the effects of high rates of recidivism on prison environments:

*Some insight into one result, at least, of such continued incarceration may be gained from where repeat offenders are shown to progress with high probabilities (considerably higher for Aboriginals) to more serious crimes with each successive imprisonment. In as much as this indicates frustration with and alienation from society it may be expected to produce ever more tension within the present regime.*⁸

25.2.4 Certainly, the views of some Aboriginal people as reported by the Aboriginal Issues Unit (AIU) of the Northern Territory suggests a direct connection between repeated incarceration and attempted suicide. An elder at Gurungu Camp, Elliott, stated, 'if they keep locking up [name deleted] people-over and over again--they might hang themselves'.⁹

25.2.5 Evidence given before me strongly suggests that people with a suicidal ideation and people who are 'attempters' but lack strong suicidal ideation are both more likely to bring about their own death in prison than outside prison. This applies to Aboriginal and non-Aboriginal prisoners alike. The cases investigated by the Commission suggest some Aboriginal cultural factors make the experience of prison especially difficult.

25.2.6 For example, while the enforced separation from one's friends, family and domestic environment is undoubtedly traumatic for all prisoners, the greater significance of kin and community relations in Aboriginal cultures exacerbates the trauma of separation for Aboriginal people. Likewise, shyness and discomfort in

the face of non-Aboriginal authority, a particular and severe aversion to physical isolation and, in the case of offenders from more traditional Aboriginal communities, fears associated with potential retribution and punishment as a result of the actions which lead to imprisonment, have all emerged as factors in evidence heard by the Commission.

25.2.7 Shyness, a degree of withdrawal and a difficulty in communicating effectively with unfamiliar, non-Aboriginal figures of authority can apparently contribute to feelings which may predispose an Aboriginal prisoner to attempt self harm in the prison setting or even to premature death from natural causes. In his report of the inquiry into the death of Max Saunders, Commissioner Wootten referred to the evidence of an Aboriginal prisoner known to the deceased, who stated:

*All prisoners suffer the same problems, but I do not think that Kooris get the attention they need. Max was in need of help. There are things which are particular to Kooris that require that they be given special attention. These things include shyness, and a problem with attitude to authority. Also a person in gaol does not have a responsible attitude, otherwise he wouldn't be in there. All these things contribute to the fact that someone like Max would not seek out help. Max was trapped. I believe that he had a sort of death wish. He was going through a lot of frustration.*¹⁰

25.2.8 In the course of consultations with Aboriginal people in the Northern Territory the Commission's AIU heard evidence of great fear amongst Aboriginal prisoners confronting the prospect of traditional punishment upon their return to their home community. The report of the AIU observes that fears concerning 'payback business' can also contribute to prisoner trauma by sometimes dissuading friends and peer group kin from visiting prisoners for fear of implications in 'payback'.¹¹

25.2.9 There is evidence that some Aboriginal prisoners are in fact enduring something akin to a 'double punishment' while imprisoned. Evidence was presented in the course of the inquiry into the death of Paul Farmer to the effect that the deceased was being punished not only by European law while being imprisoned, but also by Nyungar law. It was submitted that Paul Farmer was 'in a state of spiritual fear because he had not been forgiven for his offence by his own people'. Clearly these fears played heavily on Paul's mind. An anthropologist who provided evidence in the case stressed the severity of these fears referring to Paul's 'recurrent life threatening perceptions'.¹²

25.2.10 It is also apparent from the evidence placed before me that the experience of physical isolation central to the prison experience can have a profound effect on Aboriginal prisoners. Not only might the fears associated with physical isolation be conducive to attempting self harm, but the conditions of physical isolation can seriously affect the state of health of an Aboriginal prisoner. Commissioner O'Dea in his report into the inquiry into the death of an Aboriginal man at Sir Charles Gairdner Hospital proposed that:

It may be that illness can be exacerbated by the isolation and alienation an Aboriginal person feels. It may also be that such illness raises spiritual problems which affect his health in a way which would not pose a problem with non-Aboriginal prisoners, as where a prisoner has been,

*or believes himself to have been, sung.*¹³

25.2.11 Commissioner O'Dea's observation underlines the importance of the matter of access to kin, community and country in the appreciation of the effects of enforced physical isolation on Aboriginal people. This matter is addressed below.

25.2.12 The weight of evidence before me indicates that prison as presently experienced by Aboriginal people is typically unconstructive, often highly traumatic and occasionally potentially lethal. This conclusion is consistent with the views of very many Aboriginal people. The report of the Northern Territory AIU refers to the 'widely held view amongst Aboriginal people that jail is no good; at best useless and more often dangerous'.¹⁴

25.2.13 Before turning to a detailed consideration of the issues concerning the conditions of imprisonment as revealed by the cases investigated by this Commission, the contradictory nature of the prison experience must be recognised. While the weight of evidence suggests that gaol is no good for Aboriginal people, some have suggested that prison fails to rehabilitate offenders because it is too easy. It has even been submitted that certain aspects of the prison experience offer an incentive to offend. An Aboriginal informant offered the view that:

*After gaol you come out fat and well people deliberately get themselves locked up so that they can get a feed and a warm, safe place to sleep.*¹⁵

25.2.14 In oral evidence given before Commissioner Wyvill at the hearing into the death of the young man who died at Aurukun, anthropologist David Martin stated:

*[W]hen they [young men from Aurukun] come back [from Stuart Creek Prison] they are bigger, sleeker. People talk all the time about how people go out skinny and come back big from the Stuart Creek food. They come back having gone through what I term one of the new sorts of initiation ritual, the modern initiation. They go out as boys and they come back in a very real sense as men. [E]very conversation I've had with young people about gaol has been in terms of the good food, the television, yes, the hard work but it makes you strong and healthy and the fact that it holds no fears for them, so I've heard, and many many occasions in fighting, young men say: 'I'm not frightened to go back to Stuart', or in a couple of cases: 'Stuart' s my home'. So in terms of, if there' s a kind of an attempt to dissuade young men from performing anti-social acts through prison, it is most certainly not having that affect, quite the contrary, one might argue.*¹⁶

25.2.15 Certainly if the incarceration of Aboriginal people in prisons is seen to be for punishment or rehabilitation, the experience is often, at the least, contradictory. However, to propose that prison conditions should therefore be made more extreme or arduous is to run counter to the weight of evidence and to court further trauma and death in custody. The significant point is that the experience of prison, however extreme or mild, fails to facilitate the reintegration of offenders into society and with their community.

15.2.16 An assessment of the nature of the prison experience for Aboriginal people must also be carefully qualified in recognition of the diversity of the

personal experiences and backgrounds of Aboriginal offenders, the community from which they come and the diversity of prison settings to which they are committed. Thus, opinions that the prospect of imprisonment can operate as an incentive to offend or that it fails to act as a deterrent are more often proffered, it seems, in relation to offenders from remote relatively discrete Aboriginal communities than in respect of Aboriginal offenders from urban settings. Again, the prison experience will be a different experience for different people. It follows that responses to over-representation and to calls for the reform of the prison system must recognise these differences and be prepared to canvass different alternative solutions for different Aboriginal offenders from different communities.

25.2.17 While the experience of prison is a negative experience, especially for Aboriginal people, positive aspects of the Aboriginal experience of prison must also be recognised. Indeed, the development by Aboriginal prisoners themselves of formal or informal Aboriginal groups or organisations capable of providing the constructive support and assistance required by their people in prison is testimony to the resilience and sense of community of Aboriginal people. Perhaps it is because of these qualities that where Aboriginal people in prison are permitted to provide support and assistance to their fellow Aboriginal prisoners the likelihood of a less destructive experience of prison is greatest. In the report of the inquiry into the death of Kingsley Dixon Commissioner Muirhead observed that Aboriginal people in custody 'tend to be supportive of each other and may feel less isolated than perhaps prisoners of foreign extraction'.¹⁷

25.3 ACCESS TO KIN, COMMUNITY AND COUNTRY

25.3.1 I have referred in the previous section to the significance of the separation of imprisoned Aboriginal people from their family, friends and home environment. In the report of the inquiry into the death of Kingsley Dixon it was recognised that allegiance to the family has particular significance for Aboriginal people. In the course of hearings into that death Commissioner Muirhead received evidenced from Professor Ivor Jones to the effect that the increased likelihood of an Aboriginal prisoner attempting suicide while in prison custody might often be related to 'their allegiance to the group, the allegiance to family; the traditional consequences of isolation, outlawing, virtually synonymous with death'.¹⁸ It was observed in the report of the inquiry into that death that isolation from family has serious consequences for Aboriginal prisoners. Much evidence and many submissions have been received on the effects of separation from family; however, the connections between separation and depression common in the Aboriginal experience of prison is perhaps most eloquently described by one Warlpiri man who had been in gaol:

It's really hard--single cell behind bars they think too much about family mutters ... you worry. Where's my mother? Where's my brother? You feel like killing yourself. ¹⁹

25.3.2 It follows that the provision of adequate access for Aboriginal prisoners to their family, their friends and associates from their home community is of paramount importance to the amelioration of the prison experience and the probable reduction of deaths in prison custody. That observation raises associated issues including the location of prisons and the transfer of inmates as well as prisoner access to visits and the provision of adequate affordable forms of transport for visitors.

THE LOCATION OF PRISONS AND PRISONER TRANSFERS

25.3.3 In a number of cases prisoner access to friends and family has been severely restricted through the location of prisons far away from the offender's home country. In his report of the inquiry into the death of Peter Williams, Commissioner Wootten noted, in reference to the existence of Grafton Gaol on the north coast of New South Wales, that the location of prisons close to offenders' communities is valuable in facilitating access to families. For this reason, Commissioner Wootten expressed reservation as to the proposed closure of Broken Hill Gaol in Western New South Wales. The existence of 'regional prisons' relatively close to areas of high Aboriginal population has also been proposed in the context of reducing the potential incentive to offend consequent on the fact that imprisonment will be away from home. Research conducted by the Australian Institute of Criminology reviewing high rates of offence and incarceration amongst young men from Groote Eylandt recommended the consideration of the establishment of a small prison facility at the community as a means of nullifying the possible attractiveness of offending and imprisonment as a way of leaving the community.

25.3.4 Decisions as to the location of prisons cannot, of course, be determined purely on the basis of their proximity to the homes of prisoners and families; however, the principle of facilitating meaningful access to a prisoner's home support can be applied creatively and constructively. For example, in my report of the inquiry into the death of Gordon Semmens I referred favourably to a practice in operation at Port Augusta Gaol whereby a regular session is conducted wherein prisoners from the remote communities assemble and make a telephone call from the prison to one of the communities and talk to kin. While such initiatives are relatively simple and inexpensive their potential for improving the quality of life of Aboriginal prisoners, particularly those from remote communities, may be considerable.

25.3.5 In a number of cases investigated by the Commission there has been evidence of considerable anguish and hardship being caused by the transfer of Aboriginal prisoners away from prisons located close to friends and family or by the failure to transfer prisoners as soon as possible to institutions within visiting distance. Commissioner O'Dea has referred to an apparent inconsistency in the treatment of Aboriginal prisoners in this regard in Western Australia where one of the deceased from that State, Ronald Ugle, was permitted his preference of remaining in Geraldton and was later able to obtain a transfer to Broome, where he had relatives, while another, the man who died in Sir Charles Gairdner Hospital, was transferred against his will from Roebourne to Perth far from the support of his relatives and friends. The Western Australian Department of Corrective Services has defended the decision to transfer the latter prisoner against his will and drawn a distinction between the two cases on the basis of different security classifications and periods of sentence served.²⁰

25.3.6 The practice of suddenly transferring a prisoner from one gaol to another, commonly known as 'shanghing' is the subject of considerable anger and frustration amongst many Aboriginal prisoners. The evidence indicates that there is substance to their disquiet. For example, the self-motivated education and potential rehabilitation of Max Saunders was greatly disrupted through two apparently unjustified decisions to transfer him to another prison. This led Commissioner Wootten to observe that:

It is obvious that the settlement into prison life of prisoners, particularly long-term prisoners, their rehabilitation through employment and education, their

*emotional maturation, and their preparation for return to civilian life, can be very adversely affected by misjudged transfers.*²¹

25.3.7 The AIU in New South Wales has reported the view of many Aboriginal prisoners in country gaols in that State that the transfer of Aboriginal prisoners is used in order to maintain deliberate control over the number of Aboriginal prisoners in particular prisons. Those prisoners have claimed that the fear of being transferred creates considerable tension and militates against constructive self organisation and representation.²²

Recommendation 168:

That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision.

PRISON VISITS

25.3.8 On the evidence before me, it appears that a common complaint of Aboriginal prisoners in regard to access to friends and families relates to the policies and practices regulating prison visits. The evidence suggests that there is a degree of variation between and within correctional institutions as to visiting privileges. The Aboriginal prisoner organisation at Yatala Prison in Adelaide, the Sansbury Association, has submitted that family contact visits should be a right rather than a privilege for the sake of the prisoner's family as well as the prisoner. Certainly Correctional Services should recognise the importance of visits from family and friends in the development of a humane and sensitive environment and in the rehabilitation of a prisoner. The significance of adequate visits for Aboriginal prisoners, especially those far away from remote home communities, must be emphasised. Security demands must be accepted and a particular prisoner's access to visits must be monitored and managed according both to his/her (and the family's) needs as well as to their security rating and considerations of risk. Whether cast as a right or a privilege Correctional Services should not normally seek to use access to visits as a disciplinary tool, but rather should regard access to adequate visits as a means of encouraging prisoners and as means of helping them cope with their deprivation of liberty.

25.3.9 Such an approach which attempts to maximise a prisoners access to regular contact with friends and family can be consistent with the security demands of prisons and is central to the rehabilitation of prisoners. The approach of the Superintendent of Alice Springs Gaol, Mr Bohning, to visits demonstrates a sensible and sensitive flexibility. At that gaol, where the overwhelming majority of prisoners are Aboriginal, special visits can be arranged when relatives come in from remote communities or interstate. In the hearing relating to underlying issues, one of the Aboriginal prisoners spoke of a visit from his mother who had travelled from South Australia to see him. Mr Bohning stated that in such circumstances daily visits of two hours duration were arranged. This was confirmed.

*I agree with that, yes. She came up from Adelaide to see me just as a surprise. I didn't know that she was here. She came up for a week and that was it. I got a visit every day.*²³

25.3.10 Mr Bohning was clearly of the view that visits should be accommodated as often as possible and that visits were to be regarded as a prisoner's right. Visits remain a source of complaint, however, it appears that the resolution of any difficulties is normally a matter of communication. Correctional Services ought to ensure that wherever possible institutions have the services of an Aboriginal welfare officer capable of facilitating effective communication between families, communities and prison authorities.

25.3.11 In its final submission to the Commission the Sansbury Association referred to prisoner concerns as to the lack of private visits and emphasised the role of adequate family visits in maintaining the cohesion of prisoner families. The association has submitted that all prisoners should be entitled to conjugal visits three times monthly, that adequate facilities for visiting children be provided, that visitors should be able to receive food and drink supplied by the prisoner and that adequate and affordable transport be available for visitors.²⁴ The New South Wales AIU has proposed that families of prisoners who live a long distance from the gaol be provided with low cost accommodation, where this is not available close to the gaol, so as to facilitate visits. These submissions should be carefully considered by correctional authorities, and their undoubted contribution to the management and welfare of prisoners must be balanced against the security considerations relevant to particular institutions and particular prisoners and the cost implications of new schemes.

25.3.12 Two general principles emerge from these submissions: that in the formulation of policies and practices regarding visits, correctional administrators should give consideration to the need of the family as a unit, rather than simply to the punishment of the prisoner; and, second, the creation of sensitive and humane environments for prisoner interaction with families and friends must attempt, as far as is practicable, to recreate relatively normal and personally meaningful conditions for regular interaction. The application of these principles will ameliorate the conditions of imprisonment and assist in the social reintegration of a prisoner.

Recommendation 169:

That where it is found to be impossible to place a prisoner in the prison nearest to his or her family sympathetic consideration should be given to providing financial assistance to the family, to visit the prisoner from time to time.

Recommendation 170:

That all correctional institutions should have adequate facilities for the conduct of visits by friends and family. Such facilities should enable prisoners to enjoy visits in relative privacy and should provide facilities for children that enable relatively normal family interaction to occur. The intervention of correctional officers in the conduct of such visits should be minimal, although these visits should be subject to adequate security arrangements.

25.3.13 A related matter, of special significance to Aboriginal prisoners, concerns the release of prisoners so that they may attend family funeral services. Again, there is evidence that correctional services administrations do not always appreciate the profound kin obligations to which Aboriginal people are subject. In his report of the inquiry into the death of Ronald Ugle, Commissioner O'Dea found that several days before his death, Ugle had sought, unsuccessfully, permission to attend the funeral of his brother who had just died. Commissioner O'Dea had received evidence indicating that Ugle was 'uncharacteristically quiet and unhappy' in the days following that refusal. As suggested by Commissioner O'Dea, prison

administrations should give careful consideration to the humanitarian context and the context of rehabilitation in the determination of an Aboriginal prisoners request to attend a funeral.²⁵

25.3.14 I note that as a result of Commissioner O'Dea's investigation of that case the Western Australian Department of Corrective Services has advised that the relevant Executive Director's Rule relating to applications to attend funerals has been amended so as to ensure the maintenance of consistent practices at all institutions.²⁶

25.3.15 In New South Wales the Commission was told that permission to attend family funerals was given only in relation to a narrow group of close relatives, which did not recognise the kinship obligations felt by Aboriginal people. In some cases Aboriginal people were being made to choose between attending the funeral service and the burial.

Recommendation 171:

That Corrective Services give recognition to the special kinship and family obligations of Aboriginal prisoners which extend beyond the immediate family and give favourable consideration to requests for permission to attend funeral services and burials and other occasions of very special family significance.

25.3.16 In addition to ensuring Aboriginal prisoners' rights to adequate contact visits with friends and family, the right of access to Aboriginal service organisations should also be respected. Regular visits and visits at the request of a prisoner of organisations such as the Aboriginal Legal Service (ALS) ought not to be unreasonably restricted. The correctional services administrations of each State should negotiate with Aboriginal prisoner groups and Aboriginal service organisations in order to establish mechanisms whereby regular services can be assured. While not attempting to specify a definitive list of such service organisations, the legal and cultural needs of Aboriginal prisoners must be met. (Health needs are dealt with in Chapter 31.) For example, it was claimed that organisations such as Link-Up encounter difficulties in gaining access to prisons in New South Wales. This should be investigated. The broader question of the delivery and regulation of welfare services to prisoners is discussed below.

Recommendation 172:

That Aboriginal prisoners should be entitled to receive periodic visits from representatives of Aboriginal organisations, including Aboriginal Legal Services.

25.4 ACCESS TO OTHER ABORIGINAL PRISONERS

25.4.1 I have referred earlier to the potential for enhanced Aboriginal prisoner interaction with fellow Aboriginal prisoners to make a significant contribution to the improvement of the prison experience for Aboriginal people and, potentially to the reduction of Aboriginal deaths in prison custody. Commissioner Muirhead referred to a submission:

That an easing of the restrictions on prisoner's movements from one part of a prison to another to enable inmates to discuss emotional problems would be a benefit to Aboriginal prisoners who are more likely to talk to other Aborigines than to the prison authorities.²⁷

25.4.2 The evidence placed before the Commission indicates that Aboriginal

prisoners place a very high value on access to other Aboriginal prisoners. It is also evident that a relatively high degree of mobility within prisons can succeed in generating a less stressful and more relaxed atmosphere for prisoners. In his report of the inquiry into the death of Dixon Green, Commissioner O'Dea noted a great improvement in the management of Broome Regional Prison. Commissioner O'Dea referred to the prison atmosphere and surroundings as 'relatively relaxed', which he in part ascribed to the provision of multi-occupancy cells and the freedom of interaction and movement afforded prisoners.

25.4.3 The matter of freedom of movement and interaction of Aboriginal prisoners is associated with issues concerning prison design and the provision of shared cells.

25.4.4 Experienced prison administrators such as the Executive Director of the Department of Corrective Services in South Australia, Mr Dawes, have submitted their opposition to shared cells in prisons on the basis of security considerations and on the basis that prisoner safety can be compromised.

Prisoners may be appropriately protected against rape and assault only with the use of single cells. Moreover, single cells provide privacy for prisoners and make possible compliance with requirements relating to reducing the risk of transmission of communicable diseases. The Crown Solicitor has indicated that the Department must house prisoners in single cells to demonstrate that it has discharged its responsibility to minimise the transmission of AIDS.²⁸

25.4.5 The Sansbury Association submitted that the provision of cells within lockable cell wings would allow Aboriginal prisoners to elect to share cells at appropriate times. Prisons such as that at Port Lincoln provide a most promising model. There, in a new wing, a prisoner has a key to his own cell and it is only the wing that is locked. It is conceivable that such designs may be able to satisfy the three demands of a prisoner's right to privacy, a prisoner's right to company and the security of prisoners within a particular physical space.²⁹

25.4.6 Some correctional services authorities in other States have recently recognised the virtues of flexible accommodation conditions. The Board of the Queensland Corrective Services Commission (QCSC) at a meeting in March 1989 passed the following policy:

General Managers implement, where practicable the Board policy that -

-Aboriginal prisoners be able to socialise and live near each other and, on a voluntary basis, be given the opportunity to join an Aboriginal community formed within the prison system;

- non-Aboriginal and Islander prisoners, or prisoners from any other cultural group who wish to participate in such a group, be included;

- Aboriginal and Islander prisoners have access to Aboriginal and Islander elders and other people of their cultural groups who can contribute to their rehabilitation whilst in custody and towards entry into the general community.³⁰

25.4.7 The QCSC admits this policy has met with resistance from some prison

managers who have argued that this is tantamount to 'apartheid' and that it increases security risks.

25.4.8 Although the QCSC submits that it remains committed to single cell accommodation with showers and toilets because of the ability to reduce homosexual rapes and assaults they note that their

new centres are designed as Self Contained Accommodation Modules (SCAMS) which enable prisoners to have keys to their own rooms. There is no reason why these cannot operate in a very open way with doors open to allow freedom of access at any time for medium and low security prisoners.

We hope the supportive environment of dormitories can be recreated in the SCAM units. If not, we will give serious consideration to building a modern dormitory. Certainly, many modern North American institutions use dormitories for low security accommodation. A point worth noting is that dormitories are capital and operational cost effective.³¹

25.4.9 In its submission to the Commission the QCSC has recommended that:

Aboriginal inmates be allowed to live as a community and be offered, wherever practical, the alternative of single room or community accommodation.³²

Recommendation 173:

That initiatives directed to providing a more humane environment through introducing shared accommodation facilities for community living, and other means should be supported, and pursued in accordance with experience and subject to security requirements.

25.4.10 The dangers associated with the segregation or isolation of individual Aboriginal prisoners has been identified in the Commission's *Interim Report* (Recommendation 18) and in reports of enquiries into deaths such as that of Peter Williams.³³ The practice of segregating Aboriginal prisoners for disciplinary reasons is to be approached with utmost care. At the very least, Aboriginal prisoners who are segregated must be carefully supervised by selected officers trained in the identification and assistance of distressed Aboriginal prisoners. The issue of the use of segregation as a disciplinary measure is addressed below in Section 27.8.

25.5 ABORIGINAL PRISONER WELFARE NEEDS AND SERVICES

25.5.1 It is apparent that the circumstances of imprisonment, most particularly the trauma associated with trial, sentence and incarceration, results in the need for extensive welfare support and assistance amongst Aboriginal prisoners in particular. The evidence presented to the Commission indicates that those welfare needs are best met by Aboriginal people themselves. In his report of the inquiry into the death of Kingsley Dixon, Commissioner Muirhead noted support from the South Australian Government for such a proposition, while recognising the claim of the Executive Director of the State's Department of Corrective Services, that the department has encountered difficulties in recruiting Aboriginal people to work in the department.³⁴ In its submission to the Commission, the QCSC referred to the

success of having Aboriginal elders at Townsville Prison provide counselling to distressed Aboriginal inmates. The submission refers to the opinion of prison managers in that State that elders 'have undoubtedly contributed to the prevention of some suicides of Aboriginal inmates'.³⁵ The submission of the National Aboriginal and Islander Legal Services Secretariat (NALSS) containing the results of a survey of Aboriginal prisoners in Western Australia has argued that, on the basis of the survey, 'it is quite clear that prisoners overwhelmingly desire that the person they deal with [for welfare and parole matters] be an Aboriginal person'. The submission also indicates a considerable degree of dissatisfaction amongst Aboriginal prisoners with prison welfare services in that State, and reports that almost 50% of those surveyed would see the services of stress counsellors as being helpful or very helpful. The majority of prisoners who expressed a view on the matter desired that such counsellors be Aboriginal.

25.5.2 The value of Aboriginal people providing welfare services to Aboriginal prisoners is associated with their (perceived) sensitivity toward Aboriginal prisoners and their ability to identify with Aboriginal problems. Moreover, it appears that Aboriginal people are more able, or are perceived by prisoners to be more likely, to facilitate communication with friends, family, institutions and agencies outside of prison. The New South Wales AIU has reported that Aboriginal prisoners in country prisons in that State regard Aboriginal welfare officers as one of their major links to the outside world. It was in this context that the Sansbury Association submitted to the Minister in South Australia that an Aboriginal liaison officer, employed by the then Department of Aboriginal Affairs, should work at each correctional institution in order to assist Aboriginal prisoner communication with those outside the prison. While the Minister conceded that the proposal had 'merit' he argued that 'it would be seen as an inefficient use of scarce government resources'

25.5.3 The abolition of Aboriginal welfare officers in Western Australia has apparently exacerbated the problem of meeting the welfare needs of Aboriginal prisoners in that State. While the abolition of that service was the result of the introduction of a Unit Management regime whereby mainstream correctional officers have greater welfare service responsibilities, the existence of specialist Aboriginal welfare officers is not incompatible with Unit Management. Commissioner Dodson and Commissioner O'Dea are strongly of the view that Aboriginal welfare officers should be re-established in Western Australian prisons. Commissioner Wootten is strongly supportive of Aboriginal welfare officers in New South Wales.

Recommendation 174:

That, all Corrective Services authorities employ Aboriginal Welfare Officers to assist Aboriginal prisoners, not only with respect to any problems they might be experiencing inside the institution but also in respect of welfare matters extending outside the institution, and that such an officer be located at or frequently visit each institution with a significant Aboriginal population.

25.5.4 The period of transition from liberty to custody is clearly a particularly traumatic time for any person committed to a prison. When a prisoner or remandee is about to be taken to an institution it is likely that they will have considerable welfare needs and concerns, and their anxieties will normally be greatly heightened by the prospect of impending incarceration. Commissioner Dodson received a submission from the Western Australian Prison Officers' Union that the transition from being a free citizen to prisoner could be made far less traumatic if, in the city, there were holding cells where sentenced prisoners could be held for

forty-eight hours so they could contact relatives, which would ease emotional trauma. Similarly, prisoners with access to telephones could make arrangements for children to be looked after or for their domestic business to be attended to. The Union recognised that there would be security concerns in the implementation of this procedure; however, the Union submitted that these concerns could be met without much difficulty and that this process of transition would considerably ease the trauma of a person being sent to prison.

Recommendation 175:

That consideration be given to the principle involved in the submission made by the Western Australian Prison Officers' Union that there be a short period in a custodial setting for prisoners prior to them entering prison routine.

THE ROLE OF ABORIGINAL VISITORS

25.5.5 The welfare needs of Aboriginal prisoners have become a focus for the operation of various Aboriginal Visitors Schemes (AVSs) in a number of jurisdictions. In the Interim Report, Commissioner Muirhead referred favourably to the operation of such a scheme in Western Australia in the context of recommending regular visits to Aboriginal people incarcerated in police cells. Prison visiting schemes for Aboriginal and non-Aboriginal prisoners now operate in different States. In Western Australia, Aboriginal Visitors, nominated by communities but effectively controlled by the Aboriginal Affairs Planning Authority (AAPA) visit Aboriginal prisoners with a view to hearing and notifying authorities of the grievances of Aboriginal prisoners. Those visitors raise prisoner concerns with the superintendent of a prison or the officer in charge of a police station, notify the ALS of any complaint of a legal nature but must leave the option of taking formal action in the hands of the ALS. Visitors can report to the AAPA. However, in the words of Commissioner Dodson, 'there are no apparent sanctions, no back-up and no regulatory powers in respect of the operations of the Aboriginal Visitors Scheme'.³⁷

25.5.6 Although there is considerable evidence that Aboriginal people support the operation of the AVS, a number of factors appear to inhibit its operation. Aboriginal Visitors are unable to pursue an investigation or ensure the satisfactory resolution of a grievance. Evidence concerning the operation of the scheme in Western Australia indicates that an effective AVS requires greater power and improved co-ordination with legal and medical services. Nevertheless, Commissioner Dodson has reported that the scheme is able to meet certain limited prisoner needs and is able to operate as 'a representative Aboriginal self-help organisation'.³⁸

25.5.7 In Victoria, Official Visitors are appointed by the Minister for Corrective Services in order to provide independent advice to the Minister as to the operation of the prison system generally, and to improve links between the prisons and the community.

25.5.8 In Queensland, legislative provision is made for the appointment of at least two Official Visitors to each correctional institution. Official Visitors have the power to report the results of any investigation to the Corrective Services Commission under the Corrective Services Act 1988:ss.22-23. The QCSC has endeavoured to appoint an Aboriginal or Torres Strait Islander Visitor to each correctional institution. The demands of Aboriginal prisoners for greater welfare services is suggested in the submission of the QCSC which states that: 'Aboriginal Visitors have been less active in pursuing complaints. Their role has probably been

most valuable in providing counselling and support'.³⁹

25.5.9 It is apparent that visitors schemes are capable of making a valuable contribution to the satisfaction of the welfare needs of Aboriginal prisoners. Commissioner O'Dea has noted the apparently successful operation of the scheme at Broome Regional Prison where, significantly, no restriction is placed on access by the visitors to the prison.⁴⁰ However, if visitors schemes are to operate as an effective grievance investigation and general monitoring mechanism, then their members must be given sufficient power and resources to investigate, and sufficient power to ensure the satisfaction of genuine complaints. Moreover, it appears likely that a scheme that was not independent of prison authorities might be regarded with suspicion by Aboriginal and non-Aboriginal prisoners.

25.5.10 The operation of the AVS in Western Australia has been assessed and has been the subject of submission to the Commission by NAILSS. They have submitted that the AVS provides both emotional support and general welfare services to Aboriginal prisoners, but have argued that there are two immediate problems concerning the current operation of the AVS:

1. *The level of training given to scheme members to cope with the emotional trauma of a potentially suicidal prisoner or detainee.*
2. *The fact that since the abolition of Welfare Officers they are being used as a cheap form of Welfare Worker while the Department of Corrective Services abdicates its responsibilities.*⁴¹

25.5.11 NAILSS has submitted that the AVS receives insufficient training and resources to provide the welfare services required by Aboriginal prisoners, and have argued for a significantly expanded role for the AVS. That role would involve the AVS being based within the Aboriginal community and would provide welfare, legal, liaison and counselling services to all Aboriginal prisoners in all correctional institutions throughout the State. The submission emphasises the importance of such an organisation being under local community control rather than being part of the bureaucracy. Certainly, such a body, based on the model of the Native Counselling Service of Alberta, Canada would facilitate better access for Aboriginal prisoners to the Aboriginal community and, potentially, improve relations between Aboriginal prisoners and correctional authorities.

25.5.12 An improved approach to the welfare needs of Aboriginal prisoners requires a commitment by corrective services authorities to a number of initiatives. Correctional officers will continue to be the first line of regular interaction for Aboriginal prisoners and, while the issue of the recruitment of Aboriginal people into corrective services organisations is discussed below, it is apparent that all staff need to be aware of Aboriginal needs, culture and life styles as they affect them in prison. Where possible the welfare needs of Aboriginal prisoners should be met by Aboriginal people employed as Aboriginal welfare officers within institutions and supplemented by the access of specialist Aboriginal organisations to institutions for the provision of legal, health and educational services to Aboriginal prisoners. Corrective services authorities should be encouraged to negotiate specific contracts for the delivery of such services to Aboriginal prisoners where such organisations are available.

25.5.13 Even with adequate services available, however, meeting the needs of Aboriginal prisoners requires that the use of services be actively facilitated, co-ordinated and monitored. In the highly artificial environment of an institution, difficulties and complaints will continue to arise, and the sensitive resolution of

difficulties and the thorough investigation of genuine complaints is central to prisoner welfare. Aboriginal Visitors, whether as part of larger Visitors Schemes or as a specialist service in its own right, should not be expected to satisfy the welfare needs of Aboriginal prisoners and should not be used by corrective services authorities to abrogate their responsibilities to prisoners. However, it is apparent that Aboriginal Visitors can act as an effective monitoring body capable of receiving complaints and queries of Aboriginal prisoners, ensuring that needs are being met and that services at any particular institution are adequate, accessible and co-ordinated. As such Aboriginal Visitors would take on an inspecting role and might best be referred to as complaints officers. In order that such persons gained the public and prisoner confidence they would require it might be best that such complaints officers were accountable to a government body other than that directly responsible for corrections and that Aboriginal complaints officers were endorsed by Aboriginal people from the community.

Recommendation 176:

That consideration should be given to the establishment in respect of each prison within a State or Territory of a Complaints Officer whose function is:

- a. To attend at the prison at regular (perhaps weekly) intervals or on special request for the purpose of receiving from any prisoner any complaint concerning any matter internal to the institution, which complaint shall be lodged in person by the complainant;***
- b. To take such action as the officer thinks appropriate in the circumstances;***
- c. To require any person to make enquiries and report to the officer;***
- d. To attempt to settle the complaint;***
- e. To reach a finding (if possible) on the substance of the complaint and to recommend what action if any, should be taken arising out of the complaint; and***
- f. To report to the complainant, the senior officer of the prison and the appointing Minister (see below) the terms of the complaint, the action taken and the findings made.***

This person should be appointed by, be responsible to and report to the Ombudsman, Attorney-General or Minister for Justice. Complaints receivable by this person should include, without in any way limiting the scope of complaints, a complaint from an earlier complainant that he or she has suffered some disadvantage as a consequence of such earlier complaint.

DRUG AND ALCOHOL MISUSE AND COUNSELLING SERVICES

25.5.14 A particularly significant dimension to the welfare, counselling and medical needs of Aboriginal prisoners relates to the apparently widespread use of drugs in prison. In his report of the inquiry into the death of Max Saunders, Commissioner Wootten observed that, at the time at Goulburn Gaol, drug use was 'an accepted part of prison culture', and that drug use in prison tended to be seen as something a person 'slept off' rather than a practice which might often require urgent medical attention.⁴² While there was little evidence in that case that Max

Saunders had used drugs extensively before entering prison, a number of witnesses provided evidence as to his usage in prison. While in prison he used pills and could evidently gain access to methadone, although he was not on any form of methadone treatment. The explanations offered for his drug use by people who knew Max are testimony to the difficulties and pressures of prison life. One prisoner explained that Max was a regular taker of pills who indulged 'to relax and keep above things'. A friend had been told by Max that he took drugs because 'things were so bad that he resorted to using drugs to make himself feel better' .43

25.5.15 Whether for reasons of boredom, frustration, depression or stress, it is apparent that unauthorised use of prescription and non-prescription drugs is relatively common in many of our gaols. Leaving aside the question of the reasons for drug use in prisons, it is apparent that facilities for short and long-term treatment of problematic drug use in prisons are often inadequate. Max Saunders died of heart disease complicated by the effects of a substantial dosage of methadone, however, when he was seen to be unable to walk unassisted, he was not referred for medical attention.⁴⁴

25.5.16 The inadequacy of responses to drug and alcohol use in prisons has been referred to the Commission on a number of occasions. The use of prescription drugs as a response to the circumstances of prison is a most worrying development. Commissioner Dodson has referred to evidence before him as to the official supply of prescription medication in order to cope with the isolation of prison. Such approaches, while they may offer short-term relief, constitute an inadequate response to such problems and may themselves become the source of further problems.

25.5.17 Drug and alcohol use in prison, and the problems associated with longer term use, must be confronted through programs that address the underlying causes of misuse including boredom, frustration, powerlessness and feelings of personal inadequacy. While the means of improving Aboriginal prisoner access to more sensitive drug and alcohol counselling is addressed in Section 24.4 of this report, it is observed here that drug and alcohol use in prison is, at one level, symptomatic of the current experience of prison for many, and is presently inadequately addressed by institutional services.

25.5.18 The evidence before me indicates that the prison experience is an especially traumatic one for Aboriginal prisoners, and that, presently, prisons are failing to meet the resultant needs of Aboriginal prisoners. Other evidence indicates that not only is prison a stressful and traumatic environment but that for Aboriginal prisoners it is often a racist environment.

2 5.6 RACISM IN PRISONS

25.6.1 Commissioner Muirhead, in his report of the inquiry into the death of Kingsley Dixon, referred to evidence of racist attitudes of some correctional staff towards Aboriginal prisoners, and noted evidence to that effect provided by both prisoners and correctional officers themselves. Allegations of racist taunts by correctional officers are certainly very common. Racism can also be manifest in the day-to-day treatment of prisoners and in the discriminatory allocation of resources, privileges and services. The Western Australian prison survey reports that a little over one-fifth of respondents who answered the relevant question claimed that they had been discriminated against by prison psychologists, drug and alcohol counsellors or parole officers in that State.⁴⁵ The matter of discrimination in the allocation of jobs in prisons is dealt with below.

25.6.2 Aboriginal prisoners are also apparently subject to the racism of non-Aboriginal prisoners. In evidence presented to Commissioner Wooten, one

Aboriginal prisoner said that being a Koori in prison created what he called 'an invisible wall' between himself and other prisoners. In that case, the Commissioner noted the failure on the part of prison superintendents and other administrators to be aware of the nature of the problem of racism in prisons. For example, the superintendent of Goulburn Gaol stated that: 'In my time here as Superintendent or as Deputy I have never had an inmate coming to me with a complaint about problems with racism'.⁴⁶

25.6.3 As Commissioner Wootten pointed out, such an attitude fails to appreciate that aggrieved Aboriginal prisoners are unlikely to complain to non-Aboriginal prison authorities and fails to appreciate that racism can be structural and covert as well as explicit and overt. The Commission's *Interim Report* called for prison and police authorities to establish appropriate screening procedures of recruits for racist views. I have referred to this recommendation (Recommendation 125) in Chapter 24. The Executive Director of Correctional Services in South Australia has stated that while the identification of racist officers would not be difficult, there remained problems with taking effective action against such officers. A means must be found to overcome such difficulties; the elimination of racist views among correctional officers is a pre-requisite to a humane custodial environment. Effective education and training provides the greatest promise for the elimination of more subtle forms of prison racism.

CORRECTIONAL OFFICER EDUCATION

25.6.4 If ignorance is the foundation of racism then education is the foundation of its correction. In its Interim Submission to the Commission, the Sansbury Association succinctly identified present problems and pointed to potential solutions:

Racial tension in prisons is always a problem for Aboriginal inmates. A major problem with racial discrimination in prisons is that no action by management or legal bodies will take action against a prison officer, as prison officers are not criminals and are therefore believed before an inmate. Our group feels that an Aboriginal awareness course should be undertaken by all potential prison officers so that they will have an understanding of Aboriginal people. A lot of today's prison officers have had little or no contact with Aboriginal people before getting jobs as prison officers

25.6.5 While Aboriginal content is becoming increasingly common in the training of correctional officers, the extent of such training varies and should be increased. In Queensland, for example, Aboriginal and Islander awareness training commenced only in September 1989. Currently, a short program of less than one day's duration is provided to new correctional officers. The Custodial Correctional Officer's Induction Course covers supervisory differences, verbal and non-verbal communication, and an introduction to Aboriginal culture and its implications for attitudes to learning and rehabilitation. The QCSC is also conducting cross-cultural workshops, attendance at which is tied to pay increments. The QCSC was, at the time of its submission, planning to appoint an Aboriginal or Islander person to the Commission's Training and Development Centre. The QCSC has recommended to the Royal Commission that:

All staff within the Corrective Services receive cross-cultural training in Aboriginal Studies; and there should be positive incentives (including financial

incentives)for staff to increase their awareness of the issues of Aboriginals in custody, and develop methods to alleviate these

25.6.6 While these recommendations are welcome, the importance of the sustained and effective participation of Aboriginal people in such training programs must be emphasised. The involvement of Aboriginal controlled educational organisations in such training should be actively considered in all jurisdictions. For example, organisations such as Tranby Aboriginal College in New South Wales appear able to provide such services, and I am sure others do as well.

25.6.7 As a matter of interest and of some importance to this issue, I remark that the Institute of Aboriginal Studies in Alice Springs conducts a course in cross-cultural awareness which is attended by persons from a number of different departments and agencies, Territory and Commonwealth. The institute runs week-long courses attended by a cross section of people; sometimes departments request an in-house course lasting a day or two.

25.6.8 A recent review of prisoner education in Queensland has, as part of its enquiries, identified alarming deficiencies in present education and training of custodial correctional officers. The report notes that there still needs to be a fundamental shift in the approach to corrections before correctional officers will be equipped adequately to cope with the demands of a rehabilitative, rather than a retributive, regime.

Correctional Services have not yet, as a whole, been encouraged to make this attitudinal shift from an exclusive goal based on the needs of the system ('lock the bastards away out of sight and make sure they don't bother us') to a combined objective of protecting society on the one hand, but also providing help, treatment and encouragement to prisoners to alter their behaviour, attitudes and purpose to give them a second chance of a fulfilled and normal place in society on release, on the other. It is, therefore, understandable that there has been no social or political thrust for training for the Correctional Services, to follow that of the other social services; and to move the Correctional Services from an unskilled or heterogeneous entry to a professionally established training with a controlled entry. 49

25.6.9 That review's survey of prison officer attitudes revealed a very widespread need for basic level training. Correctional officers identified needs for first-aid training, firearms training, training in report writing and basic English education, training in stress management and fire fighting drill and industrial safety training. More advanced, yet it appears essential, skills also need to be developed. Amongst such training needs referred to by correctional officers were, basic psychology and, significantly, the study of Aboriginal and Islander culture.

25.6.10 It is most significant that correctional officers themselves have identified Aboriginal issues as a specific area in which enhanced training and instruction is required. In South Australia also the Correctional Officers' Legal Fund have referred to expressions of dissatisfaction by some trainee officers as to the training received in relation to 'race relations'.

[[It is considered that there is an urgent need to establish proper, and effective training programs, by replacing the present essay type training of race relations, with more dynamic, affective programs, and that properly trained,

*and qualified staff should be appointed to conduct such training.*⁵⁰

25.6.11 The Queensland review has recommended that the QCSC move to meet these identified training needs amongst correctional officers. The review has recommended that more ambitious training be undertaken by future custodial correctional officers during their pre-service training by way of the introduction of significantly higher recruitment standards, the establishment of a Board of Correctional Education and the introduction of a one year Diploma in Custodial Corrections for prospective officers.⁵¹

25.6.12 It is likely that it is unreasonable to expect correctional officers to perform, for example, welfare roles, especially with respect to the special needs of Aboriginal prisoners, without first possessing a mastery of basic and general skills required. Commissioner Dodson has observed that 'correctional officers are unable to fulfil this [welfare] role due to the absence of sufficient human resources to meet the immediate day-to-day needs of prisoners'.⁵² He also has referred to 'the reluctance of Aboriginal prisoners to confide in someone who spends most of their time reprimanding them and who has a different cultural background'

25.6.13 Correctional officers will continue to have the most regular day-to-day contact with prisoners, and, while it is suggested they should not be made ultimately responsible for prisoner welfare (at least at this stage), they must play a constructive role in this regard if only to the extent that they develop the capacity to relate to prisoners. Co-operative and constructive relations between prisoners and officers characterised by mutual respect do exist at some institutions. According to the evidence of the Secretary of the Northern Territory Department of Correctional Services, Mr Doug Owston:

*It is considered that there is a close and accepting relationship between staff and Aboriginal inmates. Numbers are sufficiently small in total and unfortunately recurring, so that many of the inmates are well known. Staff retention is high and an almost familial relationship develops.*⁵⁴

25.6.14 Training in Aboriginal culture and contemporary issues is advocated above as an essential element of all correctional officer training, however, there is no substitute for sustained contact and experience with Aboriginal people. At institutions, where the proportion of Aboriginal prisoners is very high, this is almost inevitable. In jurisdictions such as the Northern Territory, where approximately 70% of prisoners are Aboriginal, it has been submitted by the Department of Correctional Services that

*if any officer finds a personal problem with dealing with Aboriginal inmates, the officer would encounter such an untenable position in their daily role that they would not last long in their profession.*⁵⁵

Recommendation 177:

That appropriate screening procedures should be implemented to ensure that potential officers who will have contact with Aboriginal people in their duties are not recruited or retained by police and prison departments whilst holding racist views which cannot be eliminated by training or re-training programs. In addition Corrective Services authorities should ensure that all correctional officers receive cross-cultural education and an understanding of

Aboriginal-non-Aboriginal relations in the past and the present. Where possible, that aspect of training should be conducted by Aboriginal people (including Aboriginal ex-prisoners). Such training should be aimed at enhancing the correctional officers' skills in cross-cultural communication with and relating to Aboriginal prisoners.

RECRUITMENT OF ABORIGINAL CORRECTIONAL STAFF

25.6.15 Issues concerning the improvement of relations between prisoners and officers, enhanced officer appreciation of Aboriginal issues and the elimination of racism in prisons raises the question of the recruitment of Aboriginal correctional staff. The strategy of increasing the use of Aboriginal organisations for the provision of services to prisoners should be accompanied by strategies designed to increase the number of Aboriginal people employed as mainstream staff in correctional institutions.

25.6.16 The difficulties encountered in the recruitment of Aboriginal officers in South Australia reported by the department have been adverted to above. The QCSC has adopted the policy of an Aboriginal employment target of 10% of all Commission staff. The QCSC has argued that a high level of Aboriginal staff will have significant long-term benefits because:

- *It provides a different non-offending role model for Aborigines;*
- *It helps other staff appreciate that Aborigines can have roles other than that of prisoners;*
- *It provides a line of communication between Aboriginal inmates and correctional management;*
- *It opens up a positive communication between corrections and the Aboriginal communities whereas previously the communications were negative;*
- *It highlights the self-determination and the decision-making responsibility that is necessary for the continuation of Aboriginal people;*
- *It provides a career structure for Aboriginal people.*⁵⁶

25.6.17 As at the time of submission the QCSC reported that it had achieved a 5% Aboriginal staff proportion and that it had encountered some difficulties and some successes in the recruitment process. Foremost amongst the difficulties reported were the generally lower educational standards of Aboriginal candidates and the propensity for them to have criminal records. On the advice of its senior Aboriginal staff the QCSC reported that it has not as yet moved to different entry requirements in the case of Aboriginal applicants, but that such a strategy remained optional. The QCSC's commitment to Aboriginal recruitment is to be applauded, and its continuing commitment to further initiatives encouraged.

25.6.18 Similarly, in the Northern Territory there have been recent and also very long overdue improvements in the recruitment of Aboriginal correctional staff. In 1986, in conjunction with the Department of Correctional Services the Aboriginal Development Division of the Public Service Commission held Information Seminars to stimulate the interest of Aboriginal people in taking up employment within the prison service. The programs have apparently met with considerable success and Aboriginal recruitment has been increasing such that in 1988 of thirty-two recruits throughout the Territory, nine, or approximately 28%, were

Aboriginal. At the time of the department's submission to this Commission Mr Owston estimated that approximately 10% of all uniformed staff were Aboriginal. While this is encouraging, in a jurisdiction where over 70% of prisoners are Aboriginal, further significant improvements are warranted.

Recommendation 178:

That Corrective Services make efforts to recruit Aboriginal staff not only as correctional officers but to all employment classifications within Corrective Services.

25.7 PRISON DISCIPLINARY SYSTEMS

25.7.1 The various systems of internal discipline that operate throughout Australia's prisons tend to operate according to punitive and authoritarian philosophies that deny the rights of justice to prisoners, rather than according to humane and rehabilitative philosophies that respect such rights. Prison rules and disciplinary systems constitute one of the strongest manifestations of the authoritarian, almost militarist, philosophies according to which prisons were established. The harshness of disciplinary measures, the capriciousness of their application, the opportunities for abuse open to correctional officers and the lack of accountability that can characterise the operation of disciplinary systems have long featured in prisoner grievances and been at the heart of much prisoner unrest and resistance. Much evidence has emerged in the course of the investigation of cases before the Commission as to the petty and often harmful use to which many correctional officers put their power to charge prisoners of offences against prison discipline in the course of their daily interactions with prisoners. On occasion, such actions have been implicated in deaths in custody. For example, in the case of Graham Walley the prisoner made a thoroughly reasonable and polite request for some sugar and then showed his irritation by throwing his cup of tea on the window, only to receive a promise from a senior prison officer that he would be charged with a breach of prison discipline as a result. Although he could not foresee the consequences of his actions, the officer's inflammatory reaction led to the escalation of a serious and tense situation.⁵⁷

25.7.2 Similarly, Patrick Booth had been involved in a confrontation with a chief prison officer which started over a shin button not being done up at a prison parade on the morning of his death. In response to the chief prison officer's query as to why Patrick had not done up a button on his clothing, Patrick was alleged to have smiled. The officer then told Patrick that he had three days 'early bed', which meant Patrick had to go to bed early for three days and could not watch television or socialise with other prisoners. Patrick was escorted back to his cell to await the charge being dealt with by the prison superintendent. During a subsequent discussion with another prison officer another confrontation occurred, which resulted in that officer informing Patrick that he would be further charged with using obscene words to a prison officer. When asked whether he contemplated talking to Patrick about his swearing before deciding to charge him, the prison officer replied:

[B]asically, I had to charge him with using obscene words mainly because he'd spoken those words to me. Under the Act, we were basically committed to--if someone actually spoke those words to you, you were basically, under the old Prison's Act, committed to charge them for that. 58

25.7.3 Following the exchange the officer departed and left Patrick alone locked in his cell. Later that morning Patrick Booth died by his own act leaving a

note which read: 'this is to say that if I die it is because of the fucked up chief of this place'.

25.7.4 The use and abuse of prison disciplinary regulations by correctional officers is symptomatic of the often poor relations between correctional officers and prisoners and the antagonistic attitude of at least some correctional officers to prisoners. In his report of the inquiry into the death of Patrick Booth, Commissioner Wyvill commented that:

Patrick's negative interaction with Prison Officers [names withdrawn] immediately before his death is characteristic of the inter-personal relations engendered by a custodial regime incorporating strict military-style discipline as its primary management tool.⁵⁹

25.7.5 It needs to be said that the attitude of some prisoners appears to be equally antagonistic to correctional officers. Unfortunately, it is a deeply ingrained attitude on both sides--' them and us'. It is no doubt founded in the history of prisons, and goes back to days when prison discipline was more draconian than it is today and prisoners' rights were virtually unknown. It is also connected with the fact that many prisoners come into a prison hostile to authority, and correctional officers become for them a symbol of alien authority. I would only add that while the feelings of hostility appear mostly to be the order of the day, in my enquiries I came across not a few examples of quite comfortable relationships between officers and prisoners. This was particularly so in smaller prisons, and, in my opinion, the case for small prisons as against large ones is overwhelming. It would be a matter which could only be determined by research. I would not be at all surprised if the extra costs associated with building smaller institutions--such as the duplication of infrastructure and services--is not balanced by the advantages of the environment. These advantages include an atmosphere which is less hostile, less volatile and generally happier.

25.7.6 I am impressed with the attitude of various of the services reflected in submissions made that is clearly directed to attempting to break down the 'them and us' mentality. Undoubtedly this presents many difficulties, but over time the initiatives which have been taken and some of the proposals contained in this chapter and Chapter 24 can hopefully bring about some improvements in this respect to the advantage of prisoners, particularly, but also to the advantage of correctional officers and administrators.

25.7.7 Very often poor relations between officers and prisoners are exacerbated by the procedures through which they interact. Complaints have been received in a number of jurisdictions that procedures for making a request are unnecessarily torturous; forms are required to be completed which must pass from officer to officer which cause delay and frustration. Without commenting on the rights and wrongs of any particular complaint I would make the following recommendation:

Recommendation 179:

That procedures whereby a prisoner appears before an officer for the purpose of making a request, or for the purpose of taking up any matter which can appropriately be taken up by the prisoner before that officer, should be made as simple as possible and that the necessary arrangements should be made as quickly as possible under the circumstances.

25.7.8 While I address this broader issue of prison management regimes below, it is necessary here to examine a number of the problems associated with

the operation of prison disciplinary systems that have come to the attention of the Commission.

25.7.9 I recognise that there can be circumstances in the context of a prison where behaviour which would, outside of prison, be regarded as either entirely innocuous or not meriting any criticism at all could well be viewed as having the potential to create a more serious disciplinary problem. However, while it is apparent that there will be a continuing need for the operation and enforcement of systems of rules and regulations within correctional institutions, such procedures and systems need to be kept under review. This is to ensure that disciplinary procedures are conducted fairly, respecting the rights of prisoners and that penalties and punishments are not unduly harsh or counter-productive to the process of correction. Moreover, this review would ensure that correctional officers use those disciplinary rules and regulations in a sensible and accountable fashion and that the disciplinary system contributes to a harmonious environment for corrections rather than to the continuation of a strict and authoritarian environment.

25.7.10 The Sansbury Association has made detailed submissions to me as to the reform of charging in disciplinary procedures within the correctional services of South Australia. The Association has submitted that there should be two distinct groups of charges which prisoners face: internal disciplinary matters, which are discussed below, and, offences which would be offences at law, which should be dealt with externally before a magistrate or other court. With respect to the former matters, it has been submitted that the present system of appearing before a visiting justice requires review. The Association has argued that in the course of hearings into internal disciplinary charges the accused prisoner faced situations that may have prejudiced their position. In this regard the Association points out that the prisoner is prosecuted by a correctional services officer, that many prisoners complain that the prosecutor and the visiting justice discuss the case in the prisoner's absence and that the visiting justices have statements provided to them by correctional officers. It is alleged that the prisoner never sees these statements. In addition the Association makes the comment that the prisoner is refused legal representation and that a number of charges are sometimes heard together at one hearing. Furthermore no transcript of proceedings is kept and prisoners say that they are never given reasons for guilt or reasons for penalty. Prisoners feel that that they are never listened to in relation to submissions concerning the fact that they have already been punished by being segregated. Whether all of these allegations are true may be a matter of argument; it is important that they are perceived to be true. The Association has submitted that the present visiting tribunal system should be replaced by a system of visiting magistrates and has appealed to the finding of the Clarkson report that:

It seems to me quite wrong in principle that a member of the community charged with an offence who is entitled to obtain legal advice, legal representation, a trial before a professionally qualified Magistrate, and, if convicted, a right of appeal should be entitled to anything less merely because he is in prison when charged with that offence.

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25.7.11 The Association has submitted that under such a new system prisoners should be entitled to legal representation, the visiting magistrate should be bound by the rules of natural justice and evidence, a transcript of proceedings should be taken, the prosecutor should not be a correctional services officer. Additionally, it is desired that there should be a right of appeal to the visiting magistrate as a consequence of a prison manager or superintendent charging a prisoner and imposing a penalty. I support the proposition that a charge of an offence at law

should be heard in the ordinary courts. I support that the visiting justice should be a magistrate and should be bound by the rules of national justice. However, it is necessary that managers should have some limited powers of enforcing discipline as they can; for example, in most employment situations, although there should be a grievance procedure. NAILSS submitted that any charge which might result in a penalty of a period of detention in a place other than the prisoner's normal accommodation, or that might result in any loss of remission, or effect the period of a prisoner's incarceration must be heard before a magistrate or judge. I am unclear about the ramifications of the first of these proposals but support the second.

Recommendation 180:

That where a prisoner is charged with an offence which will be dealt with by a Visiting Justice, that Justice should be a Magistrate. A charge involving the possibility of affecting the period of imprisonment should always be dealt with in this way. All charges of offences against the general law should be heard in public courts.

25.7.12 The use of isolation or solitary confinement as a disciplinary measure has been the subject of a study by the Queensland Aboriginal prisoner group, the Incarcerated Peoples Cultural Heritage Aboriginal Corporation (IPCHAC) for the Commission. IPCHAC has reported that although the use of segregation has declined since the passage in Queensland of the new Corrective Services Act, abuses still occur. The extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement should be recognised. One Queensland Aboriginal prisoner has described isolation from other Aboriginal prisoners as

the equivalent of total sensory deprivation for a white person. Murris always acknowledge other Murris, even strangers. There are social repercussions, people don't communicate. Even when fighting, we are still recognising others. Public displays of emotion are normal. Being forced to live internally is not normal. The Murri psyche is still there. If forced to internalise, our thoughts become ugly and we see no future.⁶¹

Recommendation 181:

That Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention. In any event, Corrective Services authorities should provide certain minimum standards for segregation including fresh air, lighting, daily exercise, adequate clothing and heating, adequate food, water and sanitation facilities and some access to visitors.

25.7.13 Disciplinary rules necessarily involve the concept of enforcement and sanctions. However, it is important that the ultimate purpose to be served is not seen as the imposition of penalties but to correct behaviour and address underlying prisoner distress, frustration and anxiety.

25.7.14 A distinction should be made here, however, between a sensible use of the withdrawal of privileges as a legitimate management tool and the petty and capricious use of prison rules that creates a great deal of resentment and intensifies the prisoners' sense of powerlessness. In evidence before me, prisoners complained of such petty gestures as an officer confiscating a newspaper from a prisoner who was reading it in the compound of the Alice Springs Gaol. Such minor vexations assume an exaggerated importance in the

closely confined world of a prison. Michael John, a clinical psychologist in the Queensland Department of Health has commented that:

*It is important to avoid a cycle whereby insolence is dealt with by the imposition of penalty which produces further insolence and a harsher penalty which ultimately results in a prisoner becoming chronically insolent.*⁶²

25.7.15 Correctional services should not tolerate and should not be seen to tolerate the misuse of prison disciplinary rules nor the powers vested in correctional officers under those rules.

Recommendation 182:

That instructions should require that, at all times, correctional officers should interact with prisoners in a manner which is both humane and courteous. Corrective Services authorities should regard it as a serious breach of discipline for an officer to speak to a prisoner in a deliberately hurtful or provocative manner.

25.7.16 The means must be found by which complaints levelled by either prisoners or correctional officers can be taken to some mutually respected third party. Such a third party must have the power to make a determination as to the allegations and have resort to more constructive options such as counselling rather than merely punitive sanctions. Such a process of mediation, rather than crude punishment, must look to placing new responsibilities on parties and offering incentives for meeting those responsibilities rather than offering only punishments.

25.7.17 Fairness dictates two principles that should guide disciplinary systems: prisoners must be made aware of their rights, and procedures must provide prisoners with a reasonable opportunity to put their case.

25.7.18 As to the first principle, institutions should ensure that a comprehensive statement of prisoner rights, and the rules and responsibilities to which they are subject, is available to them as part of their induction and is permanently accessible thereafter. Particularly in the case of Aboriginal prisoners whose literacy may very often be limited, institutions must accept a responsibility to ensure that prisoners actually know and understand such rights and responsibilities. As to the second principle, I believe it is proper to emphasise the importance of designing a means of appeal whereby a prisoner may hear the allegation against him or her and have the opportunity to make response. It may well be that in many cases there has been some kind of misunderstanding. The opportunity for the prison officer to state his case before a senior officer and for the prisoner to be present and tell his or her side of the story offers both parties a fair opportunity to be heard. It is a plain matter of natural justice. It may not only give the prisoner a sense that the procedure has been just, it may also reduce the likelihood of an officer resenting any direct private approach to his or her senior officer.

25.8 ABORIGINAL PRISONER GROUPS

25.8.1 Earlier in this chapter I have referred to the profound significance for Aboriginal prisoners of freedom of access to the company, camaraderie and support of other Aboriginal prisoners. As a consequence there has occurred, particularly in recent times, a growing trend toward the formation within prisons of informal and formal Aboriginal prisoner groups. The commitment of very many Aboriginal prisoners to their fellow prisoners through the formation of these groups is a source for considerable hope, and should be considered by correctional authorities as providing an invaluable resource in the reform of the prison experience for Aboriginal inmates. Aboriginal prisoner groups are able to offer the

support, assistance and, potentially, the sense of self-worth and identity that very many non-Aboriginal organisations, welfare officers or specialists, however committed and sensitive, cannot. In his report of the inquiry into the death of Peter Campbell, Commissioner Wootten referred to the evidence of the chaplain of the Central Industrial Prison, Sydney, who stated that:

*[T]he gaol scene gave an opportunity for the temporary development of community feelings amongst Aboriginal inmates. They would usually stick together on a voluntary basis, as did the members of other groups. They were able to support each other, and provide a sense of belonging which helped them to survive the difficult times which a period of imprisonment presented.*⁶³

25.8.2 Evidence presented to the Royal Commission 's Corrective Services Conference held in Sydney indicates the success and growing popularity of Aboriginal prisoner groups and coalitions in New South Wales. The positive effects of the establishment of an 'Aboriginal wing' at Cessnock Prison and the recently established practice at Parklea Gaol whereby new young Aboriginal prisoners are placed with an experienced Aboriginal inmate were referred to at that conference. Indeed, it was asserted that without such strong bonding that such organisations and practices embody there may well have been even more Aboriginal deaths in custody.⁶⁴

25.8.3 NAILSS has submitted that the development of Aboriginal prisoner groups should be supported and guaranteed, and, in reference to the recent establishment of an Aboriginal prisoners group at Port Augusta Gaol, have submitted that the right to have such Aboriginal groups meeting within gaols be incorporated into the rules of the gaol. They have submitted that while considerable resistance from correctional services authorities to the formation of such interest groups is to be expected, the presence of such groups often results in the avoidance or resolution of conflict situations rather than in their escalation. There is much to commend such a submission.

25.8.4 Correctional services authorities are able to recognise and accommodate such groups within their administrative responsibilities. Recently, for example, the QCSC has made 'a formal commitment to allow Aboriginal and Islander inmates to maintain their cultural groups within correctional centres'. The Commission has also given its formal support to the Education and Cultural Heritage program established in 1989 by IPCHAC at the Brisbane Correctional Centre.⁶⁵ IPCHAC, which was formed by Aboriginal and Torres Strait Islander prisoners at Brisbane Prison in 1988, has demonstrated considerable success in initiating and operating educational, recreational and research projects that seek to represent the interests and meet the needs of Aboriginal and Torres Strait Islander inmates. It has in the past organised cultural heritage and education programs under which tutors in various fields were invited to instruct prisoners. The organisation has recently been working toward the development of small scale industries for Aboriginal prisoners interested in various artistic and cultural pursuits.

25.8.5 In South Australia, Aboriginal prisoners at the Yatala Labour Prison formed the Sansbury Association in order to provide a support and pressure group for Aboriginal prisoners in that institution. The Sansbury Association has not, however, apparently received the degree of support enjoyed by IPCHAC in Queensland. Nevertheless, in response to questions put to the South Australian Department of Correctional Services the department stated that 'it recognises properly constituted groups which operate within the policy framework within each

institution'. In its detailed submission to the Commission, the Sansbury Association submitted that the Department of Correctional Services in South Australia should actively encourage the establishment of Aboriginal prisoner organisations in all institutions in the State.⁶⁶ Certainly corrective services authorities should look positively to the development of Aboriginal prisoner groups as a potential resource in terms of providing services to Aboriginal prisoners and providing, potentially, a representative voice for the interests and views of Aboriginal prisoners. However, it must be appreciated that such groups can only operate and be supported within the requirements of security that prevail with respect to particular prisoners and particular institutions.

25.8.6 The successful development of such organisations is not without precedent. In federal prisons in Canada, very great importance is attached by the authorities to encouraging the development of Indian groups in gaols. In recent years there has been a strong growth of organisations in the gaols devoted to reviving Indian traditional cultural and religious practices, and, in the view of the federal authorities, these had a very beneficial effect not only on the individual Indians but on the atmosphere in the gaol. During a visit to Canada Commissioner Wootten was told of an occasion when there was a gaol riot in which all other prisoners took part, but the Indians as a group stayed apart. The groups were seen to be particularly beneficial to urban Indians who had had minimal contact with traditional communities. One such Indian was reported as saying that it was only in gaol that he learnt what it meant to be an Indian. In Canada, federal gaols hold all prisoners who are sentenced to periods of confinement of two years or more. A number of provinces are following the lead of the federal system in encouraging Indian groups.

Recommendation 183:

That Corrective Services authorities should make a formal commitment to allow Aboriginal prisoners to establish and maintain Aboriginal support groups within institutions. Such Aboriginal prisoner support groups should be permitted to hold regular meetings in institutions, liaise with Aboriginal service organisations outside the institution and should receive a modest amount of administrative assistance for the production of group materials and services. Corrective service authorities should negotiate with such groups for the provision of educational and cultural services to Aboriginal prisoners and favourably consider the formal recognition of such bodies as capable of representing the interests and viewpoints of Aboriginal prisoners.

25.9 ABORIGINAL PRISONER EDUCATION NATIONAL PRISONER EDUCATION PROFILE

25.9.1 In an analysis drawn from the annual census of prisoners, David Biles has demonstrated the generally much lower levels of educational achievement by Aboriginal prisoners compared with non-Aboriginal inmates. This data is reproduced in Table 25.1.

TABLE 25.1: PERCENTAGE OF PRISONERS BY JURISDICTION (EXCLUDING NSW AND ACT),⁶⁷ ABORIGINALITY AND KNOWN HIGHEST LEVEL OF EDUCATION, 30 JUNE 1989

	Vic	Qld	WA	S A	Tas	NT	Total
ABORIGINAL							
Tertiary	-	1		1	-	-	0.3
Tech/Trade	-		2		-	-	1.0
Other Post- Secondary	-				-	1	0.1
Complete secondary	3	4	1	6	11	2	2.6
Part secondary	84	69	7	76	67	49	42.3
Primary or no formal school	5	25	90	17	22	38	51.0
Unknown	8	1				9	2.7
TOTAL	100	100	100	100	100	99	100.0
NON-ABORIGINAL							
Tertiary	2	2	1	2	1	6	1.9
Tech/Trade	-	1	13	1		3	2.8
Other Post Secondary	-			1	5	2	0.6
Complete secondary	3	10	4	18	28	16	8.4
Part secondary	72	74	9	72	60	69	61.7
Primary or no formal school	5	11	71	5	4	4	17.7
Unknown	19	1	1	1	1	1	7.1
TOTAL	101	99	99	100	99	101	100.2

Source: Biles, The Educational Standards of Aboriginal and non-Aboriginal Prisoners, p. 3

25.9.2 The most striking difference between Aboriginal and non-Aboriginal prisoners, as revealed by these figures, is in the proportions that have completed secondary education or better. Well over three times as many non-Aboriginal prisoners as Aboriginal prisoners had completed secondary schooling or achieved a higher level of education (13.7% compared with 4%). A similar bias is recorded at the lower levels, with nearly three times the proportion of Aboriginal prisoners as non-Aboriginal prisoners having only received primary or no formal schooling at all. This pattern is consistent for all States for which data are supplied.

25.9.3 This educational profile is consistent with the measures of educational disadvantage recorded for the Aboriginal population as a whole and as documented in Chapter 16. The influence of educational achievement on offending and re-offending amongst Aboriginal prisoners Queensland:

*Inmates felt that their lack of education was extremely important in their continued offending. In general, inmates had first been charged at an early age, when most children are still at school. In some cases the offenders had run away from home and therefore had been unable to continue their education... Inmates felt that their lack of education and skills, in combination with racism, meant that their **ability** to get a job was very limited. They felt that their options were restricted. They felt that had educational programs been provided when they were first picked up by the prison system, that their chances of re-offending would have been reduced.⁶⁸*

25.9.4 The Commission has identified education as one of the principle underlying issues associated with the disproportionate representation of Aboriginal people in custody and Aboriginal deaths in custody. The initiatives advocated in Chapter 33 of this report, which are designed to improve the educational status of Aboriginal people and thereby reduce their representation in the criminal justice system, should not stop at the prison gate. Imprisonment offers an opportunity for prisoners to develop skills and attitudes able to assist their re-integration into

society.

25.9.5 More immediately, the provision of educational opportunities in prisons offers prisoners considerable potential relief from the frustrations and tedium of the prison experience. A prisoner population that is learning and achieving is more likely to be co-operative and stable. The conflict, trauma and low self-esteem that has led in many cases to premature death in prison might well be alleviated as a result.

25.9.6 While an interstate comparison of prisoner education profiles reveals a degree of variation between jurisdictions and while variations are to be expected between institutions, a commitment to enhanced educational opportunities for Aboriginal prisoners needs to be embraced universally. While identical programs and strategies could not and should not be adopted in all places, a co-ordinated approach needs to be adopted nationally. The co-operation of the States and their correctional services authorities with the Commonwealth and their relevant agencies will be crucial to the success of such initiatives. For this reason the information available to the Royal Commission as to prison educational services is presented in the form of a brief overview of the situation in each of the States and the Northern Territory. The realisation that the information available is not equivalent, and is therefore impossible to compare, underlines the need for a co-ordinated approach.

PRISON EDUCATION SERVICES

South Australia

25.9.7 The Department of Employment, Technical and Further Education (DETAFE) is responsible for the provision of educational programs in South Australian prisons. The School of Aboriginal Education within DETAFE provides specific educational programs for Aboriginals through the use of video and telephone tutorials. Additionally, Aboriginal focused programs are available at institutions with high Aboriginal prisoner populations. Examples include:

- Aboriginal Studies at Yatala Labour Prison and Northfield Prison Complex
- English as a Second Language at Port Augusta Gaol
- Aboriginal Studies at Cadell Training Centre and Mobilong Prison

25.9.8 The South Australian Department of Correctional Services reports that other programs, including Art, Craft, Aboriginal languages, Welding and Literacy, have been provided 'from time to time, depending upon demand'. No formal evaluation of the programs has been undertaken, and the department can supply only an impressionistic account of participation on the part of Aboriginal prisoners:

It is difficult to gauge the extent to which Aborigines take up the opportunities available. Certainly, where there is the possibility of Aboriginal prisoners talking to community members through the telephone 'hook-up' provided by DETAFE, Aboriginal prisoners are keen to undertake this process. In other situations Aboriginal prisoners have directly requested Aboriginal education programs in English [as a] Second Language, Native Languages, Welding, Computing. In most cases DETAFE have been able to provide the programs.⁶⁹

25.9.9 This suggests that participation is best when the programs allow contact with other Aboriginal people, or when they have been instigated at the request of prisoners themselves.

25.9.10 The department also reports on the prejudicial attitudes which attend the provision of dedicated education programs for Aboriginal prisoners, whilst also acknowledging their value:

Aboriginal only education programs are, of themselves, most beneficial in addressing Aboriginal learning needs and issues of self-esteem. However, in the environment of a correctional institution, educational programs which are designed as 'for Aboriginals only' have the potential to engender racial conflict.⁷⁰

25.9.11 In a meeting with the Sansbury Association at Yatala Prison in 1988, Commissioner Muirhead was presented with several complaints in respect of the prison education services provided by that institution:

- There was no encouragement or incentive for Aboriginal people to become involved in education.
- Only a very small proportion of Nungas (Aboriginals) were perceived to benefit from the educational services provided.
- It was thought to be 'impossible' to get full-time courses.
- The fact that some courses had to be paid for was a disincentive.
- Prisoners could not obtain education grants whilst in prison.
- Most of the courses provided were 'just too basic'.
- Some inmates wishing to take courses were hindered by prison officers; the example given was cell searches conducted during class times.

25.9.12 It was also noted that several Aboriginal prisoners could neither read nor write. Courses available at Yatala included remedial education, typing, accounting, media writing, computer programming and hairdressing. A literacy and numeracy course was also taught⁷¹

25.9.13 A comprehensive survey of Aboriginal participation in prison education programs in South Australia was undertaken by Peter Taylor in 1982. One of the most significant findings of that report was the observed high Aboriginal participation rate at Port Augusta. The reasons for this high level of involvement included:

- The lecturer was sensitive to the special needs of Aboriginal prisoners. The main roles of the lecturer was teaching, liaising and counselling.
- There were extensive literacy and numeracy resources.
- Many of the literacy resources had been produced by Aboriginal inmates of the Gaol.
- Periodic group discussions of issues that affect Aboriginal people were incorporated into weekly programs.⁷¹

Queensland

25.9.14 The QCSC has reported cases of extreme educational disadvantage amongst Aboriginal prisoners:

We know of Aboriginal inmates who cannot read, cannot write, cannot even count, read a ruler or tell the time. We have Aboriginal inmates working in the laundry at Townsville who stack folded sheets. They know when they have ten to a stack because it is the same as the stack counted by the supervisor. But, sometimes there are nine, sometimes there are eleven. It is an indictment of our education system that we have obviously

*intelligent, mature Aborigines not able to count to ten.*⁷³

25.9.15 This picture of education disadvantage is confirmed by a survey of Aboriginal prisoners in south-east Queensland institutions conducted by IPCHAC.⁷⁴ The Corporation found that two-thirds (67%) of respondents had less than ten years of schooling, 42% had less than nine years of schooling, and four people had no schooling at all. Ten per cent of respondents had continued beyond ten years of schooling.⁷⁵ This educational profile reflects that of the Aboriginal population at large.

25.9.16 Almost one-third (32%) of all respondents said that they required help in reading and writing English. Over one-half (59%) said that they would like to improve their reading and writing.⁷⁶

25.9.17 The corporation conveyed a strong criticism of the provision and content of educational courses available to prisoners in south-east Queensland: 'All of the inmates were critical of the lack of meaningful educational programs'.⁷⁷ No inmate interviewed had learnt useful work skills while in prison. The recently established 'private enterprise' prison, Borallon, was the only institution found to offer a variety of courses for inmates. These included screen printing, welding, rugby league coaching and air-brush techniques. These were seen by prisoners as a form of entertainment rather than a way of acquiring usable skills. Most were offered by volunteers in their spare time, rather than being structured courses leading to qualifications. Library services were generally inefficient and lacking in material of interest to Aboriginal prisoners. The corporation noted: 'At Sir David Longlands the procedure for any request, such as a visit to the library, is sufficiently Byzantine that inmates are deterred from making the request'. In that institution, a prisoner is strip searched before and after a visit to the library.⁷⁸

25.9.18 The Brisbane Women's Correctional Centre had only just acquired a full-time educational officer in the weeks preceding the IPCHAC survey (in 1990). On visiting that institution the corporation found a climate which was unsupportive of educational aspirations:

*Inmates in the women's prison commented: 'three thousand two hundred and eighty seven photo frames and you get parole, but enrol in a degree course and you get no help at all'. They said that enrolling in meaningful courses, which could help them once they left prison, was actively discouraged.*⁷⁹

25.9.19 Over 63% of respondents to the questionnaire indicated their wish to enrol in courses while in prison, and nearly one-half (49%) said they would like to enrol in a course when they leave prison. Women prisoners requested the corporation recommend the provision of education and work release schemes.⁸⁰

25.9.20 The QCSC has sought the assistance of the Royal Commission in having the educational needs of Aboriginal prisoners recognised and supported, and has recommended that, 'as a high priority funding should be provided for education, including adult literacy and numeracy programs for Aboriginal prisoners'

25.9.21 A recent review of prisoner education in Queensland initiated by the QCSC has called for the establishment of a three-tier structure for all education and training programs for all Queensland prisoners. While the review made no recommendations specifically relating to Aboriginal prisoners, it noted that Aboriginal prisoners 'will expect to, and should be expected to, share in the expanded educational opportunities' under the proposed structure. It recommended that as development of the new curricula occurs 'consultation take

place with relevant Aboriginal and Islander interests about how far, and in what ways, programs might need cultural adjustment for Aboriginal and Islander prisoners'.⁸²

Western Australia

25.9.22 The Western Australian Department of Corrective Services⁸³ provided the Royal Commission with the following outline of training courses available in Western Australian prisons:

- *Literacy*

Tuition in literacy is available in all prisons. Literacy screening is carried out at all prisons except Wyndham⁸⁴ and the C.W. Campbell Remand Centre for all prisoners serving effective sentences of six months or longer. Wholly Aboriginal literacy classes are held at Fremantle, Albany, Broome, Eastern Goldfields, Greenough, Canning Vale, Bunbury and Roebourne prisons.

- *Numeracy*

General classes are available in all prisons except Wyndham. Wholly Aboriginal classes are held at Canning Vale, Greenough, Eastern Goldfields, Bunbury and Fremantle. Both literacy and numeracy classes are held throughout the academic year. Individual tuition is available for up to 46 weeks per year depending on staff and location. Some prisoners also enrol in Tertiary and Further Education (TAFE) External Studies courses in literacy and numeracy.

- *Driver Training*

Theory instruction is available in all prisons except Wyndham. Practical tuition is available in all prisons except Fremantle, Canning Vale, C.W. Campbell Remand Centre and Wyndham.

- *Harmful use of Alcohol and other Drugs*

Substance Abuse Team (SAT) programs are available in Fremantle, Canning Vale, Bandyup, Karnet and Wooroloo. These are scheduled according to demand and resource availability. SAT programs are not available in country prisons. The Education Team offers an Aboriginal Alcohol Education course package at all prisons except Wyndham subject to demand and resource availability. It is estimated that these courses are available once every four to eight weeks per prison.

- *Social Skills Training*

Skills Development Team (SDT) programs in life style, fitness and recreation are offered to all prisoners at Bandyup, Wooroloo, Karnet, Fremantle and Canning Vale. Wholly Aboriginal courses in self-esteem are offered at Bandyup and Canning Vale. These course are available twice per year per prison on average.

- *Work Skills Training*

'All prisons have at least one trade training option (including apprenticeships/trainee-ships). Short term, externally accredited courses are run in welding at Wooroloo, Fremantle and Canning Vale, upholstery at Canning Vale, and horticulture at Greenough, Roebourne and Eastern Goldfields. Vocational counselling is available to all prisoners in metropolitan and outer metropolitan prisons, but not in country prisons.

25.9.23 Statistics which would identify Aboriginal participation in these programs are generally not kept.

25.9.24 Overall participation in education courses as at March 1990 is given as a total of 558 prisoners, of whom 220 (39%) were Aboriginal.

25.9.25 Aboriginal involvement in the provision of these courses was reported as follows:

- *Literacy/Numeracy*

A total of 7 Aboriginal tutors work in prison education centres in Western Australia: 2 at Fremantle, 3 at Canning Vale, 1 at Albany and 1 at Eastern Goldfields. The department employs a full time Aboriginal education officer at Canning Vale. Agencies such as the Commonwealth Department of Employment, Education and Training (DEET), TAFE Aboriginal Access and the Western Australian College of Advanced Education (WACAE) provide Aboriginal tutors for Education Team programs.

- *Other Courses*

One Aboriginal consultant and facilitator is used by the Substance Abuse Team and one Aboriginal research assistant has been used by the Skills Development Team.

25.9.26 Departmental education officers also run classes for Aboriginal prisoners attempting the WACAE General Education Certificate and the Advanced Aboriginal Education Certificate. The latter is a tertiary bridging course.

25.9.27 According to the department, courses in Aboriginal history, current affairs, Aboriginal media, Aboriginal studies and Aboriginal art are a prominent feature of programs delivered by the Education Team. These are partially funded by DEET and supported by TAFE. It is reported that these courses have sometimes resulted in the production of Aboriginal reading and taped materials, concerts and Aboriginal art exhibitions open to the public. Some efforts have been made to recognise the first language of traditionally oriented prisoners. For example, Wangkatja Literacy is taught in the Eastern Goldfields prison and a linguist has run courses in Fremantle and Canning Vale.

25.9.28 The department's policy on education emphasises voluntary participation in an 'adult' learning mode, the development of occupational skills, encouragement to gain awards in accredited courses, the development of social skills and personal growth, encouragement to interact with the community at large by means of sessional employment of tutors and the Voluntary Tutoring Program, and the provision of opportunity for prisoners to continue education upon release. Prison education is considered a form of prison work and is accorded similar status and remuneration.

25.9.29 Visits by the Western Australian Aboriginal Education Consultative Group to various prisons identified a strong demand for more educational courses, particularly in the areas of literacy and practical skills. The consultative group also

noted that very few long-term Aboriginal prisoners leave custody with academic qualifications, apprenticeships or marketable skills. Several factors were reported as contributing to this failure of prisons to produce substantive educational results. These include:

- Lack of commitment to education on the part of prison administrations; in the past, prison education has been viewed as an undeserved 'reward' or a 'soft option'.
- Inadequate or inappropriate curriculum material for Aboriginal adults, particularly for those with little formal education. Most formal academic courses in prisons are designed for non-Aboriginal adults who have some secondary education.
- Lack of experience in Aboriginal studies and Aboriginal education on the part of prison education officers.
- Lack of continuity; prisoners may be transferred without consideration being given to disruption of study.
- Limited aims and objectives; prison education often fails to prepare Aboriginal prisoners for a post-release situation.
- An absence of Aboriginal teachers and other role models.

25.9.30 The Consultative Group have made a number of recommendations for change in the areas of curriculum design, program delivery, time allocation, employment of Aboriginal teachers and Aboriginal education workers, in-servicing for prison education officers, and funding.⁸⁵

Northern Territory

25.9.31 In a General Exhibit (GENT/0/023) tendered before a Commission hearing, Doug Owston, notes that an Inter Departmental Working group made up of officers from the correctional services and education departments was established in late 1989. The Working Group has the following terms of reference:

- Develop a policy to obtain joint Ministerial approval, outlining realistic and relevant education programs and services for prisoners.
- Identify the human and building resources needed for these programs to operate effectively.
- Outline the number and nature of education courses needed to meet the needs of the prison population. Aboriginal prisoners are noted as a major group requiring special account.
- Design courses to fit in with prisoner employment in prison industry, to provide theoretical understanding of and qualification in trades and other employment areas.

25.9.32 A senior Education Department officer in charge of the 'Open Schools' program has been appointed to work on the development of prison education, as have additional teachers and adult educators. According to Mr Owston: 'As far as possible prison "in cell" activities will focus, in future, on educational courses'.⁸⁶

25.9.33 The Northern Territory Department of Correctional Services administers provision of the following educational programs:

- In-house literacy courses.
- In-house preparation for higher literacy courses.
- Correspondence courses to Diploma and Degree levels.
- Cooking courses.
- Boiler attendant courses.
- Trade courses in mechanics, carpentry, agriculture, horticulture and electrical engineering.

- Short courses in welding and advanced welding.

25.9.34 No programs are offered or designed specifically for Aboriginal prisoners, although the department indicates that it has no objection to such programs being established.⁸⁷

New South Wales

25.9.35 The New South Wales Department of Technical and Further Education (TAFE) is the major provider of basic education, life skills and vocational education for inmates of institutions administered by the New South Wales Department of Corrective Services. Consistent with the prime responsibility of TAFE to provide vocational education, TAFE has a commitment to provide work skills training to inmates, integrated with their prison work, in order to support the development of prison industries, and to increase the employment prospects of prisoners on release. The objective of all TAFE programs to prisons is also to improve prisoners' basic educational and living skills, and access to further educational opportunity. Courses are provided on a fee-for-service basis. In general, the Department of Corrective Services is the funding department. The provision of any course is negotiated between the relevant prison and the appropriate TAFE College.

25.9.36 Commissioner Wootten has noted that there seemed to be considerable satisfaction with the courses provided by TAFE when it was directly funded, and there appears to have been a marked decline in the available courses since it has had to rely on funding from the Department of Corrective Services.

25.9.37 Specific courses for Aboriginal inmates are rated with the same 'highest priority' as vocational and basic education courses for the general prison population. Aboriginal programs provide vocational or basic education courses in consultation with the TAFE Regional Aboriginal Coordinator.

25.9.38 New South Wales TAFE upholds the right of prisoners to attend classes regularly and to complete courses, including final course assessment, once enrolled. Specific strategies for program delivery have therefore been developed to meet the needs of prison administration and prisoner mobility. They include:

- short courses, or longer courses offered in short modules;
- provision of similar courses in several gaols of different security rating so that students have the opportunity of transferring
- between gaols with similar courses;
- the prisoner classification system is requested to consider educational needs and progress in making decisions about
- classification and transfer,
- courses are offered at times which fit in with prison routine.

25.9.39 The New South Wales Department of Corrective Services launched its Aboriginal Policy on 1 August 1990. Under the terms of this policy the department will seek the assistance of Aboriginal educational establishments and government agencies such as TAFE to provide a range of tailored programs, including:

- Education programs
- Vocation programs
- Drug and Alcohol programs
- AIDS education
- Aboriginal cultural programs
- Post Release programs

25.9.40 Each institution will develop its own strategy for monitoring and evaluating Aboriginal programs as part of its overall management plan.⁸⁸

25.9.41 In a submission to the Commission, the senior assistant superintendent of Bathurst Gaol reported on that institution's compromised efforts over the last couple of years to institute Aboriginal education programs. The high Aboriginal population of Bathurst Gaol⁸⁹ and the limited funding available for education has meant the restriction of programs offered to Aboriginal prisoners. According to Mr Robson, 'The Aboriginal resource allocation is meagre'. He advocates the acquisition of Federal funding on a per person basis, in combination with a 'special cases' funding for institutions with high Aboriginal populations:

For each Aboriginal within the prison, an amount could be allocated thus allowing for development of Aboriginal programs without prejudicing the Caucasian element. The logical extension of such an argument would be to consider prisons that have a very high Aboriginal population (i.e. 15% or more of the total population...) as 'special cases' for funding allocation.⁹⁰

25.9.42 Courses offered to Aboriginal prisoners at Bathurst Gaol as at October 1989 included language and communications, creative writing, mathematics, media studies, politics and government, and Aboriginal studies. Class time totalled twenty-four hours per week. There was also a large after-hours Aboriginal class in 'X' Wing in which students studied creative writing, Aboriginal studies and basic education. There were tutorial classes for students studying tertiary courses. Students also attended a pre-release program focused on life skills. As at June 1990, there was one Aboriginal basic education class being run by two teachers, one specialising in English and the other in mathematics. The only other program offered was a course in Aboriginal culture, arts and crafts for five hours per week. New arrivals at the Gaol were told that the education classes were full. There were no pre-release courses scheduled.

25.9.43 Representations to a Royal Commission hearing⁹¹ produced three major criticisms of prison education services in New South Wales:

- *Financial support*

Significant criticism and anger was expressed concerning the introduction of fees for service by the Department of TAFE.⁹² These fees are not being met by budgetary allocations within the Department of Corrective Services.

- *Staffing*

Staffing allocations have been significantly reduced. When the Department of Corrective Services abolished its Division of Welfare it also cut eight positions in the Education section. In 1990 the budget for employment of staff had not been increased for two years, representing a real decrease against the effects of inflation. The Commission was also told that not one Aboriginal person was employed within the Programs Division of the Department of Corrective Services.⁹³

- *Prejudicial attitudes*

Opposition to separate Aboriginal courses on the part of custodial staff in some gaols was reported. In some cases this has meant negotiation for courses taking several months. An Aboriginal educator told the Commission hearing:

We are operating [in] a situation that is not... supportive of education generally, let alone of separate Aboriginal education, and particularly now we've got a much stronger emphasis on work and work skills versus education. There has been in some of the gaols opposition to Aboriginal only classes. It's been said that those are racist and that they should be open programs for all prisoners.

It was also reported that some superintendents are opposed to specific programs for minority groups, and that they are opposed to prisoners having too much of a say in the running of courses.

25.9.44 During a recent crack down on private property of prisoners related to the concealment of drugs, there were many complaints by prisoners that they were no longer allowed books and materials necessary for study. The opportunity to undertake study, including personal development courses, is quite fundamental to the rehabilitation of prisoners, and great care should be taken in implementing any policy to ensure that it does not cut across the opportunities of prisoners to undertake such study.

25.9.45 The overall impression in New South Wales is that there has been a great decline in courses available to Aboriginal prisoners since the funding responsibility passed from TAFE to the Department of Corrective Services. If true, this is very unfortunate and indeed unsatisfactory. The funding for Aboriginal courses, which are so important for preparation for return to the outside community, should be made a high priority in government programs; it should not be left to prison superintendents who may have no understanding of the needs of Aboriginal people and should not have to compete with security and other expenditure in the budget of the Department of Corrective Services. In New South Wales, TAFE has developed considerable skills in Aboriginal education, including Aboriginal prisoner education, and has employed Aboriginal staff. The maximum use should be made of these resources as well as of other resources such as Tranby College.

Victoria

25.9.46 Koorie (Aboriginal) prisoners in Victoria are predominantly male, young, single and poorly educated. Cannel Barry, an Aboriginal Liaison Officer with the Victorian Office of Corrections, has reported that education programs targeted for Koorie inmates are a 'major recent development'. A focus on Aboriginal heritage has been built into these programs in an attempt to redress the cultural 'confusion and uncertainty' experienced by these prisoners. Some Koorie prisoners have a history of being fostered or adopted by non-Aboriginal families. The resulting crisis of identity has been seen as a major cause of the anti-social behaviour which has led to their imprisonment.

It was proposed to set up cultural programs to assist this type of young Koorie prisoner, or just those Koories who wish to improve their knowledge and understanding of Koorie culture. It is felt that an important aspect of the culture is Koorie history. A program was therefore designed to encourage an understanding of Koorie history, especially as it affects Victoria. Such a program could benefit these young Koories and help in their rehabilitation by encouraging pride in their Koorie identity and culture.⁹⁴

25.9.47 Vocational training has also been promoted, as have basic skills courses including courses in daily living skills such as cooking, hygiene and budgeting. The aim of all these programs is to provide skills and strategies which will alleviate the cycle of recidivism and counter some of the disadvantages experienced by Koories in non-Aboriginal urban environments.

25.9.48 According to Carmel Barry, the Education Centre in Pentridge—the main Victorian prison—was rarely used by Koories prior to 1986. When the Aboriginal Studies/Cultural Group was introduced in 1987 attendance at the centre rose from one or two prisoners per year to twelve.

Tasmania

25.9.49 No courses designed or conducted specifically for Aboriginal inmates are provided by the Tasmanian Prison Service. Aboriginal prisoners are able to participate in all education and training programs conducted for the general prison population. These include Adult Literacy classes, Computer Studies, Art, Music Public Speaking, Hobbies, trade training—including full indentured apprenticeships--and agricultural training. Degree courses are available by correspondence. No record of Aboriginal participation in these programs was reported in the response to the Commission from the Tasmanian Law Department.⁹⁵

THE FUTURE

25.9.50 In summary, it can be said that there are some encouraging signs of greater participation by Aboriginal prisoners and, overall, some improvement in availability of courses and greater acceptance by correctional services of the concept of education. There are, it seems, some problems.

25.9.51 In submissions and representations to the Commission, the Commonwealth DEET has indicated its willingness to support initiatives in the area of prison education:

*We would not propose the substitution of DEET programs and services for the responsibility of prison authorities. Rather we would seek to work with those authorities to develop appropriate employment, education and training strategies for Aboriginals in custody but for which they would ultimately be responsible. DEET would be prepared to examine seed or joint funding of such strategies.*⁹⁶

25.9.52 Mr Mike Gallagher, First Assistant Secretary of the Community and Aboriginal Programs Division of Commonwealth DEET, told a Commission hearing:

*[W]hat seems to us to be needed is that the schooling authorities and the training authorities and the corrective institutions at least need to get together in ways that they came together for the Aboriginal Education Policy operational plans and develop... an operational planning approach that would set some agendas ... with some clear **objectives** and get some agreed arrangements to do with materials development, curriculum issues, articulation, [and] teacher education.*⁹⁷

25.9.53 Mr Gallagher told the hearing that Commonwealth DEET were prepared

to make a financial contribution to facilitate negotiation between agencies, although he stressed that the corrective services portfolio should initiate the process. The need for co-operation between States—which have responsibility for prison systems—was also stressed. There is an urgent need for a comprehensive national strategy dealing with the improvement of education and training opportunities for those in custody.

Recommendation 184:

That Corrective Services authorities ensure that all Aboriginal prisoners in all institutions have the opportunity to perform meaningful work and to undertake educational courses in self-development, skills acquisition, vocational education and training including education in Aboriginal history and culture. Where appropriate special consideration should be given to appropriate teaching methods and learning' dispositions of Aboriginal prisoners.

Recommendation 185:

That the Department of Education, Employment and Training be responsible for the development of a comprehensive national strategy designed to improve the opportunities for the education and training of those in custody. This should be done in cooperation with state Corrective Services authorities, adult education providers (including in particular independent Aboriginal-controlled providers) and State departments of employment and education. The aim of the strategy should be to extend the aims of the Aboriginal Education Policy and the Aboriginal Employment Development Policy to Aboriginal prisoners, and to develop suitable mechanisms for the delivery of education and training programs to prisoners.

25.10 ABORIGINAL PRISONER EMPLOYMENT AND TRAINING OPPORTUNITIES

25.10.1 If one of the central rationales of corrections is the constructive reintegration of an offender back into the mainstream community, then it is obvious that to succeed such correction must ensure that the offender is equipped with adequate skills to function effectively and productively in that community. Work experience and the acquisition of useful work skills are central to that process. In Chapter 17 of this report I have referred to the connections between economic marginalisation, unemployment and the disproportionate representation of Aboriginal people in custody. Custodial settings offer an opportunity for prisoners to break this nexus through the acquisition of work skills.

25.10.2 In another sense, the provision of opportunities for meaningful work while in custody can also make a great contribution to the quality of the prison experience on a day-to-day basis and provide the means for a prisoner to retain or, in some cases, establish a sense of self-worth and positive identity. It is probable that the provision of good prison jobs can alleviate the frustrations and avoid the depression which may lead to self-inflicted death in custody.

25.10.3 Finally, the provision of relatively meaningful work opportunities can simply help alleviate one of the worst aspects of the prison experience: inactivity and boredom. In the course of the hearing on underlying issues in November 1988 one of the prisoners from Alice Springs Gaol referred to the emptiness of imprisonment without work: 'You're unemployed, you've got no choice but to go in the compound. You've got to sit there eight hours a day or whatever'.⁹⁸

25.10.4 It is apparent from the evidence presented to the Commission that correctional services authorities have, in the main, failed to provide prisoners, especially Aboriginal prisoners, with adequate opportunities for meaningful work. There are examples to the contrary. In his report of the inquiry into the death of Dixon Green, Commissioner O'Dea referred to the operation of that program at Broome Regional Prison noting that:

Groups of prisoners are involved in community work and projects outside the confines of the prisons ... on any day between 12 and 15 prisoners would be working outside the prison confines, some of them unsupervised.⁹⁹

25.10.5 More often, unfortunately, the lack of meaningful employment opportunities and a perception of discrimination in the allocation of jobs between Aboriginal and non-Aboriginal prisoners is the source of severe frustration and resentment amongst Aboriginal prisoners.

25.10.6 It has been found that, generally, Aboriginal prisoners prefer to work outside. Such preferences do, of course, correspond with the work histories of very many Aboriginal people in relatively unskilled rural occupations. Thus, over three-quarters of Aboriginal prisoners surveyed by NAILSS in the course of their Western Australian Gaol Survey classified their type of employment prior to entering prison as rural, unskilled or semi-skilled.¹⁰⁰ I have referred in Chapters 17 and 34 of this report to the structural difficulties which beset rural labour markets in contemporary Australia. While the virtue of training in different skills is suggested by this observation, the provision of adequate and meaningful work in whatever field appears to be a major problem in many institutions.

25.10.7 Ultimately, however, for prison employment to make a sustained contribution to the reduction of levels of Aboriginal representation in custody, employment and training programs must be geared to life after prison. Commissioner Dodson has observed that:

Many prisoners leave prison w face unemployment. An attitude was summed up as: 'most prisoners don't expect to learn anything which is going to affect their life outside. There are no jobs'. Some prison jobs, such as the boot shop in Fremantle Prison, offer little or no practical skills or work outside of prison. Others could be helpful if they could connect with jobs after release.¹⁰¹

25.10.8 The learning of relevant job skills while in custody can make a positive contribution to the quality of the prison experience, and can offer prisoners something of value worth working for, particularly if training and experience can be linked to attractive job placements out of custody. Commissioner Dodson has argued this point most forcefully:

The value in offering courses for people who are staying longer in prison, such as job-skill development programs, are limited if people cannot be guaranteed jobs when they leave prison. The promise of a job, of something to look forward to after prison, offers people hope for their own lives. Otherwise as ex-prisoners they lose confidence, become frustrated and this can naturally lead them back into further crime.¹⁰²

25.10.9 It is apparent that the majority of Aboriginal prisoners have a strong desire for improved access to relevant employment experience and training programs that offer a better future out of custody. The report by NAILSS on the

basis of the Western Australian Gaol Survey indicates that Aboriginal prisoners want training for jobs that are available outside prison, and that they would like to see more Aboriginal education and training officers teaching such courses.

25.10.10 Although I observed at the outset of this section that the provision of adequate employment opportunities in Australian prisons is more the exception than the rule, it must be recognised that meaningful and successful employment programs are possible. In the submission prepared on behalf of Eddie Betts' next of kin, Andrew Collett and Paul White referred favourably to the employment opportunities available to Aboriginal prisoners incarcerated at Port Lincoln Gaol. It was observed that the farm area of the prison had been recently expanded and was able to accommodate all prisoners who desired agricultural work, and that the prison workshop was performing work for Port Lincoln and wider markets. The submission noted that:

*The prison management clearly show a commendable attitude towards maximising the range of employment available to prisoners, both Aboriginal and non-Aboriginal. The initiative of the present manager to arrange for the four present Yalata inmates to be employed preparing a Pitjantjatjara dictionary for prison officer and prisoner use in conjunction with the local Aboriginal education worker is most constructive and commendable.*¹⁰³

25.10.11 One of the most innovative ventures in the Northern Territory has been the creation of mobile work camps where prisoners with appropriate security ratings travel to work sites and camp there in what are known as 'silver-bullet' caravans. Much solid work has been undertaken through this program, in particular the construction of a walking trail through the McDonald Ranges.

25.10.12 In response to questions put by the Royal Commission the South Australian Department of Correctional Services stated that:

*Similar programs have been subjected to criticism in the past on the grounds that they are elitist and consume resources which are disproportionate to their supposed value ... [T]he Department intends to closely study and evaluate the most recent... [Northern Territory Scheme] prior to forming an opinion about its possible introduction in South Australia.*¹⁰⁴

25.10.13 Obviously the costs associated with such programs must be balanced against their potential value, and their applicability is restricted to prisoners and institutions with appropriate security ratings. However, particularly in the case of Aboriginal prisoners accustomed to rural and remote environments, their investigation is advocated.

25.10.14 It was in relation to the success of such schemes that the Superintendent of Alice Springs Gaol, Mr Bohning, commented: 'It's a ludicrous situation. You may get a man lugging railway sleepers in 40 degree heat, and he gets 40 cents a day'.¹⁰⁵

25.10.15 I am aware that at most institutions wages are so low as to be merely nominal. I am also aware that in a number of jurisdictions, such as the Northern Territory and Queensland, corrective services are considering the review of wages payable to prisoners. I am unable to recommend any particular approach to the issue of prisoner remuneration.

25.10.16 If rehabilitation is to be translated from rhetoric to reality, governments

and correctional services authorities must ensure that adequate employment opportunities and training capable of leading to meaningful employment beyond prison are the right of all prisoners, rather than a privilege of those incarcerated in institutions with particularly creative or committed administrations.

Recommendation 186:

That prisoners, including Aboriginal prisoners, should receive remuneration for work performed. In order to encourage Aboriginal prisoners to overcome the educational disadvantage, which most Aboriginal people presently suffer, Aboriginal prisoners who pursue education or training courses during the hours when other prisoners are involved in remunerated work should receive the same level of remuneration. (This recommendation is not intended to apply to study undertaken outside the normal hours of work of prisoners.)

25.11 CONCLUSION: COMMUNITY CORRECTIONS

25.11.1 Recent developments in correctional theory and practice in Australia have placed a greater emphasis on the involvement of the community in the process of correction for a significant proportion of offenders. This has involved the development of progressive styles of institutional management based around the idea of managing prisoners in smaller more autonomous groups or units. and the development of specific case management strategies for each individual prisoner. These developments have implications for the Aboriginal experience of imprisonment and will no doubt be studied by all corrective services.

25.11.2 Unit management approaches are capable of meeting the stated desires of very many Aboriginal prisoners for the right to live in prison as part of a community of Aboriginal prisoners. The Queensland Prisoner Group, IPCHAC has, amongst others, called on the Commission to recommend the establishment of exclusively Aboriginal correctional institutions. I remain unconvinced that such a development would of itself promote a more constructive and humane prison experience for Aboriginal offenders. However, the spirit of the submission is worthy of careful consideration by all corrective services authorities and governments. Aboriginal prisoners have very many needs and legitimate expectations that are clearly best met by Aboriginal people themselves. The development of Aboriginal Prisoner Groups, the contracting of Aboriginal organisations for the delivery of services to Aboriginal prisoners and the negotiation more generally with Aboriginal community groups and individuals as to details of correctional conditions and programs is advocated in accordance with that spirit. While the establishment of Aboriginal prisons *per se* is not supported, the freedom of Aboriginal prisoners to spend their own time in a community of Aboriginal prisoners within an institution is recommended subject to the security requirements and preferences of individual prisoners.

25.11.3 The development of *community* corrections rather than *institutional custodial* corrections is also supported by the evidence presented to the Commission. At one level this demands the greater involvement of Aboriginal people in the design and operation of correctional strategies. At another level it requires the investigation of the establishment of graduated stages of correction in the community itself at places and in programs that belong to the communities.

Recommendation 187:

That experiences in and the results of community corrections rather than institutional custodial corrections should be closely studied by Corrective Services and that the greater involvement of communities

and Aboriginal organisations in correctional processes be supported.

25.11.4 The thrust of this chapter has been that imprisonment offers, at least in many cases, an opportunity to provide some positive experiences for prisoners. These experiences may lead to changes in the prisoner's attitude and behaviour and prepare him or her to be better able to participate in the broader society than was the case before imprisonment. It seems to me that there are factors in the prison experience which work the other way. It seems that those factors are most pronounced in a maximum security situation. Whilst the factors tending to rehabilitate are often hardest to achieve in the maximum security situation, it seems it ought to be a very conscious aim of corrective services to bring about as soon as is possible a situation whereby as many as possible maximum security prisoners are re-classified as medium security prisoners; and in a like way, as many as possible medium security prisoners are re-classified as minimum security prisoners. Insofar as corrective services have any discretion in the matter under applicable laws the further aim should be to move the minimum security prisoner to a non-custodial corrections program.

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- 2 L.F. Wyvill, Report of the Inquiry into the Death of Daniel Alfred Lacey, RCIADIC QT, AGPS, Canberra, 1990, p. 25
- 3 J.H. Muirhead, Report of the Inquiry into the Death of Paul Farmer, RCIADIC W/5, AGPS, Canberra, 1990, p. 16
- 4 L.F. Wyvill, Report of the Inquiry into the Death of Vincent Roy Ryan, RCIADIC QQ, AGPS, Canberra, 1990, p. 4
- 5 J.H. Wootten, Report of the Inquiry into the Death of Maxwell Roy Saunders, RCIADIC N/18, AGPS, Canberra, 1990, p. 141
- 6 E. Johnston, Report of the Inquiry into the Death of the Aboriginal Man who Died in the Darwin Prison on 5 July 1985, RCIADIC NT/7, AGPS, Canberra, 1990, p. 66
- 7 RCIADIC Transcript, Sydney, NSW **Corrective Services Conference**, 28-29/6/90, p. 38
- 8 M. Langton and others, Too Much Sorry Business, Northern Territory Aboriginal **Issues Unit**, Alice Springs, 1990, p. 183
- 9 Langton and others, p. 183
- 10 Wootten, Maxwell Roy Saunders, p. 135
- 11 Langton and others, p. 185
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- 13 D.J. O'Dea, Report of the Inquiry into the Death of an Aboriginal Man on 25 February 1985 at Sir Charles Gairdner Hospital, RCIADIC W/9, AGPS, Canberra, 1990, p. 63
- 14 Langton and others, p. 186
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- 18 RCIADIC Transcript, Adelaide, 7/4/88, p. 473 1
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- 21 Wootten, Maxwell Roy Saunders, p. 138
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- 23 RCIADIC Transcript, Alice Springs, 3/11/88, p. 54
- 24 C. O'Connor, Aborigines and the prisons, Paper prepared for RCIADIC, Adelaide, 1990, p. 38
- 25 D.J. O'Dea, Report of the Inquiry into the Death of Ronald Mock Ugle, RCIADIC W/28, AGPS, Canberra, 1990, p. 17
- 26 Western Australia, Department of Corrective Services, Letter to RCIADIC dated 18 December 1990, pp. 11 - 12
- 27 Muirhead, Kingsley Richard Dixon, p. 96
- 28 M.J. Dawes, Statement to the RCIADIC, RCIADIC Exhibit S/1/114, 1988, Appendix 3, p. 1
- 29 O'Connor, p. 10
- 30 Queensland Corrective Services Commission, RCIADIC Submission, 1990, p. 25
- 31 Queensland Corrective Services Commission, p. 26
- 32 Queensland Corrective Services Commission, p. 26
- 33 J.H. Wootten, Report of the Inquiry into the Death of Peter Wayne Williams, RCIADIC N/17,

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- 39 Queensland Corrective Services Commission, p. 22
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- 45 NAILSS, Western Australian Prison System, p. 40
- 46 Wootten, Maxwell Roy Saunders, p. 139
- 47 O'Connor, Appendix 7, p. 15
- 48 Queensland Corrective Services Commission, p. 46
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- 65 Queensland Corrective Services Commission (QCSC), Annual Report 1989, QCSC, 1989, p. 24
- 66 O'Connor, p. 29
- 67 No data were available from New South Wales or the Australian Capital Territory; 172 cases for which Aboriginality was not known have been excluded from this table.
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- 69 South Australia Department of Correctional Services, RCIADIC submission, 1990, p. 8
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- 75 IPCHAC, p. 10
- 76 IPCHAC, p. 10
- 77 IPCHAC, p. 33
- 78 IPCHAC, pp. 28-9
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- 80 Under the Release to Work Scheme prisoners can be released for a day or for extended periods to find work. The Queensland Corrective Services Commission owns a hostel in Brisbane—the Kennigo Community Corrections Centre—where prisoners can live on a period

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- 89 R. Robson, Education of Aboriginals at Bathurst Gaol 1986-1990: Submission to Aboriginal Deaths in Custody Royal Commission, 1990, p. 1. The population of Bathurst Gaol as at June 1990 was 400 inmates, of which one-third were Aboriginal. The Aboriginal demography of New South Wales places large numbers of Aboriginal people within the prison's 'catchment area', which includes Walgett, Brewarrina, Dubbo and other centres in the western region. Many Aboriginal people request to serve their sentence at Bathurst as this places them in closer proximity to their families.
- 90 Robson, p. 1
- 91 RCIADIC Transcript, Sydney, NSW Corrective Services Conference, 28-29/6/90, pp. 113, 116-17, 120-1, 124-5, 190
- 92 Prior to the election of the Greiner Government in New South Wales courses for Aboriginal prisoners were supplied free by TAFE to the Department of Corrective Services. See RCIADIC Transcript, Sydney, 28-29/6/90, p. 123
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